THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Appeal No.: 2020-000581

Harland Jones, ... Appellant,

v.

Karen Robinson, ... Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. ARE PLAINTIFF'S ARGUMENTS REGARDING ALLEGED "MIS-STATEMENTS OF FACT" UNPRESERVED FOR APPELLATE REVIEW?

II. IS THE CIRCUIT COURT'S FINAL SANCTIONS ORDER REASONABLY SUPPORTED BY THE RECORD BELOW?

III. ARE THE SANCTIONS IMPOSED IN THE FINAL SANCTIONS ORDER APPROPRIATE AND CONSISTENT WITH PRIOR CASE LAW?

Plaintiff/Appellant Harland Jones' ("Plaintiff") Brief makes only a passing gesture at defending his and his counsel, Lane Jefferies' litigation tactics or pointing out legal or factual errors allegedly committed by the Circuit Court. Instead, Plaintiff's Brief overwhelmingly consists of unpreserved arguments and unsubstantiated attacks on Defendant/Respondent Karen Robinson ("Defendant") and her counsel, Brett Bayne. Apparently, Plaintiff hopes that, by misdirecting this Court's focus to strategically selected and isolated portions of the underlying litigation, he will be able to convince this Court that somehow Mr. Bayne "tricked" and "hoodwinked" no fewer than five Circuit Court Judges into believing a set of facts that Plaintiff insists are untrue, despite transcripts and pleadings that fully support the sanctions imposed in this case.

Each Circuit Court Judge who ruled in this case had the pleadings and transcripts before him or her, and is presumed to have reviewed them carefully. Judge Robert E. Hood took particular care with his final decision, stating that, in his career, he had dismissed only one other case for discovery abuses: "I don't take this sanction lightly. When the proposed order came in I didn't sign it the second that it came in the door. So I am … very aware of the very stiff sanctions and I want everybody to also understand that's why I agreed …. So I do take it very cautiously …. I usually like to rule quickly, but it's going to take me a little longer … to sort through this," explaining he needed "a couple of weeks [so that] I can really sit down and go through everything one more time before I make my final decision." (Dec. 5, 2019 Tr. 74:11-75:6; 80:7-13). After an in depth review, Judge Hood issued his Order on rehearing almost three months later, on March 2, 2020. As is set forth below, there is no legal error in the sanctions Orders on

appeal, which are supported by the facts and Record, and which this Court should affirm fully.

STATEMENT OF THE CASE

This appeal arises out of the conduct of discovery in a case involving an accident between an automobile driven by Defendant and a bicycle ridden by Plaintiff, that occurred on Old Bluff Road in Richland County on June 7, 2016. Plaintiff filed a Summons and Complaint in the Richland County Court of Common Pleas on March 16, 2018. (Summons and Complaint filed March 16, 2018) ("Complaint"). Defendant timely answered the Complaint, (Answer, filed May 8, 2018), and then filed an amended answer and counterclaim. (Amended Answer and Counterclaim, filed May 22, 2018) ("Amended Answer").

On May 1, 2018, Defendant served Plaintiff with Defendant's First Set of Interrogatories and Requests for Production pursuant to Rule 26(a) of the South Carolina Rules of Civil Procedure. As no response was received to those requests, Defendant filed a Motion to Compel on August 10, 2018.

Meanwhile, on June 5, 2018, in support of a Motion to Dismiss Defendant's counterclaim that Plaintiff's Complaint violated the South Carolina Frivolous Proceedings Act, S.C. Code Ann. § 15-36-10(A)(4) ("SCFPA"), Plaintiff's counsel stated in sworn, signed pleadings to the Circuit Court that he believed there to be a witness or witnesses who would testify on pertinent issues related to Defendant's alleged negligence. As a result of this assertion, on August 14, 2018, Defendant served Plaintiff with Defendant's First Supplemental Set of Interrogatories and Requests for Production. As part of Defendant's First Supplemental Set of Interrogatories, Defendant requested

certain information regarding the identity and existence of *any and all* witnesses who would have knowledge of the events giving rise to the subject motor vehicle accident.

All outstanding discovery issues were heard by the Honorable DeAndrea G. Benjamin on October 1, 2018. Judge Benjamin issued a Form 4 Order on October 3, 2018 granting Defendant's Motion to Compel and ordering that "[r]emaining records and all supplemental responses should be received in 20 days." (Form 4 Order, filed Oct. 3, 2018) ("Form 4 Order"). When Plaintiff still did not respond to discovery, Defendant filed a Motion for Rule to Show Cause and, on October 30, 2018, Judge Benjamin issued an Order Granting Rule to Show Cause based on Plaintiff's failure to comply with the October 3, 2018 Order. (Order Granting Rule to Show Cause, filed Oct. 30, 2018) ("Rule to Show Cause Order"). On November 7, 2018, Plaintiff answered the outstanding interrogatory requests responding to the questions seeking the identity of any fact witnesses with simply, "None."

Months later, in a March 6, 2019 deposition, Plaintiff referenced two potential fact witnesses: one was identified as "Alex," an individual Plaintiff testified worked for him who had seen and photographed the accident, and the other was identified as Plaintiff's wife's cousin, who allegedly was driving a car that slowed down and signaled for Plaintiff to turn in front of her. Defendant filed another Motion to Compel Discovery, seeking information concerning potential fact witnesses and also seeking, penalties including dismissal of Plaintiff's Complaint. At a motions hearing on May 7, 2019, the Honorable Roger L. Couch ordered from the bench that a fact witness had to be identified by June 1, 2019 or that witness could not be called at trial which, at that time, was scheduled to commence the first full week in July. Judge Couch later memorialized his

bench ruling with a written Order, stating that "Plaintiff's failure to comply with this Order shall result in Plaintiff's inability to use the aforementioned witnesses or any other unidentified witness at trial," and reserving the right to sanction Plaintiff "in accordance with" Rule 37, SCRCP. (Order Granting Defendant's Motion to Compel, filed July 3, 2019) ("July 3, 2019 Order"). Plaintiff immediately filed a Motion to Alter or Amend,[1] which was denied by Judge Couch on July 24, 2019. (Order Denying Plaintiff's Rule 59 Motion to Alter or Amend, filed July 24, 2019) ("July 24, 2019 Order").

None of the above-referenced orders have been appealed. (*See* Notice of Appeal, filed April 1, 2020, appealing "four [sic] orders of the Honorable Robert E. Hood").

In the meantime, the parties attempted mediation on June 21, 2019, which failed. Thereafter, Defendant submitted directly to the Court (due to confidentiality concerns) another Motion for Sanctions, alleging violations of Rule 6, 8 and 10 of the Alternative Dispute Resolution ("ADR") rules. Defendant raised both the ADR issues and Plaintiff's on-going discovery abuses and mis-statements to the Court.

While this motion was pending, the parties proceeded to trial before the Honorable Casey Manning on August 13 and 14, 2019, which ended in a mistrial. During pre-trial motions, Plaintiff's counsel made certain representations to Judge Manning regarding compliance with Judge Couch's ruling and Orders.

Following a September 27, 2019 hearing on Defendant's Motion for Sanctions, Judge Hood issued an Order Granting Defendant's Motion for Sanctions, based on "repeated discovery violations, mediation violations, and disobedience of court orders."

[1] As noted, trial was scheduled to start in July and, on July 8, 2019, the parties appeared before the Honorable Alison Lee for pre-trial motions, at which Mr. Jefferies made certain representations regarding his statements to Judge Couch. In light of Plaintiff's pending Rule 59(e) motion, Judge Lee declined to rule on Plaintiff's Motion to Alter or Amend.

In particular, Judge Hood held that, "Despite two Orders from Judge Benjamin, a Ruling from Judge Couch, an Order from Judge Couch, and pre-trial and trial rulings by Judge Manning, Plaintiff continues to violate discovery rules and willfully ignore the prior orders of this court. Plaintiff has acted in bad faith with willful disobedience of numerous court orders and rulings, and with gross indifference toward the court and counsel highlighted herein." As a result, Plaintiff's Complaint was dismissed with prejudice and he was ordered to pay Defendant's attorney's costs and fees in the amount of $23,277.14. (Order Granting Defendant's Motion for Sanctions, filed Oct. 31, 2019).

In response to Judge Hood's Order, Plaintiff filed two motions: first, a motion for sanctions against Defense counsel for alleged "misrepresentations to the court," and second, a Rule 59 Motion to Alter, Amend, or Reconsider which repeatedly referenced Plaintiff's sanctions motion. Judge Hood heard the parties on December 5, 2019 and issued an Amended Order Granting Defendant's Motion for Sanctions on March 2, 2020, reaffirming the sanctions imposed in his prior Order. (Amended Order Granting Defendant's Motion for Sanctions, filed March 2, 2020) ("Final Sanctions Order"). On March 23, 2020, Judge Hood issued a Form 4 Order, updating the amount of attorney's costs and fees awarded to Defense counsel. (Form 4 Order, filed March 23, 2020).

Plaintiff timely appealed Judge Hood's three Orders to this Court.[2]

BACKGROUND FACTS

In his Complaint, Plaintiff alleged that, on June 7, 2017, Defendant struck him with her car on Old Bluff Road while Plaintiff was riding his bicycle. In particular,

[2] Plaintiff's Statement of the Case contains argumentative statements regarding contested maters, in violation of Rule 208(b)(1)(C), SCACR ("The statement shall not contain contested matters"). *See* App. Br. p. 3 (imputing motives to Defense counsel regarding Plaintiff's alleged inability to identify witnesses).

Plaintiff alleges that Defendant was "unlawfully attempt[ing] to pass the vehicle in front of her, crossed over into Plaintiff's lane of travel," *i.e.*, the "lane of oncoming traffic," which caused her to strike the front of Plaintiff's bicycle, causing him personal injuries and property damage. (Complaint, ¶¶ 8-11, 13).

In addition to denying Plaintiff's claims and raising various affirmative defenses, Defendant alleged that she did not "deviate from her lane of travel," but, instead, that Plaintiff "suddenly and without warning turned left directly into the path of Defendant's car." (Amended Answer, ¶¶ 40-42, 52). Defendant also sought "costs, fees and other damages pursuant to the [SCFPA]." (Amended Answer, ¶¶ 59-67). Plaintiff responded to the counterclaims, denying the allegations and moving to dismiss Defendant's SCFPA counterclaim. (Plaintiff's Answer to Defendant's Counterclaim, filed June 5, 2018).

1. Plaintiff's repeated discovery abuses and mis-representations to the Court.

Discovery did not go smoothly. Defendant served Plaintiff with a First Set of Interrogatories and Requests for Production on May 8, 2018, seeking among other things, "the names and addresses of persons known to Plaintiff or counsel to be witnesses concerning the facts of the case," along with information relating to what each such person knew or would testify to. (Defendant's Interrogatories to Plaintiff, dated May 1, 2018).

Instead of timely responding to Defendant's discovery requests, on June 5, 2018, Plaintiff filed a motion and memorandum in support seeking dismissal of Defendant's SCFPA claim. (Plaintiff's Notice of Motion, Motion to Dismiss, and Memorandum of Law in Support Thereof, filed June 5, 2018) ("Motion to Dismiss"). In his Motion to Dismiss, Plaintiff repeated his allegation that "Defendant crossed over into Plaintiff's

lane of travel," thereby causing the accident. (*Id.*, p. 2). Plaintiff asserted that, "[u]pon information and belief, discovery in this case is expected to reveal witnesses to the events giving rise to the subject motor vehicle collision who believe that Defendant was speeding, that Defendant was not paying attention to the roadway at the time of the subject collision, and/or that Defendant unlawfully attempted to unlawfully pass a vehicle immediately in front of her at the time she (Defendant) unlawfully caused Plaintiff to strike Defendant's vehicle." (*Id.*, p. 5). As will become clear throughout, there are not and never were any such witnesses.

