THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson

RECEIVED
Nov 19 2020
SC Court of Appeals

Case No. 2017-CP-26-000273

Carolina Cool, Inc.,..Plaintiff,

v.

Garrard Construction Group, Inc., Dave & Buster's of South Carolina, Inc.,
Broadway at the Beach, Inc., and Billys Plumbing Company LLC ....Defendants,

Garrard Construction Group, Inc.,.......................................Third-Party Plaintiff,

v.

RLI Insurance Company, ...Third-Party Defendant.

Of Which Carolina Cool, Inc. is the ....Respondent,

and

Garrard Construction Group, Inc. is the .... Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The circuit court properly sanctioned Garrard for violating discovery orders.

II. The circuit court properly reviewed the entire record of the case and sanctioned Garrard for its pattern of obstructing the discovery process.

III. The circuit court's order was narrowly tailored and imposed appropriate sanctions for Garrard's intentional misconduct.

IV. The circuit court's order was necessary to protect Carolina Cool's rights of discovery provided by the South Carolina Rules of Civil Procedure and to deter future discovery abuses.

STATEMENT OF THE CASE

A. Introduction:

This appeal reviews a circuit court's sanction of a party as a result of multiple discovery abuses. This case arises from the construction of the Dave & Buster's restaurant located at Broadway at the Beach in Myrtle Beach. Appellant Garrard Construction Group, Inc. (Garrard) was hired by Broadway at the Beach, Inc. (Broadway), the owner of the real property, to build the outside shell of the building. Garrard was hired by Dave & Buster's of South Carolina Inc. (Dave & Buster's), the tenant leasing the space from Broadway, to build the interior of the building. As such, Garrard was the general contractor for both the shell and interior portions of the building. On September 1, 2016, Garrard entered into a contract to do the shell work for Broadway for a fixed price amount $4,994,912.00.[1] On October 25, 2016, Garrard entered into a cost-plus contract to do the interior work for Dave & Buster's for $3,628,786.00.[2]

[1] Garrard-Broadway Fixed Price Shell Contract, September 1, 2016. ROA 89.
[2] Garrard-Dave & Buster's Cost-Plus Contract, October 25, 2016. ROA 133.

Garrard hired Respondent Carolina Cool, Inc. (Carolina Cool) to perform the required plumbing work for both the shell and interior portions of the building. Garrard and Carolina Cool entered into a subcontract dated October 19, 2016 regarding the shell, "Carolina Cool Shell Subcontract," in the amount of $36,450.00.[3] The shell subcontract price was increased to $36,450.00 due to a subsequent change order.[4] On November 18, 2016, the parties entered into a subcontract for the interior, "Carolina Cool Interior Subcontract," in the amount of $294,688.00.[5]

Pursuant to the schedules attached to its subcontracts, Carolina Cool expected to begin work for the building's shell on November 9, 2016 and the building's interior on December 26, 2017. Due to delays on the project, Carolina Cool's start dates were pushed back by Garrard. Carolina Cool was not able to begin its shell work until December 29, 2016 and its interior work on January 3, 2017.[6] On January 20, 2017, Garrard terminated Carolina Cool's interior subcontract and removed Carolina Cool from the project. Carolina Cool was not allowed to complete the shell portion of the work even though Garrard never terminated the shell subcontract. Garrard hired Billys Plumbing Company LLC (Billys Plumbing) to replace Carolina Cool and to finish the shell and interior plumbing work.[7]

In its Complaint, Carolina Cool alleges Garrard breached both the shell and interior subcontracts by removing them from the project without justification and failing to pay for the work and materials already provided.[8] To this date, Garrard has not paid Carolina Cool anything for the materials and labor it provided, valued by the contracts in the amount of

[3] Carolina Cool Shell Subcontract, October 19, 2016. ROA 217.
[4] Change Order to Carolina Cool Shell Subcontract. ROA 233.
[5] Carolina Cool Interior Subcontract, November 18, 2016. ROA 235
[6] Deposition of Shawn Gill, ROA 535, lines 1-15.
[7] Answer, Counterclaim and Third-Party Complaint filed July 6, 2017. ROA 643.
[8] Complaint, filed June 8, 2017. ROA 635.

