THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Please

The Honorable Robert E. Hood, Circuit Court Judge

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Appellate Case No. 2020-000581

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Harland Jones.....Appellant,

v.

Karen Robinson .....Respondent.

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# INITIAL REPLY BRIEF OF APPELLANT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes & Rules



### Other Authorities

## ARGUMENTS

Respondent fails to address the actual substance of Mr. Jones's arguments in this appeal, opting instead for a response steeped with pretense and deflection. Tellingly, the bulk of Respondent's brief simply repeats the contrived narrative she used in securing inappropriate sanctions from the circuit court without making even a superficial effort to refute or explain the numerous inconsistencies between her recitation of events and the actual record in this case. Having unsuccessfully confronted the evidentiary deficiencies in her positions before the lower court, Respondent simply attempts to avoid the issue in its entirety by resorting to a specious preservation argument. However, Respondent's narrative plainly lacks support in the record and, in many instances, is flatly contradicted by the record. In addition to the misleading nature of Respondent's interpretation of the events leading to the Final Sanctions Order, her arguments continue to obfuscate the stark distinction between Mr. Jones's inability to identify witnesses and an alleged refusal to identify witnesses.

The sanctions at issue in this case are extreme and unwarranted particularly considering that the alleged offending conduct amounts to little more than a late disclosure of witnesses and a failure to adhere to a mediation rule that caused no prejudice. These sanctions are shocking given Respondent's acknowledgement that it is doubtful the alleged witnesses' actually observed the collision and the imposition of the prior sanction upon Mr. Jones of exclusion of these witnesses. *See* Respondent's Brief at 7 ("As will become clear throughout, there are not and never were any such witnesses"); Couch Hearing at 22-23 (excluding all witnesses not disclosed before June 1st and rejecting Respondent's request of dismissal as a sanction). Such sanctions are also unduly harsh where Respondent conceded the alleged wrongful mediation conduct had little impact on the parties' inability to resolve the case. *See* Hood Hearing Tr. at 27 (showing Respondent's admission

that "the case wouldn't have gotten settled" at mediation regardless which attorney attended the mediation on behalf of Respondent). This entire dispute has been blown out of proportion by Respondent's selective, inaccurate – and overly aggressive – characterization of the course of this litigation.

Review of the record reveals that Mr. Jones is a sincere but confused plaintiff who suffered severe injuries when Respondent hit him with her car, including head trauma resulting in long-term deficiencies. He has consistently conveyed the information he could remember about the collision including his belief that he executed a left turn in front of a blue car driven by an African American woman that he could not otherwise describe and his belief that an acquaintance he called "Alex" might have seen the collision. *See* Jones Dep. at pp. 23, 28-33, and 45-47.

At no time has Mr. Jones ever testified or indicated that he knew the identity of the woman driving the blue car. He only testified that, before she died, his wife told him that she thought the woman might be her cousin and that, sometime before the trial of the case, an amorphous "they" told him the woman his wife referenced might be someone named Lettie Jackson. *See* Trial Tr. at 136 and 155. Mr. Jones never testified, either at his deposition or at trial, that he ever spoke to this woman or that he was sure that the woman actually saw the accident. Yet, it is undisputed that Mr. Jones and his counsel disclosed the name of Lettie Jackson after Mr. Jones became aware that she might be the woman his wife had referenced as possibly driving the blue car Mr. Jones recalled from the day of the collision. There is nothing in the record to support Respondent's assertion otherwise.

Mr. Jones also disclosed the information he had about Alex. At his deposition, Mr. Jones testified that he had known Alex for only six or seven months at the time of the accident, that Alex helped him with odd jobs, that he did not know Alex's real name, and that he did not know Alex's

address. *See* Jones Dep. at 45-47. He also said that he believed Alex saw the collision and that Alex initially came to see him often following the accident but he no longer had a current telephone number for Alex. *Id*. However, Mr. Jones's memory regarding Alex was unclear and, at times, inconsistent with other statements Mr. Jones made during his deposition including the timing of his meetings with Alex and his recollection of the information he believed he heard from Alex – all of which is understandable due to Mr. Jones's injuries and the elapse of almost two years between the day of the collision and his deposition. *See id.* at 22 (recalling the collision occurring in the evening); 44 (noting that he saw Alex "last week sometime"); 45 (stating that he does not see Alex "no more now").