Responding to this assertion, Defendant served Plaintiff with supplemental interrogatories, seeking the identity, any statements and a detailed summary of anticipated testimony "of the witness and/or witnesses referenced in Paragraph 2, Page 5 of 'Plaintiff's [Motion to Dismiss].'" (First Supplemental Interrogatories to Plaintiff, dated August 14, 2018) ("Supplemental Interrogatories").

A few days before sending the Supplemental Interrogatories, on August 10, 2018, Defendant filed a motion to compel Plaintiff to respond to the discovery requests that had been served on him. (Notice of Motion and Motion to Compel Discovery, filed Aug. 10, 2018).

In letters dated September 5, 2018 and September 26, 2018, Mr. Jeffries requested proposed dates for mediation. In lengthy footnotes, Mr. Jeffries explained that, "*The rules require that both you and I physically attend the mediation*, as well as our clients and your adjuster. This requires finding a date that at least 5 people are free, plus finding a mediator that is also free on that date." In another footnote, Mr. Jeffries stated that, "[b]y 'available dates' we mean dates on which you, your client(s), and insurance adjuster(s)

with full authority to settle for the policy limits *without having to check with someone else*, are able to be physically present at mediation beginning at 10 a.m. and continuing as long as necessary." (Letter from Lane D. Jeffries to J. Andrew Delany dated Sept. 5, 2018) (Letter from Lane D. Jeffries to J. Andrew Delany and Rogers Edward Harrell dated Sept. 26, 2018) (emphases added).

On October 1, 2018, Judge Benjamin heard argument regarding the two outstanding motions – Plaintiff's Motion to Dismiss and Defendant's Motion to Compel. Defense counsel noted that Defendant's motion covered both their initial interrogatories to Plaintiff and the Supplemental Interrogatories. Although Defense counsel had received "the bulk" of Plaintiff's discovery responses just prior to the hearing, Mr. Bayne explained that "What we have not yet received in this case is a response to the supplemental interrogatories from August," noting that the Supplemental Interrogatories arose as a result of statements made in Plaintiff's Motion to Dismiss. Defense counsel stated that "it is our position that we are entitled to an answer to that question [raised in the Supplemental Interrogatories] specifically." Plaintiff's counsel agreed. (Oct. 1, 2018 Tr. 3:15-8:4 (Mr. Jefferies stating, "We agree largely with what Mr. Bayne has to say")). From the bench, Judge Benjamin ruled:

> THE COURT: The motion to compel will be granted. If you can get him the remaining records within 20 days. I think the supplemental – you have got – well, you don't know what you have, you just got it. But within 20 days the supplemental responses?
>
> MR. BAYNE: Your Honor, the only one that we know for sure has not been answered is the supplemental request for the identification of the witnesses that have been represented to have seen this accident.
>
> THE COURT: All right. Okay, thank you.
>
> MR. JEFFRIES: And we will provide that, Your Honor, certainly.

(Oct. 1, 2018 Tr. 9:24-10:12). The Court also granted Plaintiff's Motion to Dismiss the SCFPA counterclaim without prejudice. (Oct. 1, 2018 Tr. 20:22-21:1).

The Form 4 Order was filed on October 3, 2018, stating, in pertinent part, "Motion to compel – granted. Remaining records and *all supplemental responses* should be received in 20 days." (Form 4 Order) (emphasis added).

On October 23, 2018, Defendant filed a Motion for Rule to Show Cause, stating that Plaintiff had not complied with the October 3, 2018 Form 4 Order, and seeking to hold Plaintiff in contempt, as well as other relief. (Motion for Rule to Show Cause, filed Oct. 23, 2018, w/Att.). On October 30, 2018, Judge Benjamin granted Defendant's Motion for Rule to Show Cause. (Rule to Show Cause Order).

On November 7, 2018, Plaintiff responded to the Supplemental Interrogatories regarding identity of "the alleged witness and/or witnesses referenced in Paragraph 2, Page 5 of" Plaintiff's Motion to Dismiss by responding to each of them with, "None." (Plaintiff's Answer to Defendant's Second Set of Interrogatories, dated Nov. 7, 2018). Therefore, as of November 7, 2018, Plaintiff was admitting that there were not actually any witnesses as previously alleged.

At his March 6, 2019 deposition, Plaintiff testified about how the accident occurred: "So I put my hand out to turn left in front of the car. And then when I put my hand out left to turn in front of the car, letting the car know that I was turning in front of them, I looked over at the car and the lady and let her know that I was turning in front of her. So I put my hand out. So it was cars behind her, so she slowed down and let me know that I could turn in front of her. So when she slowed down, let me know that it was all right for me to turn to front of her, I proceeded to turn in front of her. The next thing I

know, I had a heavenly experience." (Jones 28:10-22). Despite having previously responded to the Supplemental Interrogatories indicating that there were no witnesses to support Plaintiff's version of how the accident occurred, he now identified the "lady in the car" that allegedly slowed down for his turn as his wife's cousin, although he could not recall her name. (Jones 29:17-30:20). Plaintiff said his wife told him she had talked to her cousin and "[t]hat she wasn't going to testify because she wasn't going to get in – get involved in that situation." (Jones 32:17-33:11).

Plaintiff acknowledged that he did not see Defendant attempt to pass another vehicle and, in fact, did not see Defendant's vehicle at all prior to the accident. (Jones 97:10-98:5) (*see also Id.* 100:16-101:8). When Defense counsel inquired why Plaintiff's response to discovery described Defendant's car attempting to pass another car, Plaintiff's counsel objected to any further inquiry into Plaintiff's interrogatory responses, stating that Plaintiff "didn't write that answer. We wrote that answer. And anything he would know about it, he knows from talking to his attorneys." (Jones 98:6-16).

In fact, Plaintiff said that, while he remembered starting to turn left, he did not remember crossing over the yellow lines into the oncoming lane of traffic, "[n]ot that I can remember. I remember turning, leaning over to turn; but I don't, no." (Jones 92:6-93:5). He then testified as follows:

> Q: Do you know of any witness that saw the defendant cross over the yellow line into the opposite lane of travel?
>
> A: I was told.
>
> Q: Who told you that?
>
> A: Alex.
>
> Q: Where was Alex at the time of the accident?
>
> A: He was looking down the street at me.
>
> Q: So you are saying that Alex witnessed this accident from your house?

A: Yes.

Q: He was standing at your house at the time of the accident?

A: Yes.

Q: Standing at your house, can you see the area where the accident took place?

A: Yes .... You could stand out there in front of my house and look down the street .... Out in front of my house.[3]

* * *

Q: When did Alex tell you that he witnessed this accident?

A: When I came completely through.

Q: When you were asked about witnesses to this accident, why have you never mentioned Alex?

A: Excuse me?

Q: In discovery, we asked you for a list of all the witnesses to this accident. Alex was not on that list. Do you know why?

A: I couldn't tell you.

* * *

Q: So other than what you say Alex witnessed, what evidence do you have that the defendant ever crossed into your lane of travel?

A: What they told me.

Q: When you say they told you, who are you referring to?

A: From what Alex told me.

Q: Can you tell me precisely what Alex told you about what he saw?

A: He told me that he saw the car when it came across the line when I was turning. That when I was turning, the car came, the car hit me cause it came past the double line to pass the other cars, speed up to get in front of the other cars. Then he said, when I went to go make my turn, the car had hit me. That's all I can remember him telling me.

(Jones 101:9-104:13); *see also* (Id., 107:9-22 (Plaintiff was asked, "So other than Alex, who told you anything – and your attorney, who told you anything about the events that took place during the accident?" to which Plaintiff replied, "Alex")).

---

[3] On cross, Plaintiff's counsel elicited responses from Plaintiff clarifying that the accident scene could be seen from Plaintiff's house. (Jones 117: 8-16).

After Plaintiff identified Alex as the witness who could testify that Defendant "was speeding or that she was unlawfully attempting to pass a vehicle," he was asked:

> Q: You knew that Alex was a witness to this accident immediately following the accident; right?
>
> A: Yes. He told me after I came through.
>
> Q: And that was a couple of months after the accident?
>
> A: Yeah.
>
> Q: And so you knew a couple of months after the accident that Alex witnessed this; right?
>
> A: That's what he told me.
>
> Q: And he – you say that he told you that the defendant crossed the double yellow line a couple of months after the incident; right?
>
> A: Yes.

(Jones 112:2-113:18). Plaintiff explained that he did not know Alex's last name, current phone number or his address, but that he lived in "a little shack back in the woods," in Winnsboro. (Jones 46:11-47:25). However, Alex worked for Plaintiff, often driving his car because Plaintiff did not want to drive. Plaintiff testified that he saw Alex "[a]bout every day" following the accident. (Jones 44:18-45:17; 80:25-82:21).

On March 6, 2019, Defendant moved for summary judgment. (Defendant's Motion for Summary Judgment, filed March 6, 2019).

On March 7, 2019, Defendant filed another motion to compel arguing that, during Plaintiff's March 6, 2019 deposition, he had admitted he had known since shortly after the accident of an acquaintance named Alex who had witnessed the accident. At that time, the case was scheduled for trial the week of March 18, 2019. Defendant sought dismissal of the Complaint and attorney's fees for "the late disclosure of 'Alex.'" (Notice of Motion and Motion to Compel Discovery, filed March 7, 2019).

In responding to a second set of requests for admissions served on him, Plaintiff reasserted that, "[a]fter conducting written discovery and depositions, it appears that Defendant was no longer traveling in the lane of oncoming traffic when she wrongfully struck Plaintiff. Nevertheless, it was Defendant's illegal passing maneuver, in which she unlawfully travelled in the lane of oncoming traffic, which caused her to strike Plaintiff immediately after she returned to the westbound lane of travel." (Plaintiff's Response to Defendant's Second Set of Requests for Admission, served April 4, 2019).

Plaintiff opposed Defendant's Motion for Summary Judgment, arguing that there was conflicting evidence as to "***how*** and ***why*** Defendant struck Plaintiff." Plaintiff's version of events involved a car being driven by his "wife's cousin" that had slowed down to let him know it was "ok" for him to turn in front of her. Plaintiff alleged that Defendant – whom Plaintiff acknowledged he never saw – sped up to pass the wife's cousin and struck Plaintiff after she pulled back in – all in a matter of seconds. (Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, filed May 7, 2019) ("Response in Opposition"). Plaintiff attached to his Response in Opposition a copy of his entire deposition transcript, which he referenced heavily.

Defendant filed a legal memorandum in support of her Motion for Summary Judgment, reciting Plaintiff's discovery abuses in failing to identify either Alex or the wife's cousin, asserting in his Motion to Dismiss that there were witnesses, then responding to discovery by asserting there were *no* witnesses, followed by Plaintiff's deposition in which he admitted the existence of Alex and the wife's cousin, both of whom he had known about since shortly after the accident. Defendant pointed out that Plaintiff did not remember the accident but alleged that his wife's cousin had slowed

down for him and that he had been told facts about the accident by his friend Alex, neither of whom were identified in discovery responses. (Memorandum in Support of Motion for Summary Judgment, filed May 7, 2019).