$113,350.00. In its counterclaim, Garrard alleges Carolina Cool breached the interior subcontract by not meeting the agreed upon schedules and not performing the work properly.[9] Garrard alleges it incurred damages by having to hire Billys Plumbing to fix and finish Carolina Cool's work. The case should have proceeded as a relatively straight-forward breach of contract case between sophisticated parties. However, due to the deliberate impediment of the discovery process by Garrard, the parties have spent the last three years fighting over discovery production.

B. Procedural History:

On April 12, 2017, Carolina Cool filed its Mechanic's Lien in the amount of $113,350.00 for the value of the work it performed and materials provided for both the shell and interior subcontracts.[10] Carolina Cool filed its initial Summons and Complaint on June 8, 2017 seeking additional damages for breach of contract.[11] Garrard, Broadway, and Dave & Buster's filed their Answer and Garrard's Counterclaim and Third-Party Complaint on July 6, 2017.[12] All three were represented by the same legal counsel. By way of a Consent Order filed April 30, 2019,[13] Plaintiff filed its Second Amended Summons and Complaint on May 3, 2019 naming Billys Plumbing as an additional Defendant.[14] On May 10, 2019, Garrard, Broadway, and Dave & Buster's filed their Answer and Garrard refiled its Counterclaim and Third-Party Complaint.[15] Carolina Cool

[9] Answer, Counterclaim and Third-Party Complaint filed July 6, 2017. ROA 643.
[10] Mechanic's Lien April 12, 2017. ROA 621.
[11] Complaint filed June 8, 2017. ROA 635.
[12] Answer, Counterclaim, and Third-Party Complaint filed July 6, 2017. ROA 643.
[13] Order filed April 30, 2019. ROA 16.
[14] Amended Complaint filed May 3, 2019. ROA 702.
[15] Answer to Amended Complaint, Counterclaim, Third-Party Complaint filed May 10, 2019. ROA 714.

filed its Reply on May 22, 2019;[16] RLI Insurance filed its Answer on May 23, 2019;[17] and Billys Plumbing filed its Answer on June 27, 2019.[18]

There were three scheduling orders filed in this case. The first scheduling order filed June 29, 2018 provided all discovery, including depositions, would be completed by October 19, 2018 and trial after December 3, 2018.[19] The second scheduling order filed December 11, 2018 extended discovery, including depositions, to June 1, 2019 with a trial after September 1, 2019.[20] The final scheduling order was filed August 23, 2019 and required discovery, including depositions, be completed by December 20, 2019 and trial after February 10, 2020.[21]

At issue on appeal, Carolina Cool filed its Motion for Sanctions on November 4, 2019.[22] A lengthy hearing was held December 18, 2019 before Judge Benjamin H. Culbertson, at the conclusion of which, Judge Culbertson granted the motion.[23] The court's formal order was filed January 27, 2020.[24] Garrard filed its motion to reconsider on February 6, 2020.[25] The court's order denying the motion was filed February 10, 2020.[26] Garrard's Notice of Appeal was filed February 13, 2020.[27]

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[16] Reply filed May 22, 2019. ROA 721.
[17] RLI Insurance Answer filed May 23, 2019. ROA 727.
[18] Billys Plumbing Answer filed June 27, 2019. ROA 731.
[19] Order, June 29, 2018. ROA 1.
[20] Order, December 11, 2018. ROA 7.
[21] Order, August 23, 2019. ROA 19.
[22] Motion for Sanctions, November 4, 2019. ROA 750.
[23] Transcript of Hearing, December 18, 2019. ROA 850.
[24] Order, January 27, 2020. ROA 26.
[25] Motion to Alter or Amend, February 6, 2020. ROA 783.
[26] Order, February 10, 2020. ROA 56.
[27] Notice of Appeal, February 13, 2020. ROA 792.