After Mr. Jones's counsel was unsuccessful in identifying and locating Alex or the woman driving the blue car, he provided a late response to Respondent's supplemental discovery seeking those witness identifications. *See* Jones Response to Supplemental Discovery. There is nothing in the record to suggest that either Mr. Jones or his counsel had sufficient information at the time of that response to disclose the alleged witnesses. However, the record does reflect that in the days before trial, Mr. Jones and his counsel were able to supplement the discovery responses to include Lettie Jackson's name. *See* Trial Tr. at 82. The record also reflects that Mr. Jones testified at trial that he had located Alex but Alex said he didn't know anything about the accident. Trial Tr. at 168-69. Yet, Mr. Jones's testimony did not include anything about the timing of when this actually occurred.

It is undisputed that these alleged witnesses were the only hope Mr. Jones had to corroborate his version of the collision. Therefore, Mr. Jones and his counsel had every incentive to positively identify and disclose them. Unfortunately, they were unable to timely identify and disclose them. Consequently, the trial court excluded not just those two witnesses but also the

witness Mr. Jones identified to replace his deceased wife's testimony about the impact of the collision on Mr. Jones's life. *See* Couch Order; Trial Tr. at 127.

Nothing in the record supports a finding that Mr. Jones and his counsel had the witness information and purposefully withheld it from disclosure. Notwithstanding the absence of any evidence of nefarious intent, Respondent's counsel presumed the worst.[1] To support this presumption, Respondent's counsel elected to take Mr. Jones's testimony out of context and exaggerated Mr. Jefferies' statements to convince the trial court to adopt Respondent's view of the circumstances of the discovery dispute.

This is not to say that Respondent or her counsel has tried to trick or hoodwink any judge. Nevertheless, the record does show counsel's use of a "satellite litigation" strategy focused on the conduct of Mr. Jefferies rather than the actual case or actual impact of the alleged wrongful conduct on the litigation itself. By doing so, Respondent presented a misleading and one-sided portrait of the proceedings, which the trial court found compelling.

Regardless of Respondent's success in the lower court, this Court's standard of review provides for the consideration of the entire record in determining if the lower court's decision is reasonably supported. Of course, Respondent would prefer to avoid full review of the record because it is not as one-sided and clear cut as Respondent portrays it to be. Thus, the arguments in Respondent's brief are meritless and intended to distract the Court from appropriately scrutinizing the record to determine whether the trial court abused its discretion in dismissing Mr. Jones's case

[1] Mr. Jefferies had not endeared himself to opposing counsel during the litigation. In fact, part of Respondent's strategy before the trial court included citing any communication from Mr. Jones's counsel that could be construed as curt, rude, or unflattering irrespective of whether it was made in the context of this litigation.

and awarding substantial monetary sanctions. These sanctions are additional to the witness exclusions imposed at trial and are the harshest sanctions available.

This is an extraordinarily punitive outcome. For punishment of this magnitude to be just and proper, there must be a clear record of intentional wrongdoing and of prejudice. Such a record does not exist, and the Final Sanctions Order should be reversed.

## I. The Court may review the underlying circumstances of the Final Sanctions Order.

Respondent contends that this Court may not consider the circumstances underlying the Final Sanctions Order because those circumstances are not preserved for appellate review and constitute the law of the case. This line of argument is directly contrary to the law and ignores the scope of the Final Sanctions Order. Accordingly, the findings that form the basis of the Final Sanctions Order, including the alleged misconduct of Mr. Jones and his counsel throughout the litigation, are preserved for review in this appeal.

The appellate court's standard of review for sanctions orders expressly includes review of "such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *McNair v. Fairfield County*, 379 S.C. 462, 467, 665 S.E.2d 830, 832 (Ct. App. 2008). The Court must also examine the record to determine whether the lower court's imposition of sanctions rests on "reasonable factual support" and to ensure that the sanctions do not result "in prejudice to the rights" of the sanctioned party. *Karppi v. Greenville Terrazzo Co*., 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997). Furthermore, where the trial court's sanctions include an award of attorneys' fees, the appellate court is specifically allowed to take its own view of the record. *See Ex parte Gregory*, 378 S.C. 430, 437-38, 663 S.E.2d 46, 50 (2008).