Defendant's Motion for Summary Judgment and Motion to Compel were heard by the Honorable Roger Couch on May 7, 2019. Although Plaintiff's counsel studiously avoided identifying verbally the alleged driver in the car that purportedly slowed down so that Plaintiff could turn as his wife's cousin, who allegedly could have corroborated his testimony, that is the scenario on which Plaintiff relied in order to defeat summary judgment. (May 7, 2019 Tr. 11:2-13:18). During argument on summary judgment, Mr. Jefferies repeatedly referred Judge Couch to Plaintiff's deposition testimony. (May 7, 2019 Tr. 10:3-5; 10:12-14; 12:20-24; 13:12-18). Defense counsel pointed out that Plaintiff's version of events (that Defendant passed Plaintiff's wife's cousin's car and immediately pulled back over and struck Plaintiff, that his wife's cousin "sees him get hit on a bicycle … and leaves the scene") was wild conjecture and that "there is nothing out there to support this other than … the plaintiff's assertion in this memoranda. There is nothing." (May 7, 2019 Tr. 14:1-2; 15:22-16:11). Judge Couch concluded, however, that "there's enough that's going to get you past a motion for summary judgment," which was denied. (May 7, 2019 Tr. 17:11-21).

With regard to the Motion to Compel, Defense counsel pointed out that neither Alex nor the wife's cousin – both allegedly witnesses to the accident or, at a minimum, the moments leading up to the accident – had been revealed in response to Defendant's discovery requests, following Judge Benjamin's Form 4 Order and Rule to Show Cause Order. (May 7, 2019 Tr. 19:1-20:16). When Judge Couch asked Mr. Jefferies to explain,

the response was that Plaintiff's wife had passed away six months prior and he had suffered head trauma, and that they had attempted to locate witnesses. Judge Couch ruled:

> THE COURT: I'm going to require that you get them pretty quickly, I think, because this case has been going on a long time.
>
> MR. JEFFERIES: I agree, Your Honor, and we're perfectly comfortable with that. We understand we can't find Alex …
>
> THE COURT: I believe in full discovery, and I also believe in not trying cases by ambush.
>
> MR. JEFFERIES: We agree.
>
> THE COURT: When are we going to have this witness's name?
>
> MR. JEFFERIES: Your Honor, I don't know that we can find it. If Your Honor wants to give us 30 days and say that's all you've got, we're comfortable with that.[4]
>
> * * *
>
> THE COURT: Well, I mean, what I would do is I would bar them from presenting the witness to give you time to be prepared if they don't produce the person by a certain point in time.
>
> MR. BAYNE: Certainly, Judge.
>
> MR. JEFFERIES: And we agree with that, Your Honor. We're perfectly comfortable not being able to use that witness.
>
> * * *
>
> THE COURT: Okay. If they don't have it by June 1st if they don't have it, that witness will be prevented from testifying.

Judge Couch indicated that he would issue a Form 4 on the Motion for Summary Judgment, (May 7, 2019 Tr. 21:14-23:5), however, his request for a written order with regard to the Motion to Compel was not made on the record.

On May 10, 2019, Defense counsel sent Plaintiff's counsel a proposed order, (Email from B Bayne to teamjefferies@googlegroups.com, dated May 10, 2019), to which Mr. Jefferies objected arguing that the proposed order was too broad and included

[4] At the time of the May 7, 2019 hearing, the trial was set for early July 2019. (May 7, 2019 Tr. 22:5-10).

findings not articulated by Judge Couch. Mr. Jefferies stated, "What I recall Judge Couch instructing you to put in the order is that Plaintiff must comply with your discovery requests by *identifying known fact witnesses* on or before June 1, 2019. His Honor further instructed that *any known fact witnesses* not disclosed on or before June 1, 2019 could not be called by Plaintiff at trial. That was the extent of the Court's instruction. I don't necessarily agree with all of it, but that's what the instructions were." (Email from Lane Jefferies to Brett Bayne, dated May 13, 2019) (emphasis added).

Mr. Bayne forwarded a copy of the proposed Order to Judge Couch at "sccourts.org" on May 14, 2019, (Email from Brett Bayne to Judge Couch, dated May 14, 2019, w/Att.), and followed up on May 28, 2019. (Email from Brett Bayne to Judge Couch, dated May 28, 2019). On June 21, 2019, Mr. Bayne reached out to Judge Couch again, noting that mediation had failed[5] and the case was still on the roster for July 8. "Your ruling on the Motion to Compel and the discovery violations relates directly to the ability to call witnesses at trial. As you will recall, you provided Plaintiff until June 1 to identify any other witnesses. As of today, June 21, there still has never been any supplemental discovery or identification of witnesses." (Email from Brett Bayne to Judge Couch, dated June 21, 2019). Judge Couch responded, "I will make a ruling next week." (Email from Judge Couch to Brett Bayne, dated June 21, 2019). Three days later, Judge Couch responded stating, "I will be happy to sign the proposed Order, please file it in the clerk's que for my electronic signature." (Email from Judge Couch to Brett Bayne dated June 24, 2019).

On July 3, 2019, Judge Couch filed his Order Granting Defendant's Motion to Compel discovery responses. In that Order, Judge Couch recited Plaintiff's on-going

[5] *See* Mediation Results Report, filed June 27, 2019.

discovery abuses, concluding that, "[i]t is apparent that Plaintiff has failed to fully comply with the discovery requests of Defendant. Specifically, Plaintiff has failed to identify in full persons sought by Defendant in discovery while simultaneously seeking to introduce these unidentified witnesses' statements about the accident." Judge Couch ordered Plaintiff to reveal the identity of these purported factual witnesses on or by June 1, 2019 and ruled that Plaintiff's failure "to comply with this Order shall result in Plaintiff's inability to use the aforementioned witnesses or any other unidentified witness at trial." Judge Couch also ordered that failure to fully respond may result in Plaintiff being sanctioned "in accordance with South Carolina Rules of Civil Procedure 37, including but not limited to Defendant's attorney's fees, court costs and expenses." (Order Granting Defendant's Motion to Compel, filed July 3, 2019) ("July 3 Order").

Plaintiff immediately filed a motion to alter or amend the July 3 Order. Plaintiff raised three specific objections. First, Plaintiff argued that, the July 3 Order "purports to require the impossible, i.e. that Plaintiff comply with the Order 'on or by June 1, 2019', which is over a month before the Order was entered." Second, Plaintiff argued that the July 3 Order "invade[d] the purview of the trial judge by purporting to exclude evidence from trial based on Plaintiff's failure to do the impossible." Third, Plaintiff asserted the July 3 Order contained findings that were not supported by any evidence. (Motion to Alter or Amend Pursuant to Rule 59, filed July 3, 2019) ("Motion to Alter/Amend").[6]

At this point, trial was scheduled to commence on Monday, July 8, 2010. On July 5, 2019, Defendant filed a motion in limine seeking, among other things, to have any witness who had not been previously disclosed by Plaintiff excluded from testifying,

[6] Notably, Defendant did not argue that Judge Couch's Order was limited to "*eye*witnesses" or "Alex," as opposed to *all* fact witnesses, as he later attempted to claim.

stating that Defendant knew of at least two such undisclosed witnesses. (Defendant's Motions in Limine, filed July 5, 2019).

Late in the afternoon on July 5, 2019, the Friday before the week trial was to commence, Defendant received a supplemental discovery response from Plaintiff identifying two new witnesses, Treacy Robinson, Plaintiff's step-daughter who would testify to the effect of Plaintiff's injuries on his daily life, and Lettie Jackson, who would testified to "facts and circumstances." No other information was provided regarding either of these two newly-identified witnesses. (Plaintiff's Supplemental Responses to Defendant's First Set of Interrogatories, dated July 5, 2019, with transmittal email from Donna Mills at Anastopoulo Law Firm) ("Plaintiff's Supp. Resp.").[7]

The parties appeared before the Judge Lee on July 8, 2019 to resolve preliminary issues prior to trial. Judge Lee heard argument on Plaintiff's Motion to Alter/Amend and on Defendant's Motion for Sanctions. At that hearing, Mr. Jefferies stated to the Court that he had objected to Judge Couch's ruling from the bench at the time of the May 7, 2019 hearing: "at the hearing, I said, 'Your Honor, I disagree with this, but I understand the Court's holding.'" (July 8, 2019 Tr. 32:5-6). Judge Lee asked Mr. Jefferies about the oral ruling Judge Couch made from the bench:

> THE COURT: And I wasn't at the hearing. I don't know how certain, how forceful, how convinced Judge Couch was that this was what his ruling was and that's what he wanted it to be. What part – what portion of that oral argument or oral ruling did you disagree with? I mean … I'm just trying to understand that.

[7] Defense counsel immediately sent Plaintiff's counsel an email asking "who is Lettie Jackson? What is her address? Where is the response to Rogg 2 asking for a summary of facts for the two new witnesses?" (Email from Brett Bayne to Donna Mills and TeamJefferies, dated July 5, 2019). Defense counsel received no response over the weekend. Mr. Bayne explained to Judge Lee that, "After we conducted the – the roster meeting, I asked Mr. Jeffries [sic], 'are you going to supplement with who Leddy [sic] Jackson is and what she's going to testify to,' and his response was, 'You already know the answer.'" (July 8, 2019 Tr. 25:18-26:1).

> MR. JEFFERIES: Several portions, Your Honor, and – and this was, of course, laid out in our Rule 59 memo .... No. 1, I didn't think barring was proper at all. I didn't think 30 days was a sufficient time frame or to the June 1 deadline was a sufficient time frame."

(July 8, 2019 Tr. 33:15-34:17).[8] Ultimately, Judge Lee ruled that Judge Couch should decide the Motion to Alter/Amend because, "[h]e knows what his ruling was and what his intention was at the time that he entered the ruling, and so I – I'm going to let Judge Couch make that ruling and make that decision." (July 8, 2019 Tr. 36:6-24).

Defendant subsequently filed an opposition to Plaintiff's Motion to Alter/Amend, noting that Plaintiff's counsel had both proposed and agreed to the 30 day deadline to identify witnesses, which he later confirmed via email. Defendant also pointed out that Plaintiff failed to contest any of Defense counsel's recitation of facts concerning the course of discovery in this case. (Defendant's Memorandum in Opposition to Plaintiff's Motion to Alter or Amend, filed July 16, 2019).

Judge Couch denied Plaintiff's Motion to Alter/Amend in its entirety, stating that, at the May 7, 2019 hearing, "Plaintiff agreed with both the June 1, 2019 deadline and to the exclusion of unnamed witnesses as a penalty for failure to meet the deadline." Judge Couch noted that this was the second time Defendant had had to file a Motion to Compel over this same witness issue. Judge Couch found Plaintiff's "impossibility" argument meritless, particularly given his clear understanding and agreement with the June 1

[8] Even a cursory review of his Motion to Alter/Amend reveals that Plaintiff did not raise any issue with regard to whether 30 days was sufficient time to provide the names of witnesses. (Motion to Alter/Amend). In addition, the transcript of the May 7, 2019 Hearing indicates Mr. Jefferies said no such thing to Judge Couch. Instead, when Judge Couch asked Mr. Jefferies when he would have the witnesses' name, Mr. Jefferies replied, "Your Honor, I don't know that we can find it. If Your Honor wants to give us 30 days and say that's all you've got, we're comfortable with that." When Judge Couch explained that he "would bar [Plaintiff] from presenting the witness to give you time to be prepared if they don't produce the person by a certain point in time," Mr. Jefferies stated, "And we agree with that Your Honor. We're perfectly comfortable not being able to use that witness." (May 7, 2019 Tr. 21:22-22:23). When Judge Couch set the June 1 deadline, Mr. Jefferies simply responded, "Thank you, Your Honor." (*Id.* 23:3-7).

deadline and the exclusion of witnesses not identified by that date, both at the hearing and in an email to Defense counsel. Judge Couch rejected Plaintiff's counsel's argument that he would need an "H.G. Wells-style time machine" to comply with the ruling by June 1 – pointing out that he previously had been ordered to identify unnamed witnesses multiple times over the course of this case. Judge Couch rejected Plaintiff's counsel's argument that he lacked authority to bar witnesses from trial that were not identified by the deadline based on the fact that "Plaintiff's counsel agreed to this very penalty during the May 7, 2019 hearing." Judge Couch stated that he was "not inclined to overlook Plaintiff's clear, unambiguous agreement made to this court related to the exclusion of unnamed witnesses," and that, even if he was so inclined, "I am not aware of any case that precludes a court from barring witnesses from trial as a discovery penalty for failure to comply with both the South Carolina Rules of Civil Procedure and multiple orders and rulings from multiple judges." As to evidentiary support for the Order, Judge Couch pointed out that Plaintiff's counsel did not object to or contest the recitation of facts at the May 7 hearing, and only corrected one scrivener's error concerning a June 5, 2018 filing that had inadvertently been referenced as having been filed in 2019. Judge Couch reconfirmed that Plaintiff's failure to comply with discovery orders "results in Plaintiff's inability to use any witness that was unidentified as of June 1, 2019 at trial," and that "Plaintiff may be sanctioned in any manner [in] accordance with South Carolina Rules of Civil Procedure 37." (*See* May 7, 2019 Tr. 22:16-23) (July 3, 2019 Order) (July 24, 2019 Order).