STATEMENT OF FACTS

The circuit court's order recites in great detail Garrard's discovery abuses. There was an abundant and more than reasonable factual basis to support the circuit court's decision as set forth below:

A. **Garrard's Discovery Responses:**

Carolina Cool served Garrard its initial discovery requests on September 28, 2017.[28] On November 28, 2017, Garrard responded and produced 587 pages of documents.[29] Garrard identified Billys Plumbing as the subcontractor who replaced Carolina Cool. In its response to Request to Produce No. 12, which sought all estimates and contracts evidencing the hiring of Billys Plumbing, Garrard responded "[a]ll responsive material in Defendants' possession/control is included in its production with these responses." Garrard produced only two subcontracts with Billys Plumbing – a false representation as discussed further below. The first was a subcontract dated February 3, 2017 for interior work, "Billys Plumbing Interior Subcontract," in the amount of $350,197.33.[30] Three change orders increasing the amount of Billys Plumbing Interior Subcontract were also produced: change order dated April 13, 2017 in the amount of $4,294.39;[31] change order dated May 12, 2017 in the amount of $23,237.22;[32] and change order dated May 31, 2017 in the amount of $1,679.52.[33] The second subcontract produced

[28] Plaintiff's Initial Discovery Requests. ROA 255.
[29] Defendants' Answers and Responses. ROA 267.
[30] Billys Plumbing Interior Subcontract dated February 3, 2017. ROA 312.
[31] Change Order #1 dated 4-13-17. ROA 344.
[32] Change Order #2 dated 5-12-17. ROA 346.
[33] Change Order #3 dated 5-31-17. ROA 348.

was dated February 28, 2017 for shell work, "Billys Plumbing Shell Subcontract," in the amount of $36,884.00.[34]

In Request to Produce No. 14, Carolina Cool sought "correspondence, emails, notes, voice mails or other forms of communications" between Garrard and Billys Plumbing. Garrard once again responded, "[a]ll responsive material in Defendants' possession/control is included in its production with these responses." No emails or correspondence between Garrard and Billys Plumbing were produced. As discussed below, Carolina Cool learned there were indeed emails that should have been produced.

In its Counterclaim, Garrard claimed it "incurred damages, including but not limited to acceleration and delay costs, attorney's fees and additional overhead.[35] When asked in Interrogatory No. 6 to identify the specific amount of damages it was claiming, Garrard answered it incurred damages in the amount of $102,091.78 for the cost difference to hire Billys Plumbing to perform the work that Carolina Cool contracted to perform on the interior portion of the project comprised of:

> a. $71,553.03 and the cost to complete the under-slab plumbing work and corrections to the under-slab plumbing work that Carolina Cool installed incorrectly.
> b. $8,856.25 Garrard was forced to pay ASE (steel erectors) to erect the steel with a large crane resulting from Carolina Cool's inability to complete the under-slab plumbing rough-ins per schedule.
> c. $21,682.50 in General Conditions costs resulting from Carolina Cool's non-performance.

Garrard claimed the $21,682.50 for "general conditions" was due to a three-week delay in construction allegedly caused by Carolina Cool.[36] Garrard also claimed it was

[34] Billys Plumbing Shell Subcontract, ROA 350.
[35] Defendants' Answer & Counterclaim, filed July 6, 2017. ROA 643.
[36] Garrard's Calculation of Damages, ROA 367.

entitled to unspecified damages for consequential damages, lost profits, attorney fees and punitive damages.

In reviewing Garrard's initial discovery responses, it was clear relevant documentation typically generated in a construction case had not been produced. For example, Garrard produced daily jobsite reports for only the few days of the project when Carolina Cool was on site. Garrard failed to produce daily reports for the time period before and only a few after Carolina Cool was terminated. There was no documentation regarding any alleged delays with the completion date for the project. Nor was any documentation of Garrard's overhead costs produced justifying the damages for increased "general conditions." It was certainly odd no communications with Billys Plumbing were produced, nor communications between Garrard, Broadway, and Dave & Buster's.