Respondent recognizes that review of the record in this matter will reveal the manner in which she has exploited a routine discovery dispute to her unfair advantage. Therefore, she seeks to avoid any holistic review of the facts by incorrectly asserting that the Court's review is limited because Mr. Jones did not directly appeal the discovery orders issued in this case. However, Mr. Jones was not required to appeal each of the discovery orders issued in this case. *See Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008) ("discovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute, involve the merits of the action or affect a substantial right").

The various discovery orders issued in this case did not involve the merits of the case or impair a substantial right, so they were not directly appealable. Neither is Mr. Jones required to list each of those prior orders as separate issues in this appeal because they are part and parcel of the Final Sanctions Order. Mr. Jones has sufficiently detailed objections to Respondent's mischaracterization of the facts related to the discovery orders within his briefing of this appeal to allow the Court to fully review the providence of the Final Sanctions Order. *See* J. TOAL, ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 208 (3d ed. 2016) (explaining that an issue is ripe for appellate court review if it is "reasonably clear" from the appellant's arguments) (citations omitted); *see also Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) (noting that the appellate court may consider issues that are "reasonably clear from an appellant's arguments."); and *Davis v. Parkview Apartments*, 409 S.C. 266, 281 n. 15, 762 S.E.2d 535, 543 n. 15 (2014) (finding prior discovery orders unreviewable where the appellants failed to specifically challenge the findings of those orders).

Moreover, the Final Sanctions Order incorporates the purported circumstances of those rulings as a basis for its finding that sanctions were warranted. In issuing the Final Sanctions Order,

the trial court went well beyond merely accepting the rulings of the prior discovery orders and finding sanctions warranted based on the alleged failure to comply with those orders. Rather, the trial court re-examined the underpinnings of the discovery orders as well as Mr. Jones's and his counsel's conduct since inception of this case to conclude that they actively hid their knowledge of the alleged witnesses. Given the trial court's heavy reliance on Respondent's summation of Mr. Jones's and his counsel's discovery conduct – also reflected in the discovery orders – and the severity of the sanctions issued against them, it is entirely appropriate for this Court to conduct a comprehensive review of the record regarding the circumstances of the discovery issues in this case to determine whether or not the sanctions should stand.

Additionally, Mr. Jones extensively detailed multiple misrepresentations made by Respondent's counsel to advance the misleading narrative throughout this litigation. Yet, other than a vague general denial, Respondent makes no effort to refute any of it. Instead, Respondent asks this Court to ignore those misrepresentations and limit its review of the record to only those parts cited by Respondent. That's because Respondent knows that a more complete review of the record will show that the totality of the circumstances does not warrant the extreme sanctions imposed in this case.

Respondent misleadingly argues that Mr. Jones failed to timely raise any concerns about the veracity of the factual history of the discovery dispute. However, Mr. Jones has refuted Respondent's version of the events contributing to the dispute about witness disclosures several times throughout this litigation. *See* Couch Hearing at 8-17 (discussing Mr. Jones's deposition testimony about turning before a car other than Respondent's but acknowledging that there are no witnesses to corroborate his version of the collision); Lee Hearing at 29-34 (refuting Respondent's arguments and explaining that counsel had not been able to identify and locate the potential

witnesses despite a desire to do so). Although Mr. Jones's counsel did not detail each and every misstatement of fact made by Respondent's counsel during the hearing before Judge Hood, he did indicate disagreement with Respondent's recitation and, more specifically, called out Respondent for contending that Mr. Jones continuously relied on the existence of witnesses that had not been identified. *See* Hood Hearing at 28-38. After Judge Hood entered the Initial Sanctions Order adopting Respondent's incorrect statements of fact, Mr. Jones moved to alter or amend it and more explicitly detailed the factual errors underlying the court's award of sanctions to Respondent. *See* Jones Motion to Alter Order Granting Motion for Sanctions and Exhibits. Contrary to Respondent's supposition, Mr. Jones did not simply accept Respondent's counsel's factual arguments but lodged objections within the framework and context of the relevant hearings.