The trial in this case was reset for the week of August 12, 2019. Pre-trial motions were heard by Judge Manning on August 13, 2019. With regard to Defendant's Motion

for Sanctions, Mr. Jefferies asserted that, although Plaintiff had testified that there was a witness named Alex, "[w]e attempted to find Alex. We would love to have a witness. We did not find Alex. No Alex. We found some shacks in the woods, but we did not find Alex." (Trial Tr. 17:12-19). Judge Manning then asked Mr. Jefferies:

> THE COURT: I'm going to ask you this, did you comply with the terms of Judge Couch's order?
>
> MR. JEFFERIES: Yes, Your Honor –
>
> THE COURT: Did you fail to comply? Look, I can read this myself. I'm asking for a straight answer on the record, did you – did you comply or not? "Yes" or "no"?
>
> MR. JEFFERIES: Yes, Your Honor.
>
> THE COURT: Okay. Fine. If I find out at the end, then that's additional sanctions. If you're wrong – do you understand that? I will take this matter up later, not pre-trial. At the conclusion of this case, I'll make a decision on this argument.

(Trial Tr. 17:21-18:7).

Later, with regard to the motions in limine, Defense counsel argued that the two witnesses Plaintiff had identified for the first time on July 5, 2019 were barred from the hearing per Judge Couch's prior orders. Mr. Jefferies analogized Judge Couch's order as being in "the nature of a motion in limine," which Judge Manning could "undo" if he chose to.

> THE COURT: Well, did Judge Couch exclude any additional witnesses after a certain date? Yes or no?
>
> MR. JEFFERIES: Yes, he did.
>
> THE COURT: Well, they're excluded then, aren't they?
>
> MR. JEFFERIES: He –
>
> THE COURT: Wait. Let me finish. He said they were to be provided – they were not disclosed prior to – prior to judge Couch's order; is that true?
>
> MR. JEFFERIES: If I may correct what Mr. Bayne said. First off, we did not refuse to identify them. We identified them on July –
>
> THE COURT: Did you meet the deadline imposed by Judge Couch? Yes or no?

MR. JEFFERIES: Yes, Your Honor. Can I explain how? Because that's important ....

(Trial Tr. 79:1-18). After listening to further argument from the parties, Judge Manning ruled that the late-identified witnesses were barred. (Trial Tr. 79:21-82:6).

Nonetheless, following opening statements, the first witness Mr. Jefferies called to the witness stand, in front of the jury, was Treacy Robinson – one of the two late-identified fact witnesses who had been excluded. After the jury was excused, Judge Manning admonished Mr. Jefferies for calling the witness – a witness he clearly understood had been barred from testifying – in front of the jury. "You're missing the whole point. You don't call a witness that's been excluded. You proffer that testimony in the absence of the jury, not in their presence. There's no other way to do that." (Trial Tr. 107:2-110:15). At the end of the proffered testimony of Treacy Robinson, Judge Manning advised, "My ruling remains the same in accordance with Judge Couch's order and Judge Benjamin's order. They're excluded. They weren't revealed before June 1st." (Trial Tr. 127:4-6).

At trial, Plaintiff again testified that, as he was riding down Old Bluff Road on June 7, 2016, he signaled to a car that he was going to turn left and cross the highway. However, for the first time, he positively identified Lettie Jackson as the wife's cousin, testifying that "this lady in a car, they said was a cousin .... They say she was my wife's cousin .... Lettie Jackson" and that the car this woman was driving, "[t]hey said it was a blue car. I'm not quite sure what color it was." (Trial Tr. 135:17-136:18).

Q: Do you remember anything after you started that turn until you woke up in your house?

A: No. I don't remember nothing but the heaven part. That's all I remember. And I woke up in the house.

(Trial Tr. 137:21-24).

Plaintiff admitted that he did not see Defendant cross the double yellow line ("I never saw it [Defendant's car] .... I didn't see anything happen") and, in fact, did not see anything prior to the accident (other than the woman "they" told him was his wife's cousin, who "they" said was driving a blue car). (Trial Tr. 159:19-161:5).

Plaintiff was asked about the allegations in his Complaint:

> Q: One of those is that the Defendant – that's Ms. Robinson – unlawfully attempted to pass a vehicle immediately in front of her. Do you remember that?
>
> A: That's what I was told.
>
> Q: Okay. That's what you were told?
>
> A: Yes. I don't – I don't know anything.
>
> Q: And I – and this is the last time I'll ask this. But you didn't, actually, see that happen; is that right?
>
> A: I didn't see anything happen .... I don't know anything. And I didn't see anything.

(Trial Tr. 163:8-164:20).

On re-direct examination, in response to questions from his own attorney, Mr. Jefferies, Plaintiff testified:

> Q: You mentioned that day that your buddy that you worked with had come over to the house and might have seen the wreck. Is that the guy named Alex, the guy you worked with?
>
> A: Yes, yes. He told me that he didn't see –
>
> * * *
>
> Q: Okay. Did you try to find Alex after that so he could come testify?
>
> A: Yes. But he said –
>
> Q: Did you find him?
>
> A: Yeah, yeah. But he said he didn't see anything.
>
> Q: Okay. So it was no good for him to come here and testify if he didn't see anything?
>
> A: Yes.

(Trial Tr. 168:4-169:15). This exchange is directly contradicted by the statements made by Mr. Jefferies to Judge Manning during the pre-trial conference referenced above. At that time Mr. Jeffries stated "[w]e attempted to find Alex. We would love to have a witness. We did not find Alex. No Alex. We found some shacks in the woods, but we did not find Alex." (Trial Tr. 17:12-19). Then a short while later, during the trial, Mr. Jeffries intentionally suborned testimony that directly contradicted that statement to Judge Manning when he asked his client about the identity of Alex and whether or not he had found Alex. For the first time, during the middle of trial, Plaintiff revealed that he and Mr. Jefferies had in fact found Alex, although they failed to disclose this fact. The only real question that exists is how far back does the misrepresentation that Plaintiff and Mr. Jefferies had not found Alex go?

The trial ended in a mistrial, which Judge Manning granted reluctantly. (Trial Tr. 306:9).[9]

2. <u>Mediation abuses added to the discovery abuses.</u>

As noted above, the parties attempted unsuccessfully to mediate this claim on June 21, 2019. (Mediation Results Report, filed June 27, 2019). The mediation lasted less than an hour. Immediately following the unsuccessful mediation, Mr. Bayne emailed Mr. Jefferies setting out the problems with Plaintiff's failure to have counsel of record participate in the mediation:

> You sent a six month associate who has never worked on this case, never appeared on this case, and who had precisely zero information about the case or any real knowledge of the facts – embarrassingly so. Many of the things he

[9] It is well-established that the effect of a mistrial leaves the parties in the same position as if no trial had taken place. *See*, *e.g.*, *Keels v. Powell*, 213 S.C. 570, 572, 50 S.E.2d 704, 705 (1948) "[t]he effect of the mistrial was to leave the parties litigant in *statu quo ante*, with the cause still pending for trial …"); *Floyd v. Page*, 124 S.C. 400, 402, 117 S.E. 409 (1923) (same).

> asserted were just factually incorrect even within the constructs of the allegations you have made in the Complaint. He asserted medical damages that were inaccurate (and have never been produced) and asserted that there were 'several eyewitnesses to the accident who would be called to testify' – which have never been identified and are now barred from trial by Judge Couch's ruling.
>
> After all of that, he made a demand of $500,000 on a case he openly and readily admitted you have a 1 in 10 chance of winning (although he then changed that to 1 in 6 and described this case as a game of Russian Roulette while explaining to all of us and the clients how Russian Roulette works).
>
> Rule 6(b)(3) requires the "party's counsel of record" to appear at the mediation. Gus [Anastopoulo] is not a counsel of record and does not appear on a single pleading, filing, or any other material in this case. He is not on any emails that I can find relating to this case. He clearly lacked any competent understanding of the file, the issues, or the nature of resolution to this claim. To make matters worse, it appeared your client was also unaware of a majority of the issues that were raised. Therefore, you failed to properly appear and conduct mediation in accordance with Rule 6.

Rather than move for sanctions for Plaintiff's failure to properly appear and participate in mediation, Defense counsel requested that Plaintiff pay the entire mediation cost, associated legal fees and compensate Defendant for the day of work she missed in order to participate, requesting a response by June 24, 2019. (Email from Brett Bayne to Lane Jefferies dated June 21, 2019).

Plaintiff's counsel failed to respond.[10]

Consequently, on June 27, 2019, Defendant filed a Motion for Sanctions and a legal memorandum in support, requesting an expedited hearing, given that the trial was scheduled to start the week of July 8, 2019. In addition to Plaintiff's "stonewall[ing] discovery and provid[ing] contradictory statements both in discovery and to this court," Defendant argued that "Plaintiff failed to participate in mediation as required by Rule 6." Defendant sought "sanctions pursuant to ADR Rules 6, 8 and 10," as well as "SCRCP

[10] As explained by Judge Hood, at that time Mr. Jefferies' automated email signature purported to limit any communications from defense counsel to five minute phone calls during a specific half hour, from 4:00 p.m. to 4:30 p.m. each day. (Final Sanctions Order pp 13-14). That message has since been deleted.

Rules 11 and 37." Defendant attached correspondence from this case and other cases where Plaintiff's counsel "routinely demands each and every single person – adjuster, lead attorney, individual part, etc – appear in person at the mediation and refuses to waive or ease the requirements." Mr. Anastopoulo, who attended the mediation as Plaintiff's counsel, had never entered his appearance and had not appeared on any pleading or at any hearing or deposition in this case – in other words, he was not "counsel of record" for Plaintiff. Defendant concluded that, "[a]t this point, given the repeated discovery abuses and violations as found by Judge Benjamin and Judge Couch, and now given the mediation abuses set out herein, the only proper remedy this court can fashion is to strike the Complaint, with prejudice, pursuant to SCADR Rule 10(b) and 37(b)(2)(C)." Defendant also sought an award of attorney's fees and costs, as well as compensation to Defendant for the cost of missing work to attend mediation. (Defendant's Motion for Sanctions, and Defendant's Memorandum in Support of Motion for Sanctions, dated June 27, 2019, w/Exhs., both filed June 27, 2019) ("Memorandum in Support").

On July 10, 2019, Defendant filed a second Motion for Summary Judgment based on her counterclaims against Plaintiff. (Defendant's Motion for Summary Judgment, filed July 10, 2019).

In response, on July 29, 2019, Plaintiff filed a motion for sanctions for alleged ADR abuse and breach of confidentiality related to the ADR rules, (Plaintiff's Notice of Motion and Motion for Sanctions for ADR Abuse Including Breach of Confidentiality, filed July 29, 2019), as well as another motion for sanctions regarding Defendants' second motion for summary judgment. (Plaintiff's Motion for Sanctions and Preliminary

Memorandum in Opposition to Defendant's (Second) Motion for Summary Judgment, filed July 29, 2019).

3. Judge Hood's rulings.

The pending motions were heard by Judge Hood on September 27, 2019. After Mr. Bayne chronicled the discovery and mediation abuses outlined in Defendant's pending motions,[11] Mr. Jefferies declined to contest any of the factual assertions. Instead, Mr. Jefferies specifically stated, "I'm not going to challenge all of that factually because none of that is before the court," based on his assertion that the only motion pending before Judge Hood was a motion regarding mediation. (Sept. 27, 2019 Tr. 30:16-33:13).

At the hearing, Mr. Jefferies handed Judge Hood an unfiled copy of an affidavit from Mr. Anastopoulo, signed that morning, as well as a collection of strategically edited and altered[12] printouts from Mr. Bayne's Twitter or Instagram webpages intended to impugn Mr. Bayne, suggesting Mr. Bayne was demeaning and/or threatening Plaintiff's counsel, and to explain why mediation failed. (Sept. 27, 2019 Hearing Exhs. 2 & 3) (Sept. 27, 2019 Sept. 27, 2019 Tr. 39:4-6; 43:18-20; 45:6-47:12) (Mr. Jefferies alleging that some other client in some other case had "Googled it" and provided pages from Mr. Bayne's Twitter or Instagram webpage that, according to Mr. Jefferies, shows that Mr. Bayne "has no intention of settling these cases. He views all plaintiff's attorneys, every plaintiff's attorney as unreasonable. He relishes in impassing mediations. He brags about

[11] In his argument, Mr. Bayne referenced a notebook with tabbed information numerous times. (Sept 27, 2019 Tr. 6:14-18; 8:1-5; 9:4-7; 11:3-6; 12:2-10; 13:14-19; 15:14-16; 16:20-24; 18:24-19:4; 23:13-25). Given the back and forth between Mr. Bayne and Judge Hood, there can be no serious doubt that Mr. Bayne handed the notebook up to the Court. Furthermore, despite Mr. Jefferies' assertion, for the first time on rehearing, that he was never provided with a copy of the Notebook, (Motion to Reconsider, pp. 27-28), he was handed a copy during the hearing and made no objection to the use of and references to the Notebook during the hearing.

[12] Mr. Jefferies willfully failed to disclose to the court that he had edited and altered the exhibits prior to presenting them to the Court.

various other things …"). With respect to the Twitter posts, Judge Hood corrected Mr. Jefferies' mischaracterization, explaining to counsel that "what is attached inside the post is what we call a meme …. M-E-M-E." (Sept. 27, 2019 Tr. 45:14-46:8).[13]

Mr. Jefferies argued that it was permissible for him to send Mr. Anastopoulo to the mediation because the other attorneys of record had "determined how mediation would go forward. Gus [Anastopoulo] went and did what we asked him to do." (Sept. 27, 2019 Tr. 35:17-22; *see also* 43:25-44:12 (asserting Mr. Anastopoulo "followed my instructions and the instructions of Eric Poulin …. He took the position we instructed him to take"). However, Mr. Jefferies was compelled to admit that Gus Anastopoulo had never appeared on any filing and had not appeared at any hearing in this case prior to the mediation. (Sept. 27, 2019 Tr. 39:11-17). Mr. Jefferies also acknowledged that Gus Anastopoulo was not even a licensed attorney at the time the Complaint was filed, but argued he had been an attorney for about seven months prior to the mediation. Judge Hood pointed out, "But he never filed anything. He never made an appearance. He never went to court, and he is not on any filing. I mean, you all have got like five and six people's names on every single document that's in this thing, and his name isn't on any of it." (Sept. 27, 2019 Tr. 40:17-41:2). Mr. Jefferies made the argument that "Gus Anastopoulo became a counsel of record the moment he showed up [at the mediation]. He appeared …. He appeared by appearing," which Judge Hood roundly rejected. (Sept. 27, 2019 Tr. 42:5-43:17).

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[13] The unedited versions of these posts, attached to Defendant's Replies to Plaintiff's Motion to Alter, Amend, and/or Reconsider and Plaintiff's Second Motion for Sanctions, filed Nov. 21, 2019, pp. 35-41 ("Defendant's Replies"), demonstrate that these communications were between Mr. Bayne and opposing counsel with whom he had a congenial relationship, and were in no way intended to denigrate Plaintiff's counsel in general and certainly not to disparage the process of mediation.

Mr. Jefferies was asked about his statements to Judge Manning regarding compliance with prior discovery orders:

> THE COURT: Why did you tell Judge Manning that you had complied with Judge Couch's order?
>
> MR. JEFFERIES: Here is why, Your Honor. And Judge Manning asked for further argument at the end of the case to explain. Judge Couch issued his order orally, not the final order, nothing that you could file or Rule 59 to ask him to reconsider. You have to wait for the final order to come out. So the date for performance was before the final order came out. So before there was any ability of ours to say that's not enough time or this isn't right, that date for performance would have gone by .... Judge Couch ultimately denied our Rule 59, and as soon as he did, as soon as his order became effective, we answered the question. The answer, unfortunately, was, we don't know who these witnesses are, so we can't find them. We did it immediately after that order became effective. So that's why I gave Judge Manning the answer, yes. He asked me to explain later. He didn't want to get into that before trial, but that's why the answer was there. As soon as that order took effect, we complied with it.
>
> THE COURT: I suggest you not take that position in the future.
>
> MR. JEFFERIES: I understand, Your Honor.
>
> THE COURT: That's a bad decision. If a judge gives you a deadline, whether or not there is a written order, I suggest you comply with it or file a motion.
>
> MR. JEFFERIES: Understood, Your Honor.

(Sept. 27, 2019 Tr. 55:6-56:14).[14] Mr. Jefferies then argued that, because the trial had been reset for the end of October, Defendant could no longer show prejudice with respect to the late disclosure of witnesses such that they should be allowed to testify. Judge Hood was not impressed with this argument, asking Mr. Jefferies, "[y]ou're taking the position that regardless of the fact that the plaintiff repeatedly abused and disregarded circuit court

[14] While Defense counsel argued that Judge Couch had denied Defendant's Motion for Summary Judgment on the basis of Plaintiff's allegation that he had witnesses to support his version of the accident, based both on Plaintiff's deposition and his Memorandum submitted contemporaneously to the court, Mr. Jefferies countered that argument, stating "Judge Couch's order speaks for itself," and asserting that it was based on Plaintiff's testimony that he saw a blue car before the accident but was hit by a gray car belonging to Defendant. (Sept. 27, 2019 Tr. 53:5-54:15). Thus, any alleged misstatement of Plaintiff's argument on summary judgement, which is denied, was "corrected" by Mr. Jefferies' response.

judge's orders, the defense isn't on prejudice any more?" (Sept. 27, 2019 Tr. 58:18-59:24).

On October 31, 2019, Judge Hood issued his Order granting in full Defendant's Motion for Sanctions, dismissing Plaintiff's Complaint with prejudice and awarding costs and fees. Judge Hood based his decision on Plaintiff's counsel's "repeated discovery violations, mediation violations, and disobedience of court orders." After reciting and chronicling on-going discovery violations committed by Plaintiff's counsel, Judge Hood concluded that, "based on the totality of the circumstances, sanctions pursuant to Rule 37 for violations of SCADR Rules, SCRCP Rule 11, and SCRCP Discovery Rules are warranted." Accordingly, Judge Hood dismissed Plaintiff's Complaint with prejudice, while allowing Defendant's counterclaims to proceed to trial, and awarding Defendant costs and fees incurred to date.[15] (Order Granting Defendant's Motion for Sanctions, filed Oct. 31, 2019).

In response to Judge Hood's Order, Plaintiff immediate response was to move the court to impose sanctions on Defense counsel based on alleged misrepresentations made to the Court. (Plaintiff's Notice of Motion and Motion for Sanctions Regarding Fraudulent Misrepresentations to the Court, filed Nov. 8, 2019, w/Exh. J) ("Plaintiff's Sanctions Motion"). In his Plaintiff's Sanctions Motion, Plaintiff lashed out against Defense counsel alleging, for the first time on rehearing, that Mr. Bayne had made false statements "to at least five different Circuit Judges on at least twenty different occasions over the course of at least five months," and *again* embedding strategically edited

[15] Defense counsel submitted affidavits outlining the relevant costs and fees incurred from April 30, 2018 to October 23, 2019, relating only to the Motion to Compel, the rule to Show Cause, the Second Motion to Compel, Mediation, Trial, the hearing before Judge Lee, the hearing before Judge Hood, and "[a]ny actions taken to figure out who the mystery witnesses were." (Affidavits of Brett H. Bayne, filed Oct. 25 2019 and Oct. 31, 2019, ¶ 5).

versions of Mr. Bayne's Twitter and Instagram posts to intentionally and knowingly incorrectly suggest that Mr. Bayne "publicly disparaged plaintiff attorneys," "publicly disparaged the mediation process," and, most alarmingly, "posted on the Internet about killing opposing counsel."

After first filing for sanctions, Plaintiff also filed a motion to reconsider, (Plaintiff's Motion to Alter, Amend, and/or Reconsider, filed Nov. 8, 2019) ("Motion to Reconsider"), arguing that the Court erroneously failed to rule on the purported jurisdictional issue raised by Plaintiff and that the Order lacked specific findings of fact, or erroneous and/or unsupported findings of fact. The focus of Plaintiff's Motion to Reconsider was his false allegation that he was being penalized for not being able to do something that was impossible to do: locate and provide information regarding the two alleged witnesses to the accident, claiming that "[d]espite diligent efforts, nobody has been able to positively identify or locate either of these eyewitnesses. To this date, neither Plaintiff nor his counsel have any information regarding their whereabouts." (Motion to Reconsider, pp. 7-8, *see also* pp. 10, 12, 13, 15, 19, 23, 24, 30).[16] In essence, Plaintiff argued that he was being punished for not being able "to do something that could not be

[16] Mr. Jefferies continued to advance this argument that Alex and the wife's cousin had not and could not be located, despite Plaintiff's testimony at the August 2019 trial – elicited by direct questions from Mr. Jefferies – that he in fact located Alex, had spoken to Alex, and Alex told him he had not seen anything, (Trial Tr. 168:4-169:15), and despite the belated identification of Lettie Jackson. (Plaintiff's Supp. Resp., p. 2 ("Lettie Jackson will testify as to Lettie's knowledge of the relevant facts and circumstances")) (Trial Tr. 136:5-12 (Plaintiff identifying the driver of the car that allegedly slowed for him to turn as Lettie Jackson, his wife's cousin)). Clearly, by August 13, 2019 at the very latest, both Plaintiff and Mr. Jefferies knew that Alex had been located and his wife's cousin had been identified, making Mr. Jefferies' continued insistence on the impossibility of locating Alex and/or identifying Lettie Jackson palpably false. Notably, prior to suborning testimony from his own client that he had spoken to Alex, Mr. Jefferies represented to Judge Manning that, "We attempted to find Alex. We would love to have a witness. We did not find Alex. No Alex. We found some shacks in the woods, but we did not find Alex." (Trial Tr. 17:16-19). That statement made to Judge Manning is demonstrably false.

done: provide full name, address, and contract information for the two eyewitnesses who could not be found." (*Id.*, pp. 10, 11). Plaintiff argued that the sanction of dismissing his Complaint was too severe under the circumstances and that the only reason mediation failed was due to Defendant's "bad acts." Plaintiff again repeatedly, and incorrectly, alleged that the scope of Judge Couch's Order exceeded "the scope of the understanding that Plaintiff had of the outcome of the hearing." (*Id.*, pp. 10-15).