Nonetheless, the issue presently before the Court in this appeal is whether the Final Sanctions Order is reasonably supported by the record. Respondent does not and cannot maintain that Mr. Jones's appeal of the Final Sanctions Order suffers any preservation defect. Therefore, it is appropriate for the Court to analyze this appeal based on the context of the conduct leading to the imposition of sanctions – that necessarily requires a review of the circumstances of the discovery orders explored by the trial court in issuing the sanctions.

## II. The Final Sanctions Order is not reasonably supported by the record.

Rather than directly addressing the inconsistencies in the statements provided to the lower court on her behalf, Respondent has doubled down on many of those misstatements and now mischaracterizes the arguments in Mr. Jones's opening brief. As so aptly noted by Respondent, "this Court can read for itself." Respondent's Br. at 45.

In arguing that the Final Sanctions Order is overwhelmingly supported by the record, Respondent first posits that the scheme to hide Alex from discovery by Respondent and the Court

was exposed when Mr. Jones testified at trial that he had spoken with Alex. But, Mr. Jones's testimony revealed no such scheme. On redirect, Mr. Jones testified that, contrary to his belief that Alex might be a witness to the collision, it turned out that Alex did not see the accident.

> Q. Was it Alex that was with you that day you got hit that came over to the house? Or do you remember?
> A. Yes, it was him.
> 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. at 169. This is the sum total of Mr. Jones's testimony at trial regarding Alex.

Mr. Jones never made any statement as to when he found Alex relative to his deposition or the trial and, certainly, never testified that he shared this information with his counsel or that his counsel was ever able to locate Alex. Regardless, Respondent emphatically tells this Court that this exchange proves Mr. Jones and his counsel perpetrated some master scheme to hide witnesses from Respondent and the court. *See* Respondent Br. at 24 ("For the first time, during the middle of trial, Plaintiff revealed that <u>he and Mr. Jefferies</u> 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 <u>Plaintiff and Mr. Jefferies</u> had not found Alex go?") (emphasis added); *Id.* at 40 ("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."). However, Mr. Jefferies was as surprised as anyone by Mr. Jones's responses, as indicated by the brusque conclusion of his questioning. Respondent then chose to exploit Mr. Jones's testimony to support the fictional storyline of a conspiracy to hide witnesses. While Respondent wants this testimony to show

malfeasance by Mr. Jones and his counsel, it only reinforced what Respondent already believed – that Alex was never a witness.

Respondent next conflates arguments about the validity of the unlawful passing theory, which was one of several theories included in the complaint, with the accuracy of Mr. Jones's recollection of the circumstances surrounding the collision. Mr. Jones has been steadfast in his testimony that he personally recalled executing his turn in front of a car that was not driven by Respondent; this testimony was independent of any testimony regarding what he believed Alex might have seen. *See* Jones Dep. at 28-32 and 45-47. In an effort to reconcile these claims with the fact that Respondent was the person who collided with Mr. Jones, Mr. Jones's counsel pled a theory that was plausible to explain how the accident occurred with hopes that witnesses would be located to corroborate Mr. Jones's recollection of events. *See* Complaint; Responses to Requests for Admissions. However, those witnesses did not materialize during the course of discovery. Still, even without the alleged witnesses, Mr. Jones was entitled to testify based on his own memory regarding the circumstances of the collision.

Unfortunately, Mr. Jones's recollection of the collision and surrounding events may not be as clear as he would like it to be. For example, during his deposition, he first testified that he believed the collision occurred in the evening but later recounted riding his bike in the morning as the sun was rising. *See* Jones Depo. at 22-27. He further recalled turning in front of a car driven by a woman but was unsure about her age, hair color, or what she was wearing. He could only recall that she was African-American. *Id.* at 32. Although he said that his wife told him before her death that the woman in the car may have been her cousin, Mr. Jones was not sure that the woman truly was his wife's cousin and did not know the woman's identity. *Id*. at 29-30. Mr. Jones went on to say that his wife mentioned speaking with the woman, who indicated she did not care to be

involved. *Id*. at 32-33. (Respondent assumes this meant that she saw the collision but did not want to be named as a witness. That is purely conjecture.) By the time trial came around, Mr. Jones had a name but nothing else and could not confirm that the woman he named was really his wife's cousin or a witness to the collision. Trial Tr. at 136 (testifying that the woman driving the blue car was someone "[t]hey said was my wife's cousin" and "they said her name was" Lettie Jackson) and 155 (acknowledging that he did not know whether or not she witnessed the accident). His testimony at trial continued as follows:

> Q. And that person -- your wife's cousin that Ms. Robinson, you're saying, sped around, got in front of, and hit you then fled the scene; is that right?
> A. No. She didn't flee the scene.
> Q. Well, you know she wasn't there when the police arrived; right?
> A. Yeah -- I don't know. I don't know what -- I don't know what -- I -- I wasn't there.
> Q. You know she --
> A. She had to be there because they -- because from the pictures, her car was wrecked.

Trial Tr. 156-57.

Unfortunately, there are no photographs depicting the blue car in front of which Mr. Jones recalls turning. Additionally, Ms. Murray testified that she was following behind Mr. Jones on the day of the accident notwithstanding his recollection that that there were no cars behind him. *Id*. at 225-26. She confirmed that he signaled before making his turn. *Id*. However, she stated that the only cars in the vicinity of the collision were hers and Respondent's car. *Id*. at 232.

Mr. Jones was also confused and disoriented in his statements about Alex. During his deposition, he testified that Alex saw the collision while standing by the road in front of Mr. Jones's house but he could not identify in any of the pictures where Alex might have been standing that would have allowed him to witness the accident. *See* Jones Dep. at 102. He also indicated that Alex showed him a few photos in the week before his deposition. *See id*. at 41-44. But later in the deposition, Mr. Jones stated that he had not seen Alex since he was first recovering from the

accident (which occurred almost two years before his deposition), and that he no longer had a valid contact number for Alex. *Id*. at 44-46. The confusion only continued when Mr. Jones was questioned about why Alex was not listed as a witness in response to discovery requests. *Id*. at 110-113 (acknowledging his significant memory issues).

Instead of recognizing that Mr. Jones's testimony was likely impacted by his significant memory issues caused by the injuries he sustained when Respondent hit him, Respondent opted to manipulate the narrative by cherry-picking isolated statements and presenting them as the full and true reflection of how the dispute unfolded. Without any support, Respondent ascribes ill motives to Mr. Jones and his counsel regarding Alex despite evidence in the record that Mr. Jones had not provided sufficient information about Alex to allow his own counsel to locate him.

Tellingly, during an exchange amongst counsel about Alex in the middle of Mr. Jones's deposition, counsel commented about not finding Alex. Jones Depo at 82 ("If we do find the guy -- I want to look for him, too"). When Mr. Jones responded at trial that he had located Alex but Alex had not witnessed the accident as Mr. Jones thought, he made no comment regarding the time this occurred or regarding his counsel's knowledge of Alex's location. Therefore, Respondent can only speculate that Mr. Jones located Alex after his deposition yet failed to disclose his whereabouts.

Likewise, Respondent's selective reliance on the possible testimony of Alex as the basis for Mr. Jones's responses to the Requests for Admissions is also speculative. Respondent's argument disregards Mr. Jones's testimony of his own personal knowledge regarding the accident. Mr. Jones testified at his deposition and at trial that he remembered turning in front of a blue car. While he also recounted his beliefs regarding what Alex might have witnessed when sitting for his deposition, he relied solely on his recollection of the accident at trial. His testimony alone – that

he turned in front of a blue car but was somehow hit by Respondent – provided an appropriate basis upon which Mr. Jones's counsel could have based the unlawful passing theory.