Defendant filed a response to both of Plaintiff's November 8, 2019 filings, countering Plaintiff's arguments, clarifying the relevant discovery chronology, and pointing out the intentional and misleading "cropping" of the Twitter posts by Plaintiff's counsel. (Defendant's Replies).

The parties were heard on December 5, 2019 by Judge Hood. Plaintiff's counsel enlisted two new attorneys, Ronald Richter and Eric Bland, of Bland Richter, LLP, to argue their case to Judge Hood.[17] Judge Hood pointed out that Mr. Anastopoulo's affidavit, along with various arguments raised on rehearing, had never been raised previously. (Dec. 5, 2019 Tr. 7:24-8:17; 35:22-38:7). Judge Hood observed that, "[n]ot one single lawyer in the room can tell me why out of the three to four attorneys that are listed on every single filing that they filed none of them could be [at the mediation.]" (Dec. 5, 2019 Tr. 71:10-19). Judge Hood pointed out that Plaintiff had revealed the fact that he had located Alex in response to a direct question from his counsel, "[a]bout Alex and thank God Mr. Jones decided to tell the truth .... But for Mr. Jones telling the truth, on the witness stand in the trial nobody in this room right now would know what the truth is. You know why, because its been hidden. Its been intentionally, strategically and

[17] Mr. Richter clarified that they were not entering an appearance for Plaintiff but were appearing solely on behalf of the Anastopoulo Law Firm and its attorneys. (Dec. 5, 2019 Tr. 2:7-13; 43:21-25).

willfully hidden from the other side. Just like the wife's cousin, intentionally, willfully and strategically hidden from the other side. And we would never know right now that Alex was found and that Alex didn't see anything but for Mr. Jones telling the truth on the witness stand," all of which Judge Hood and Mr. Richter agreed was "just shocking" in a civil proceeding. (Dec. 5, 2019 Tr. 72:19-74:4). Mr. Jefferies began to argue that Mr. Bayne had made "absolutely false factual representations ... to the Court,"[18] at which point Judge Hood cautioned him and instructed him to seek the advice of his counsel. In response, Mr. Jefferies dropped this line of argument. (Dec. 5, 2019 Tr. 77:1-22).

The Final Sanctions Order confirmed the prior ruling, with minor changes. The Court granted Defendant's Motion for Sanctions in full "based on the totality of the circumstances," including Plaintiff's "repeated discovery violations and disobedience of court orders," as well as the ADR violations. The Court specifically found "that Plaintiff's counsel acted with bad faith, willful disobedience, and gross negligence during this case." The Court dismissed Plaintiff's Complaint with prejudice and awarded updated attorney's costs and fees. (Final Sanctions Order, pp. 1, 23).

STANDARD OF REVIEW

"The selection of a sanction for discovery violations is within the trial court's discretion," which will not be disturbed by an appellate court "unless the trial court

[18] In addition, Mr. Jefferies mis-represented to the Court that "[t]he first time we heard anything about other witnesses was in the proposed order that Mr. Bayne submitted and I immediately sent an email to the judge and said Judge, and to Mr. Bayne, I don't think this proposed order comports with Your Honor's instruction from the bench. At that point, holy cow. It says, disclose all witnesses. That's what he decided to sign over my objection .... There was no agreement about anyone except for Alex. It wasn't about these damages witnesses." (Dec. 5, 2019 Tr. 44:14-45:1). However, Mr. Jefferies' May 13, 2019 email states quite clearly his understanding "that Plaintiff must comply with [Defendant's] discovery requests by *identifying known fact witnesses* on or before June 1, 2019. His Honor further instructed that *any known fact witnesses* not disclosed on or before June 1, 2019 could not be called by Plaintiff at trial." (Email from Lane Jefferies to Brett Bayne, dated May 13, 2019) (emphases added).

abused its discretion." *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999). "The burden is on the appealing party to show the trial court abused its discretion in imposing sanctions for failing to comply with a discovery order." *QZO, Inc. v. Moyer*, 358 S.C. 246, 256, 594 S.E.2d 541, 547 (Ct. App. 2004). "An abuse of discretion may be found by this Court where the appellant shows that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law." *Davis v. Parkview Apts.*, 409 S.C. 266, 282, 762 S.C.2d 535, 543-544 (2014). South Carolina appellate courts "have generally upheld the trial court's decision to use dismissal as a sanction ... when there was evidence of bad faith, misconduct, willful disobedience, or a callous disregard for the rights of other litigants." *Rickerson v. Karl*, 412 S.C. 215, 221, 770 S.E.2d 767, 771 (Ct. App. 2015).

ARGUMENTS

At the outset, a significant portion of Plaintiff's argument – regarding alleged misrepresentations, distortions and/or false narratives allegedly advanced by Defense counsel – is not preserved for appellate review. Plaintiff's argument is also meritless, as the Final Sanctions Order is supported by, not only reasonable but overwhelming evidence of Plaintiff's repeated discovery abuses, failure to comply with orders and mis-statements by Plaintiff's counsel to the Court.

I. Plaintiff's arguments regarding alleged "mis-statements of fact" are not preserved for appellate review.[19]

[19] This includes, but is not limited to, all of issue No. 1 to the extent it relates to alleged "mis-statements of fact," and the following portions of Appellant's Brief: the allegation that "Respondent unfairly portrayed Mr. Jones' inability to identify the witnesses as a willful refusal to identify the witnesses" (App. Br. p. 3); argument that "Respondent's counsel began to weave a false narrative of repetitive discovery violations by Mr. Jones and his counsel" (*Id.* p. 13); alleged "false narrative" stated to Judge Couch (*Id.* pp. 15-16); alleged "mis-statements, as provided to

Plaintiff's Brief is permeated by allegations that Defense counsel somehow "transform[ed] this litigation from a simple wreck case into a campaign to secure sanctions," by "weav[ing] a false narrative of repetitive discovery violations by Mr. Jones and his counsel," and "blatantly" distorting Plaintiff's testimony, (App. Br. p. 13, 15; *see also* footnote 2, *above*). However, none of these allegations is preserved for appellate review and, moreover, none of these allegations is true.

The first time Plaintiff challenged the veracity of any of Defense counsel's arguments or statements to the Circuit Court was in his November 8, 2019 Plaintiff's Sanctions Motion and Motion to Reconsider. Apparently recognizing he faces an insurmountable preservation hurdle, Plaintiff now suggests, incorrectly, that he "sought to correct numerous unsupported factual statements" in Judge Couch's July 3, 2019 Order. (App. Br. p. 19). While Plaintiff did assert that there was *insufficient* evidence – *i.e.*, only argument of counsel – to support the various bulleted statements taken from the July 3, 2019 Order, he did not assert or even suggest that those findings were incorrect or based on alleged misrepresentations by Defense counsel. (Motion to Alter/Amend, pp. 4-5). And, as noted above, Plaintiff has not appealed either Judge Couch's July 3, 2019 Order or his July 24, 2019 Order and, as such, the findings and conclusions in those

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Judge Couch by Respondent's counsel" and the "chart" purportedly comparing Plaintiff's deposition to Judge Couch's Order (*Id.* pp. 19-20); alleged "mis-statements" made by Defense counsel to Judge Lee (*Id.* pp. 21-22); discussion of alleged "fictitious recitation of the case history" presented to Judge Manning (*Id.* pp. 24-25); alleged "mis-statements to the court" and Defense counsel's purported "penchant for embellishment [which] infected the prior orders on which Respondent relied to weave a fictitious and unsupported tale" (*Id.* pp. 30-31); argument that the Final Sanctions Order was "shaped entirely by Respondent's false narrative of the facts and history of this case" (*Id.* pp. 33-34); allegation of "erroneous contentions advanced by Respondent [that] were adopted by" Judge Benjamin and Judge Couch in their orders that "form the foundation of Respondent's discovery abuse false narrative" (*Id.* p. 37 (this argument unpreserved for the additional reason that Plaintiff did not appeal any of Judge Benjamin or Judge Couch's orders)); and, allegations of "subterfuge" on the part of Defense counsel (*Id.* p. 38).

Orders are the law of this case. *E.g.*, *Atlantic Coast Builders & Contrs., LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("an unappealed ruling, right or wrong, is the law of the case"); *see also Davis*, 409 S.C. at 280-281, 762 S.E.2d at 543 (finding earlier discovery orders that were not appealed "are not before us for consideration" and which, "[r]ight or wrong, … form the law of the case").[20] Judge Couch's unappealed findings and conclusions in his July 3, 2019 and July 24, 2019 Orders are set forth and substantively relied on in the Final Sanctions Order at pages 7-10 and pages 17-20. It is patently obvious that Plaintiff did not note or present the alleged "discrepancies" between

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[20] This includes, but is not limited to, the findings that Plaintiff:

> has consistently referenced an individual who remains unidentified, yet, according to Plaintiff, witnessed the accident. According to Plaintiff, this individual is his wife's cousin. Plaintiff has admitted he has spoken to this individual and this individual has come to his house after the accident. Plaintiff represents he did not disclose this individual because she did not want to be involved in the case. However, Plaintiff seeks to rely on testimony or inferences arising from this individual, as they allegedly were operating the vehicle in front of Defendant immediately prior to the accident, according to Plaintiff they observed the accident, and according to Plaintiff they spoke with Plaintiff about the accident at a later date.
>
> It is apparent that Plaintiff has failed to fully comply with the discovery requests of Defendant. Specifically, Plaintiff has failed to identify in full persons sought by Defendant in discovery while simultaneously seeking to introduce these unidentified witnesses' statements about the accident.
>
> This action has been pending since March 16, 2018. This matter is currently scheduled to be heard at trial the week of July 8, 2019. Plaintiff has introduced evidence of these witnesses and admitted he has known about them for nearly two years.

(July 3, 2019 Order). It also includes findings that "Plaintiff took no issue with the June 1, 2019 deadline and has not disputed that he fully understood the nature of the deadline"; that, although Plaintiff provided the names of two witnesses on July 5, 2019, he did not provide any contact information and "Plaintiff's counsel continued to refuse to give the requested [contact] information. Plaintiff's counsel has not contested this representation or disputed his continued failure to comply with the rules of discovery or the orders of this court"; that Plaintiff's counsel clearly and unambiguously agreed to the penalty of barring witnesses not identified by June 1, 2019; and that "Plaintiff's counsel did not take any exception with the recitation of facts or the sequence of events that bought [the parties] before this court for Defendant's second Motion to Compel …. When directly asked by this court why discovery was grossly overdue, Plaintiff's counsel did not contest the previous several minutes of recitaiton [sic] of facts or any of the contest of the pleadings, motions, memorandums, etc. A review of the transcript shows there was not a single objection made to any of the facts as asserted." (July 24, 2019 Order).

his deposition testimony and Judge Couch's July 3, 2019 Order to the Court in either his Motion to Alter/Amend or in argument before Judge Lee. Instead, Mr. Jefferies simply argued, "We disagreed with what the Judge's instructions were. The judge instructed Defense counsel to prepare a proposed order stating certain things. We disagreed that that was the correct ruling, and Plaintiff filed a Rule 59." (July 8, 2019 Tr. 6:10-13).

Plaintiff's counsel simply did not raise any of the alleged misstatements referenced in his Brief during argument before Judge Couch, Judge Lee, Judge Manning or at any point prior to his Sanctions Motion and Motion to Reconsider. While Mr. Jefferies made a general statement to Judge Lee that he "would disagree with a lot of what Mr. Bayne had to say," he continued "but we don't need to go into all the unsupported factual elements and – and things that he's raised because none of it's relevant to the issue before Your Honor." (*Id.* 29:11-15). Such a generalized objection is insufficient to preserve an argument for later appeal, *Busillo v. City of N. Charleston*, 404 S.C. 604, 608, 745 S.E.2d 142, 145 (Ct. App. 2013) (a general objection "does not preserve any argument for appeal because such a general statement does not bring the specific grounds for the objection to the attention of the trial court"), particularly where, as is the case here, the party insists the issue is not relevant. Indeed, the preservation rule "serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve – intentionally or by chance – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 725 (2000), *citing Brown v. Singletary*, 226 S.C. 482, 484, 85 S.E.2d 738 (1955) for the

proposition that a "party may not neglect or ignore vices in the trial, then expect to assert those vices on appeal in case of disappointment at trial."

The indisputable fact remains that Plaintiff's counsel failed to raise any specific objection to Defense counsel's recitation or characterization of the facts relating to discovery issues during any of the motions hearings – until he was seeking rehearing.[21] It is well-established that a litigant cannot raise an issue for the first time on rehearing. *See, e.g.*, *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (an issue raised for the first time in a post-trial motion is not preserved for appellate review); *Poch v. Bayshore Concrete Prods./South Carolina*, 386 S.C. 13, 31, 686 S.E.2d 689, 699 (Ct. App. 2009) ("[a] party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not").

II. The Final Sanctions Order is reasonably supported by the Record below.

This Court should affirm the Final Sanctions Order, as it is not only reasonably supported, but is overwhelmingly supported by the Record. Indeed, Plaintiff's argument essentially boils down to an assertion that every judge who has addressed this discovery issue has been hoodwinked by Defense counsel. Plaintiff asserts that "the circuit court's view of this matter was shaped entirely by Respondent's false narrative of the facts and

[21] (*See* Oct. 1, 2018 Tr. 8:1 (no objection; instead, Mr. Jefferies stated, "We agree largely with what Mr. Bayne has to say"); May 7, 2019 Tr. 20:20-23:7 (no objection and agreement with the June 1, 2019 deadline to identify witnesses); July 8, 2019 Tr. 29:11-21 (Mr. Jefferies stating generally, "Your Honor, I would disagree with a lot of what Mr. Bayne had to say, but we don't need to go into all the unsupported factual elements and – and things that he's raised because none of it's relevant to the issue before Your Honor"); Trial Tr. 16:25-18:2 (no objection); Sept. 27, 2019 Tr. 28:20-33:13 (no objection; instead Mr. Jefferies stated, "So to the extent that Mr. Bayne is arguing that any sanctions are appropriate because of everything he alleged with respect to the discovery, witnesses named or not named, depositions taken, I'm not going to challenge all of that factually because none of that is before the court"). The first time any challenge was raised to Mr. Bayne's recitation of facts was in Plaintiff's Motion for Sanctions and his Motion to Reconsider.

history of this case." (App. Br. p. 33). Circuit Court judges in South Carolina are not quite so gullible or inattentive as Plaintiff makes them out to be. In fact, multiple judges in this case have cautioned Plaintiff's counsel before asking about compliance with prior discovery orders, and/or indicated that they have or will review the file and/or are aware of what has transpired. (*See, e.g.*, July 8, 2019 Tr. pp. 35-39; Trial Tr. pp. 17-18, 77-82; Sept. 27, 2019 Tr. pp. 39-46, 55-56). It is a long-standing rule that reviewing courts "cannot presume error on the part of the Circuit Judge or that he abused his discretion. The presumption in these matters is all the other way." *O'Barr v. Pioneer Life Ins. Co.*, 172 S.C. 72, 75, 172 S.E. 769, 770 (1934).

Plaintiff incorrectly asserts that the Final Sanctions Order was based on the conclusion that his claim was frivolous and/or necessarily required the testimony of the unidentified witnesses (Alex and Plaintiff's wife's cousin). However, the Final Sanctions Order clearly and unambiguously is "based on the totality of the circumstances," including the Plaintiff's repeated failure to identify potential witnesses while continuing to rely on their purported existence, failure to appear and engage in mediation in good faith, and Plaintiff willfully ignoring prior orders of the Court. As such, "Plaintiff has acted in bad faith, with willful disobedience of numerous court orders and rulings, and with gross indifference toward the court and counsel ..." (Final Sanctions Order, p. 23).

On appeal, Plaintiff continues to make false assertions, including that neither he nor "his attorneys were []ever able to locate the witnesses that Mr. Jones described," and or that Plaintiff and/or his counsel did not intentionally withhold witness information. (App. Br. pp. 1, 3, 4, 6[22], 19, 33, 34, 40). This, as has been shown, is patently false. First,

[22] Plaintiff's appeal brief states his counsel "hoped that they could identify and locate witnesses to corroborate Mr. Jones' version of events." While Plaintiff and his counsel indisputably did locate

Plaintiff alluded to potential witnesses he believed would support his version of the accident. Then, in response to Supplemental Interrogatories seeking the identity of fact witnesses, Plaintiff responded, "None." Then, at his deposition, Plaintiff claimed Alex had seen the accident and told him about Defendant crossing the yellow line into the oncoming lane of traffic. (Jones 101:9-104:13, 107:9-22).

At trial, in response to direct questions from his own counsel, Plaintiff testified:

> Q: You mentioned that day that your buddy that you worked with had come over to the house and might have seen the wreck. Is that the guy named Alex, the guy you worked with?
>
> A: Yes, yes. He told me that he didn't see –
>
> * * *
>
> Q: Okay. Did you try to find Alex after that so he could come testify?
>
> A: Yes. But he said –
>
> Q: Did you find him?
>
> A: Yeah, yeah. But he said he didn't see anything.
>
> Q: Okay. So it was no good for him to come here and testify if he didn't see anything?
>
> A: Yes.

(Trial Tr. 168:4-169:15). Plaintiff knew and, as is evident from the very nature of the questions directed to his own client, Mr. Jefferies also was well aware that Plaintiff had located and talked with Alex, who told him he had not seen the accident after all, as Plaintiff had alleged in his deposition.[23]

Plaintiff also asserts that Defendant "decided to focus almost exclusively on Mr. Jones' unlawful passing theory." (App. Br. p. 6). What Plaintiff fails to note is that he and his counsel were the ones who repeatedly returned to the "unlawful passing theory."

Alex, he clearly could not corroborate Plaintiff's version of events. Given the heavy reliance on Alex's alleged version in Plaintiff's deposition, it is hardly surprising that they did not call him as a witness but, instead, kept him hidden from opposing counsel and, indeed, the Court.

[23] This also demonstrates the falsity of Plaintiff's assertion on appeal that his "trial testimony was entirely consistent with his deposition." (App. Br. p. 36).

(May 7, 2019 Tr. 11:19-12:16 (Mr. Jefferies arguing "we don't need res ipsa" because he was entitled to a reasonable inference that "[t]he defendant had to pass that other car. There's no way around it. There is no other way it could have happened if what [Plaintiff] says is true"); Plaintiff's Response in Opposition, pp. 6-8 (arguing Defendant had to have attempted to pass the "blue car" which caused the collision); Plaintiff's Response to Defendant's Second Set of Requests for Admission); Trial Tr. 96:23-97:4 (Plaintiff's counsel's opening statement to the jury, relying on the narrative that Defendant attempted to pass a blue car). Plaintiff's assertion that Judge Couch relied "solely on Mr. Jones' sworn deposition testimony" in denying Defendant's summary judgment motion strategically omits the fact that Plaintiff submitted his entire deposition transcript – including the revelation of Alex as an eyewitness to the "facts" of the accident – to the Court for consideration. Apodictically, motions are decided on the basis of the filed memoranda and attachments as well as argument of counsel. While Plaintiff would like to impute reasoning to Judge Couch, the transcript does not confirm this imputation and there is no detailed written order confirming the basis of Judge Couch's denial of summary judgment.

Indeed, it remains a mystery as to where Plaintiff's theory of the accident – that Defendant crossed the double yellow lines into his lane of traffic prior to the accident – originated. First, Plaintiff testified under oath that Alex told him that. (Jones 101:9-104:13); *see also* (Id., 107:9-22 (Plaintiff was asked, "So other than Alex, who told you anything – and your attorney, who told you anything about the events that took place during the accident?" to which Plaintiff replied, "Alex")).[24] When Plaintiff was asked

[24] Despite Plaintiff's erroneous assertion that the statement in the Final Sanctions Order that Plaintiff "admitted he did not see the accident," (App. Br. pp. 35-36), is unsupported, both his

why he had not revealed the existence of Alex in discovery, his counsel admitted Plaintiff "didn't write that answer. We wrote that answer. And anything he would know about it, he knows from talking to his attorneys." (Jones 98:6-16).[25] Later, at trial, Plaintiff conceded Alex did not see the accident, (Trial Tr. 168:4-169:15), and, therefore, could not have provided him with details of how it occurred.

Contrary to Plaintiff's assertion on appeal, Judge Hood's finding that his response to Defendant's Third Requests for Admissions lacked a good faith basis is supported by Plaintiff's deposition testimony. Plaintiff testified that he never saw Defendant's car, and was only told later by Alex that Defendant crossed over into the oncoming lane of traffic, sped up to pass the other cars and then hit Plaintiff, (*see* footnote 24, *above*), but failed to disclose Alex or any witness who could testify to those facts.

Plaintiff now suggests, for the first time on appeal, that his November 7, 2018 response of "None" to the interrogatory seeking the identity of fact witnesses simply meant that he had "none of the requested information about the witnesses he previously expressed hope to identify through the discovery process." (Pl. Br. p. 34, *see also* pp. 10,

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deposition and trial testimony fully support that conclusion. At his deposition, he testified the last thing he remembered was beginning to turn in front of his wife's cousin, that he did not ever see Defendant's vehicle that hit him, but later was told some other car hit him, (Jones 36:9-23; 40:6-12; 51:19-52:8; 92:6-93:5; 97:19-101:8), and at trial, Plaintiff testified that he did not remember anything after he started to turn across the road, stating more than once, "I didn't see anything happen." (Trial Tr. 137:21-24; 160:11-161:5; 163:12-20; 164:19-20). Plaintiff's attempt to mince words on appeal fails to reveal any unsupported finding of fact.

[25] However, Rule 33(a) provides in pertinent part that, "[e]ach interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them." Rule 33(a), SCRCP; *see also CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 83, 716 S.E.2d 877, 885 (2011) (explaining that a *party* has an affirmative duty to answer interrogatories); *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 186, 708 S.E.2d 787, 795 (Ct. App. 2011) (noting that, pursuant to Rule 33, "a *party* is required to promptly update the information in the interrogatories as it becomes available") (emphasis added); *Kustom Signals v. Applied Concepts*, 181 F.R.D. 489, 494 (D. Kan. 1998) ("Interrogatories are to be answered by *parties*, not attorneys").

16, 35). First, this argument – that "None" simply referred to the "extent" of information Plaintiff had about Alex and/or his wife's cousin, Lettie Jackson – was never raised to the Circuit Court and, therefore is not preserved for appellate review. *See, e.g., Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998) (an argument raised on appeal that is based on different grounds from the argument presented to the trial court is not preserved for appeal, "because the trial judge never ruled on the grounds the [plaintiffs] raise on appeal"); *see also McNair v. Fairfield County*, 379 S.C. 462, 467-468, 665 S.E.2d 830, 833 (Ct. App. 2008) (declining to hear additional arguments that had not been raised to the trial court).