Respondent also misconstrues multiple statements from Mr. Jones's opening brief. First, Mr. Jones does not advance any new arguments as to why his response to Respondent's supplemental requests seeking the identity of witnesses was "none." Respondent's Br. at 42-43. As he has always maintained, the response meant precisely what it said; Mr. Jones had no witnesses responsive to the discovery request. Mr. Jefferies acknowledged this in the hearing before Judge Couch but he also argued that Mr. Jones was unable to recall information about the alleged witnesses, that his wife died shortly before his deposition (without having disclosed the name of her alleged cousin), and he had not been able to find out the information despite diligent effort. *See* Couch Hearing at 20-21.

Although phrased differently, the argument contained in the brief is substantially similar to the argument made to Judge Couch – that he had no additional witnesses to name because Mr. Jones did not know the name of the woman in the blue car that might have been the cousin of his now deceased wife and Mr. Jones only knew his acquaintance by the alias of Alex. *Id*. With respect to naming the alleged witnesses, Mr. Jones's counsel explained to Judge Couch that "we can't find Alex who lives . . . in the woods" and, when pressed on when he would disclose the witness, he responded "I don't know that we can find it." *Id*. at 21-22. So, the statements in Mr. Jones's opening brief about the response to the supplemental discovery do not advance a new argument in as much as it merely explains why there were no witnesses to name in the response.

Respondent further contends that the findings set forth in the Final Sanctions Order regarding Mr. Jefferies' alleged misrepresentations to Judge Lee are supported by the record. Yet, those findings are reflective of only Respondent's account of those hearings and not what actually

occurred in the hearings. While Judge Lee did inquire about the nature of Mr. Jefferies's objections to Judge Couch's oral ruling requiring witness identifications by June 1st, her question was in the context of understanding Mr. Jones's Rule 59 motion. In response, Mr. Jefferies explained his objections to the way the oral ruling was reflected in the written order. He specifically took issue with the accuracy of the factual recitation included in the written order and that the written order excluded all witnesses rather than just the alleged witnesses – Alex and the woman in the blue car – discussed during the hearing. A more complete excerpt of the discussion between Judge Lee and Mr. Jefferies, which is only partially included in Respondent's brief, is as follows:

> ***
>
> JUDGE LEE: So I -- I guess my question is: What was it about -- at least -- and -- and I understand an oral ruling from the Court is not binding unless it's in writing and -- because the judge has the opportunity to change his mind any time in -- his or her mind anytime between time of the oral rule -- ruling to the written ruling. The rules say it's the written ruling that governs. 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, was -- I -- I'm just trying to understand that.
>
> MR. JEFFRIES: Several portions, Your Honor, and -- and this was, of course, laid out in our Rule 59 memo. One portion of it was that there's no -- Mr. Bayne made any number of assertions, and these are all detailed in our Rule 59 motion. No evidence that any of these things are true. One of them he asserts we said something in a pleading on June 5, 2019. We didn't file any pleading on June 5, 2019. So that's clearly wrong. Other things were just not supported by any facts at all. We came in and made arguments of counsel and that was it. So that's an issue. The second piece is barring every witness who wasn't disclosed by the arbitrary deadline of June 1 from trial. At that point trial hadn't even been set as I recall. I could be wrong, but I'm 99 percent sure trial was not set as of June 1. If I -- if I'm wrong, please correct me. In any event, barring all those witnesses, I didn't think 30 day -- well, 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. . . .

Lee Hearing at 33-34. So, Mr. Jefferies was not purporting to make representations to Judge Lee regarding what was said during the hearing with Judge Couch in the above-referenced exchange

but rather relay the substance of the objections raised in the Rule 59 motion. The inconsistency between Respondent's description of this discussion and the actual transcript serves as a further illustration of Respondent's strategy throughout this litigation.

Similarly, in mischaracterizing Mr. Jefferies's presentation of Mr. Bayne's social media posts during the hearing with Judge Hood as strategically edited and altered, Respondent continues to impute misconduct where none exists. *See* Respondent's Brief at 30-31. Comparisons of the posts provided to Judge Hood by Mr. Jefferies with Respondent's motion papers including those same posts shows that Mr. Jefferies did not edit or alter the posts. *Compare* Plaintiff's Motion to Alter, Amend, and/or Reconsider at Ex. J *with* Defendant's Replies to Plaintiff's Motion to Alter, Amend, And/or Reconsider and Plaintiff's Second Motion for Sanction at 35-36. Mr. Jefferies presented Judge Hood with screenshots of Mr. Bayne's actual social media posts. The crux of Respondent's grievance is really that Mr. Jefferies did not include the replies to Mr. Bayne's initial posts, which Respondent believes was necessary to provide context for them. However, claiming that counsel took something out of context is a far cry from claiming that counsel doctored exhibits. Ironically, the alleged gamesmanship of which Respondent now complains is precisely the strategy Respondent used to secure the sanctions that are the subject of this appeal.