Second, the question seeks the identity of any potential witnesses and whatever information Plaintiff had regarding them. Plaintiff's argument that he was justified in intentionally failing to disclose the existence of Alex and/or Lettie Jackson because he did not have the complete information requested flies in the face of reason, the Rules of Civil Procedure, case law and, in fact, Plaintiff's own responses. Pursuant to Rule 33, "a party is required to promptly update the information in the interrogatories as it becomes available." *Holly Woods*, 392 S.C. at 186, 708 S.E.2d at 795; *Baughman v. AT&T*, 306 S.C. 101, 108, 410 S.E.2d 537, 541 (1991) ("[t]here is … a continuing duty to supplement responses with new information concerning the identity of persons having knowledge of discoverable matters"). Thus, Plaintiff should have responded to the discovery requests with the information he had and then supplemented as additional information became known to him. In addition, Plaintiff's Supplemental Responses identified Lettie Jackson, as someone who would testify as to her "knowledge of the

relevant facts and circumstances," without providing further identifying information regarding her.[26]

Plaintiff suggests, incorrectly, that Mr. Jefferies and Judge Couch "were in agreement related to the particular witnesses alluded to in Mr. Jones' initial pleadings and Motion to Dismiss," (*see* App. Br. pp. 16-18), and that Mr. Jefferies never agreed to the June 1 deadline for identifying all witnesses, (*id.*, p. 33), implying incorrectly that Judge Couch's ruling from the bench was limited to Alex and Plaintiff's wife's cousin. The fact that Mr. Jefferies strategically limited his references to those two particular fact witnesses does not indicate that Judge Couch's understanding or ruling was so limited. Indeed, Mr. Jefferies' May 13, 2019 email starkly contradicts this line of argument: "*What I recall Judge Couch instructing you* to put in the order is that Plaintiff must comply with your discovery requests by *identifying known fact witnesses on or before June 1, 2019.* His Honor further instructed that *any known fact witnesses not disclosed on or before June 1, 2019 could not be called by Plaintiff at trial.* That was the extent of the Court's instruction. I don't necessarily agree with all of it, but *that's what the instructions were.*" (Email from Lane Jefferies to Brett Bayne, dated May 13, 2019) (emphasis added).

The finding in the Final Sanctions Order that Plaintiff's counsel made misrepresentations to Judge Lee are supported by the record. First, Mr. Jefferies asserted at the July 8, 2019 hearing that he had disagreed with, "[s]everal portions" of the proposed ruling, including "barring every witness who wasn't disclosed by the arbitrary deadline of June 1 from trial … I didn't think barring was proper at all. I didn't think 30 days was a sufficient time frame …" (July 8, 2019 Tr. 34:8-17). In fact, the transcript of

[26] Plaintiff's discussion of "fictive kinship" and whether the witness – Lettie Jackson – was an actual blood relative of his wife is irrelevant and interposed for no reason other than to divert this Court's attention from the egregious discovery abuses committed by Plaintiff's counsel.

the hearing before Judge Couch contains no such objection. (May 7, 2019 Tr. 20:19-23:7).

Plaintiff asserts that the Final Sanctions Order found, as a matter of fact, that he "moved for reconsideration of the Couch Order for the purpose of delay." (App. Br. p. 34). While the Final Sanctions Order discusses Plaintiff's Motion to Alter/Amend, at no point does it find or conclude that that motion was filed for the purpose of delay, nor does the word "delay" even appear in that Order. (Final Sanctions Order, pp. 9-10, 17-20). Apparently, in an attempt to bolster his appeal, Plaintiff is now misrepresenting orders, in addition to pleadings and hearing transcripts, all of which this Court can read for itself.

As set forth above, the findings that Plaintiff and Plaintiff's counsel engaged in egregious discovery abuse, violated mediation rules and made false and misleading statements to Judge Couch, Judge Lee and Judge Manning are fully supported by the pleadings and transcripts in this case, and should be affirmed.

III. The sanctions imposed in the Final Sanctions Order are appropriate and consistent with prior case law.

In this case, Judge Hood carefully analyzed the facts of the case, (Dec. 5, 2109 Tr. 74:11-75:6; 80:7-13), and concluded, based on the totality of the circumstances, that Plaintiff's and Plaintiff's counsel's repeated discovery abuses and continued violation of discovery rules and Orders of the Court warranted severe sanctions. Specifically, Judge Hood found that "Plaintiff's counsel acted with bad faith, willful disobedience, and gross negligence during this case," which justified the severe penalty imposed. (Final Sanctions Order p. 23).

Plaintiff's continued assertion that the failure to disclose the unnamed and late-named witnesses was not willful because they believed they would have supported his

case, is undercut by the fact that Plaintiff testified in response to his own counsel's probing questions that he had located Alex who told him he had not seen the accident occur, flatly contradicting his sworn deposition testimony. (*Compare* Jones 101:9-104:13, *with* Trial Tr. 168:4-169:15).[27] And more importantly, flatly contradicting statements made to Judge Manning.

Plaintiff's reliance on *QZO, Inc.* and *McNair* is misplaced. There simply is no requirement that, in order to warrant severe sanctions, the refusal to comply with a discovery order resulted in the physical destruction of evidence, as was the case in *QZO*, or that the court specifically warn the delinquent party that failure to comply would result in the complaint being stricken, as was the case in *McNair*. In fact, here, Plaintiff was warned at least twice that continued failure to comply with the multiple discovery orders would result in any of the sanctions available under Rule 37, (July 3, 2019 Order, p. 4; July 24, 2019 Order, p. 7), which his learned counsel was well aware includes dismissal of a complaint.

Instead, as was the case in *McNair*, 379 S.C. at 467, 665 S.E.2d at 832,[28] and *Davis*, 409 S.C. at 282-283, 762 S.E.2d at 543-544, here the recurring failure to comply with repeated discovery orders over a long period of time, after being given multiple chances to comply and after repeated misrepresentations to the Court, can and does justify imposing the severe penalty of dismissing Plaintiff's Complaint. And, while one

[27] In this respect. Plaintiff continues to present falsehoods to this Court, asserting that Plaintiff never lied under oath, and that "[i]t is impossible to say whether or not 'Alex' witnessed the accident either, but Mr. Jones could not recall enough information for him to be identified with specificity or to be located." (App. Br. p. 40). None of these statements is true. (Trial Tr. 168:4-169:15).

[28] Plaintiff appropriately notes that, in *McNair*, striking the offending party's pleading was appropriate in light of repeated and protracted failures to follow the discovery rules and prior orders of the court.

may feel sympathy toward Plaintiff for the loss of his claim, regardless of its strength or lack thereof, "the acts of an attorney are directly attributable to and binding on the client." *Griffin Grading*, 334 S.C. at 200, 511 S.E.2d at 719.

Plaintiff's reliance on *Karppi v. Greenville Terrazzo Co.,* 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997), is likewise misguided. *Karppi* involved two defendants, Ogden Teck, which had manufactured allegedly defective flooring, and Greenville Terrazzo, which had sold the flooring. After Ogden Teck repeatedly failed to produce a key witness for a deposition, the trial court struck Ogden Teck's answer, its counterclaim against Karppi and its cross-claim against Greenville Terrazzo. The "circumstances" and overbreadth referenced by this Court addressed the fact that Greenville Terrazzo, who had no part in Ogden Teck's discovery abuses, would both benefit unduly (by dismissal of Greenville Terrazzo's cross-claim against it), and be unduly prejudiced (by striking Ogden Teck's answer, both it and Greenville Terrazzo would be deprived of the defense that the flooring was not defective), by the lower court's sanctions order. 327 S.C. at 544, 489 S.E.2d at 682-683. Here, in contrast, only Plaintiff will suffer the consequence of his and his counsel's behavior and no third party will be penalized or benefit inadvertently from the Final Sanctions Order.

Plaintiff's attempts on appeal to isolate and diminish the repeated discovery abuses and his counsel's untruthfulness to the circuit court ultimately fail. Patently, Defendant's Motion for Sanctions sought to address more than a mere failure to disclose witnesses and sending the wrong attorney to mediation.[29] Defendant sought sanctions for

[29] However, Defendants facing the Anastopoulo Law Firm will be heartened to read that that Firm now views sending an attorney who is not counsel of record to a mediation – particularly one unfamiliar with the case and who has no real authority of his own but, instead, has been given

"the repeated discovery abuses and violations" as well as for mediation abuses, all as set forth in her Memorandum in Support. Equally apparent, the Circuit Court imposed severe penalties for repeated, willful violations of discovery rules and prior orders of the court, and acting "with gross indifference toward the court and counsel," finding specifically "that Plaintiff's counsel acted with bad faith, willful disobedience, and gross negligence during this case." (Final Sanctions Order, p. 23).

Plaintiff argues that the award of attorney's costs and fees is excessive because it "failed to limit the monetary sanctions to only those reasonable attorney's fees and costs related to the Motion for Sanctions." (App. Br. p. 43). However, the actual costs and fees awarded were appropriately limited to responding to Plaintiff's repeated and ongoing discovery abuses, the hearing before Judge Hood, and the mediation violations.

Although Plaintiff asserts (incorrectly that the Circuit Court required him "to pay all attorney's fees and costs incurred during the entire litigation by Respondent Karen Robinson," (App. Br. p. 1), the affidavits submitted by Mr. Bayne indicate quite clearly that the requested costs and fees are limited to the Motion to Compel and the Rule to Show Cause before Judge Benjamin, the second Motion to Compel before Judge Couch, mediation, the Trial before Judge Manning, the hearing before Judge Lee, the hearing before Judge Hood, and "[a]ny actions taken to figure out who the mystery witnesses were." (Affidavits of Brett H. Bayne, filed Oct. 25, 2109, and Oct. 31, 2019, ¶ 5). The amount added following the final Sanctions Order related solely to costs and fees incurred after Plaintiff filed his Motion for Sanctions and Motion to Reconsider. (Affidavit of Brett H. Bayne, filed March 23, 2020, ¶ 4).

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explicit instructions as to what to say and do – as nothing more than "a harmless technical violation of a mediation rule." (App. Br. p. 44).

Even accepting Plaintiff's argument that Defendant sought excessive attorney's fees and costs and that the Circuit Court did not explicitly determine whether they were appropriate as accurate, solely for the sake of argument, the fact that Mr. Bayne's affidavits set out the specific matters for which costs were included renders that argument moot. "[W]hatever doesn't make any difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987). Because the costs and fees that were awarded are appropriately limited to responding to Plaintiff's and his counsel's numerous violations, there is no error.

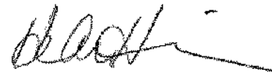
CONCLUSION

For all the reasons stated herein, this Court should affirm the Final Sanctions Order and subsequent Form 4 Order, and dismiss Plaintiff's appeal with prejudice.

Respectfully submitted,

September 23, 2020

MCANGUS GOUDELOCK AND COURIE



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Sep 23 2020
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Appeal No.: 2020-000581

Harland Jones, ... Appellant,

v.

Karen Robinson, ... Respondent.

PROOF OF SERVICE

I certify that I have served the **Initial Brief of Respondent** and Respondent's **Designation of Matter to be Included in the Record on Appeal** on Harland Jones, by emailing depositing a copy of it in the United States Mail, postage prepaid, on September 23, 2020, addressed to his attorneys of record, as follows:

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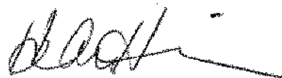

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September 23, 2020

RECEIVED
Sep 23 2020
SC Court of Appeals

Via Facsimile
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Harland Jones vs. Karen Robinson
Civil Action No.: 2018-CP-40-01518 (Richland)
Date of Incident: June 7, 2017
Carrier Claim No.: 0459413365
MGC File No.: 20554.18101
Appeal No.: 2020-000581

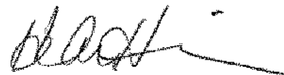
Dear Ms. Kitchings:

Enclosed for filing please find the following documents:

1. the original and one copy of the Initial Brief of Respondent Karen Robinson;
2. the original and one copy of Respondent's Designation of Matter to be Included in the Record on Appeal; and
3. the original and one copy of Respondent's Proof of Service concerning items one and two.

If you have any questions, please do not hesitate to contact me.

Very truly yours,



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