In a final effort to discredit Mr. Jones's arguments, Respondent unfairly claims that Mr. Jones has misrepresented, not just the Final Sanctions Order, but multiple orders to this Court in his briefing. Yet, the only specific claim of misrepresentation relates to the characterization of the trial court's discussion of Mr. Jones's motion for reconsideration of the Couch Order. While the word "delay" is not in the Final Sanctions Order, the Final Sanctions Order does include a strong rebuke of Mr. Jones and his counsel for not regarding Judge Couch's ruling from the bench as an enforceable order, waiting to raise concerns about the June 1st deadline, and then arguing that the

unresolved Rule 59 motion required a continuance of the trial during the hearing before Judge Lee. It is not necessary for Mr. Jones to use the precise language of the order in summarizing its contents. Respondent's accusations of an attempt by Mr. Jones to mislead this Court in his briefing is an outrageous fabrication and only reinforces Mr. Jones's arguments as to why the Final Sanctions Order should not stand.

Perhaps trial counsel could have handled some things differently during this litigation. In particular, Mr. Jones and his counsel might have been more transparent regarding their difficulties identifying the alleged witnesses or made more inquiries with Mr. Jones's wife prior to her death. However, there is nothing in the record to support a finding that they had the witness information when responding to the supplemental discovery requests or that they ever purposefully withheld it from disclosure. Moreover, none of this caused any prejudice to Respondent in the litigation. At worst, Mr. Jones' counsel should have received a reprimand or modest sanction, but there is absolutely no basis for imposing the "death penalty" of dismissal when the client did nothing wrong and there was no prejudice to Respondent.

## III. The penalties imposed by the Final Sanctions Order are excessive.

As explained above and in the opening brief, the only support in the record for a finding that either Mr. Jones or his counsel acted with bad faith, willful disobedience, or gross indifference in this case is Respondent's arguments to the court. Certainly, Mr. Jones and his counsel believed that the alleged witnesses would support Mr. Jones's case but, since the commencement of this dispute, the only reason Mr. Jones and his counsel did not make a timely witness disclosure is that they did not know who to disclose or where to find them. Respondent wants there to be some grand scheme between Mr. Jones and his counsel. However, there is no evidence of any scheme to hide witnesses in this record.

Although Respondent attempts to draw factual distinctions between the instant case, *QZO, Inc. v. Moyer*,[2] *Karppi v. Greenville Terrazzo Co., Inc.*,[3] and *McNair v. Fairfield County*,[4] at bottom, all of these cases share in the proposition that our appellate courts only find sanctions as severe as those imposed by the Final Sanctions Order appropriate where it is indisputable that the sanctioned party engaged in intentional discovery violations or bad faith violations of court orders in a manner that prejudiced the other party. Other cases support Mr. Jones's argument that the brutal sanctions handed down in this case are unjustified. *See, e.g. Kershaw Co. Bd. of Educ. v. United States Gypsum Co*., 302 S.C. 390, 396 S.E.2d 369 (1990) (affirming the trial court's refusal to dismiss claim where there was no evidence of intentional violation of the discovery order and the lesser sanction of a jury instruction would have been sufficient); *Orlando v. Boyd*, 320 S.C. 509, 466 S.E.2d 353 (1996) (reversing the trial court's grant of summary judgment because the sanction effectively resulting in dismissal was too severe where there was no evidence of any intentional misconduct).

Here, Mr. Jones and his counsel were sanctioned for failing to disclose possible witnesses to the collision and violating mediation rules. Respondent portrays this as multiple discovery violations and open contempt for court rules. However, this alleged wrongful conduct centered on their inability to identify the same two alleged witnesses and did not prejudice Respondent in any way. After Judge Benjamin's order on the Rule to Show Cause, the record demonstrates that Mr. Jones and his counsel did not name the alleged witnesses because they could not do so. Even when they finally named Lettie Jackson, Mr. Jones did not have her address and was still unsure if she

[2] 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004).

[3] 327 S.C. 528, 489 S.E.2d 679 (Ct. App. 1997).

[4] 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008).

was a witness to the accident. Additionally, while Mr. Jones testified at trial that he located Alex, there is nothing in the record indicating whether this occurred before or after his deposition testimony such that there is any evidence of efforts to avoid disclosing him as a witness. Neither Alex nor Lettie Jackson were at trial to testify and, even if they had been there, the court had already excluded them as witnesses at trial as a sanction for any untimely disclosure. Likewise, the complaints regarding the mediation violation are merely pretextual as Respondent has conceded that there was no expectation that mediation would be fruitful. Therefore, imposing the sanction of dismissal in this matter was unreasonable and went far "beyond the necessities of the situation." *The Balloon Plantation, Inc. vs. Head Balloons, Inc., et al.*, 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990).

Respondent also makes no legitimate effort to refute Mr. Jones's argument regarding the excessiveness of the attorney's fee award. Without any sense of irony, Respondent contends that Mr. Jones incorrectly characterizes the fee award as encompassing the entire litigation, while noting that that the requested costs and fees only relate to:

- the Motion to Compel, the Rule to Show Cause, and hearing before Judge Benjamin [which also included the hearing on the Motion to Dismiss];
- the second Motion to Compel and hearing before Judge Couch [which also included the hearing on the Motion for Summary Judgment];
- mediation;
- the roster meeting before Judge Lee;
- the Trial;
- the hearing before Judge Hood; and
- "[a]ny actions taken to figure out who the mystery witnesses were."

Respondent's Brief at 48 (citing Affidavits of Brett H. Bayne, filed Oct. 25, 2109, and Oct. 31, 2019). This is substantially the entire case.

If any monetary sanctions were appropriate at all, the amount of those sanctions should have been limited to the fees and costs related to the alleged misconduct. South Carolina Rules of

Civil Procedure only allow the court to impose monetary sanctions related to the offending conduct. *See* Rule 11(a), SCRCP (allowing "an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee"); Rule 37(b), SCRCP (authorizing "reasonable expenses, including attorney's fees, caused by the failure") Likewise, our mediation rules limit monetary recovery to "the payment of attorney's fees, neutral's fees, and expenses incurred by persons attending the conference." Rule 10(b), SCRADR.

While the motions to compel, mediation, and the hearing before Judge Hood could be related to the conduct complained of in the Motion for Sanctions, it was overreach to include the fees and costs incurred in participating and preparing for trial. Respondent was required to do that work notwithstanding the alleged discovery and mediation misconduct. Notably, more than half of the amount imposed upon Mr. Jones and his counsel as sanctions is attributable to those required activities. *See* Affidavit of Brett Bayne. Therefore, it is disingenuous for Respondent to contend that she did not reap a windfall in the award of monetary sanctions and none of those fees should be awarded to her as part of the sanctions.

## CONCLUSION

The circuit court's order imposes the most severe sanctions possible against Mr. Jones and his counsel. This dispute was overblown by Respondent's propensity for hyperbole. It does not involve the type of conduct that would warrant a decision by default. For these reasons and those set forth in Mr. Jones's opening brief, this Court should reverse the Final Sanctions Order in its entirety.

Respectfully Submitted,

s/ *Meliah Bowers Jefferson*

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Dated: November 5, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals



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APPEAL FROM RICHLAND COUNTY
Court of Common Please

The Honorable Robert E. Hood, Circuit Court Judge

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Appellate Case No. 2020-000581

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Harland Jones.....Appellant,

v.

Karen Robinson .....Respondent.

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**PROOF OF SERVICE**

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I certify that I have served the INITIAL REPLY BRIEF OF APPELLANT by electronic mail, on November 5, 2020, addressed to its attorneys of record e-mail address of record with AIS:

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