In January 2018, Carolina Cool served more specific discovery requests.[37] Garrard responded on February 20, 2018, producing an additional 754 pages of documents.[38] When asked what it paid Billys Plumbing, Garrard answered:

> 16. Set forth the total amount of monies paid to Billy's Plumbing Company, Inc. for services and materials provided for the Dave & Buster's Myrtle Beach Interior Project.
> **ANSWER: Garrard paid Billy's a total of $379,408.46. See Defendants 000589 – 598 produced with these responses.**
>
> 17. Set forth the total amount of monies paid to Billy's Plumbing Company, Inc. for services and materials provided for the Dave & Buster's Myrtle Beach Shell Project.
> **ANSWER: Garrard paid Billy's a total of $379,408.46. See Defendants 000589 – 598 produced with these responses.**

[37] Plaintiff's Supplemental Discovery Requests. ROA 376. ROA 379.
[38] Defendants' Answers to Supplemental Discovery Requests dated February 20, 2018. ROA 383.

Carolina Cool also inquired as to jobsite meetings since no documentation of any meetings had been produced. Garrard claimed every Tuesday, there were coordination meetings to discuss scheduling, two-week "look ahead," requests for information, percentage of completion and safety. Garrard falsely claimed Carolina Cool's foreman refused to participate in the meetings.[39] In fact, Garrard's interior superintendent, William Bromley, later admitted during his deposition on April 16, 2019 that he did not even schedule any meetings during the time Carolina Cool was on the project and that he was not aware of any meetings Carolina Cool failed to attend.[40]

In November 2018, Carolina Cool served additional supplemental discovery requests.[41] Carolina Cool specifically requested communications amongst the Defendants regarding the project, documentation regarding payments to Garrard from Broadway and Dave & Buster's, and inspection reports. After having to file a motion to compel,[42] Garrard finally responded on March 14, 2019.[43] The responses included an additional 4,232 photographs and an additional 1,632 pages of documents related to project including weekly reports, correspondence, calendars, notes, and payments. Unbeknownst to Carolina Cool, Garrard still held back critically relevant documents.

B. Subpoenas Issued to Billys Plumbing:

On July 18, 2018, Carolina Cool served a subpoena on Billys Plumbing to which Billys Plumbing filed a Motion to Quash on July 31, 2018.[44] A hearing was scheduled for October 9, 2018. On the day before the hearing, Garrard's attorney emailed counsel for

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[39] Defendants' Answers to Supplemental Discovery Requests dated February 20, 2018, ROA 387.
[40] Deposition of William Bromley, ROA 394 line 12 – ROA 395 line 9.
[41] Carolina Cool's Second Supplemental Requests. ROA 409.
[42] Motion to Compel, February 13, 2019. ROA 681.
[43] Defendants' Responses to Second Supplemental Requests. ROA 416.
[44] Billys Plumbing's Motion to Quash filed July 31, 2018. ROA 667.

Carolina Cool and Billys Plumbing stating he was attaching all of his client's documents related to Billys Plumbing, which he claimed consisted of eighty-seven pages.[45] In lieu of having a hearing, Carolina Cool and Billys Plumbing entered into a Consent Order filed October 11, 2018.[46] Pursuant to the Consent Order, Carolina Cool agreed Billys Plumbing could redact certain information due to Billys Plumbing's concern its confidential pricing and trade information would become public. Carolina Cool made that concession not knowing Billys Plumbing and Garrard had entered into a time and materials contract dated January 23, 2017, which Garrard failed to produce.

Unfortunately, in order to enforce the Consent Order, Carolina Cool was required to file a Motion for Contempt/Sanctions on November 20, 2018,[47] which was granted on April 3, 2019.[48] Thereafter, Billys Plumbing produced over 1,700 pages of documents – a whopping contrast to the eighty-seven pages produced by Garrard's attorney. Through this production, Carolina Cool discovered extremely relevant documents including correspondence and emails between Garrard and Billys Plumbing, as well as, a third subcontract between the parties. The emails revealed Garrard had contacted Billys Plumbing about taking over while Carolina Cool was still working on the project, which supports Carolina Cool's theory of the case. The emails include the following between Garrard's Project Manager, Shawn Gill, and Billys Plumbing's foreman, Scott Gasque:

- **Email from Shawn Gill to Scott Gasque dated January 6, 2017**:[49]
  Scott, In follow up to our conversation a few moments ago, please find the link below to the construction drawings for the Dave and Buster's Myrtle Beach Interior project. Please note that the drawings at the below link are

[45] Countryman Email dated October 8, 2018. ROA 427.
[46] Order filed October 11, 2018. ROA 4.
[47] Motion for Sanction as to Billys Plumbing filed November 20, 2018. ROA 678.
[48] Order filed April 3, 2019. ROA 13.
[49] Email from Shawn Gill, January 6, 2017. ROA 516.

the current construction drawings, however Bulletin #1 was released on Tuesday and those sheets concerning any plumbing changes are in the Bulletin #1 folder, in that bulletin #1 they did flip the family restroom lavatory and toilet so you know. Give me a call when you have checked out the site. Thanks

- **Email from Scott Gasque to Shawn Gill dated January 18, 2017:**[50]

Shawn, I have made a site visit and talked to your superintendent Bill. I see Carolina Cool is still on site working. In order for me to be able to help you we need to work out some paperwork. We need confirmation on when Carolina Cool will be off the project permanently. Also need to work about the material they have on site now. I am working on setting up manpower to finish the underground. But cannot go much further than that until we work out the details. Please let me know how you want me to proceed.

- **Email from Shawn Gill to Scott Gasque dated January 18, 2017:**[51]

Scott, Sorry I have been on the phone with our owner and am waiting on confirmation back from our attorney that we are buttoned up on the appropriate notices and paperwork to legally remove the current plumbing contractor. Our attorney is to let me know the exact time we can release them. We are working on it. I will be in touch soon. Thanks

- **Email from Shawn Gill to Scott Gasque dated February 1, 2017:**[52]

Scott, Sorry, I was on a site all day and ran out of day, but my coordinator did send me your subcontract to review today through our paperless system and I did not get to review and initial. I will review this evening and if all is good I will have Cherie send it to you in the morning. You should see it tomorrow. Send me your shell number as soon as you get it together tomorrow. Also, as we disucced (sic) last week, could you get me a quote for the revised floor drain and the heat tape on Bulletin #1, I need to get this submitted to the owner. Please note I have to submit the subcontractor change request with any owner change request as back up and they require the change requests to be broken down in Labor, Material, Tax and 10% OH&P. Thanks

Billys Plumbing also produced a previously unknown contract, "Billys Plumbing's Times and Material Subcontract," dated January 23, 2017, to complete the underslab

[50] Email from Scott Gasque, January 18, 2017, ROA 519.
[51] Email from Shawn Gill, January 18, 2017, ROA 521.
[52] Email from Shawn Gill, February 1, 2017, ROA 523.

plumbing.[53] There were additional emails between Shawn Gill and Scott Gasque regarding this contract as well:

- **<u>Email from Scott Gasque to Shawn Gill dated January 23, 2017:</u>**[54] Shawn, attached is our proposal from the T & M to finish the underground. Please review and return a signed copy as soon as you can. My superintendent should already be on site by now. I have other manpower and equipment headed that way also. Please advise if there is any issues.

- **<u>Email from Shawn Gill to Scott Gasque dated January 23, 2017:</u>**[55] Scott, See attached signed copy per your request. Thank you!

Carolina Cool would not have learned of Billys Plumbing's Times and Material Subcontract or the numerous email communications had it not aggressively pursued enforcement of its subpoenas and orders of the court. Garrard manipulated Billys Plumbing's Times and Material Subcontract dated January 23, 2017 into the change order dated May 12, 2017 in the amount of $23,237.22.[56] Additionally, Billys Plumbing's Time and Materials Subcontract contained the following relevant terms and conditions:[57]

- This is an agreement between Garrard Group & Billy's Plumbing Company, LLC. (From here out known as BPC.) BPC shall not have any contact with Carolina Cool, nor their Bonding Company. Garrard is to handle any issues that may arise from either party.
- Garrard Group is to be responsible for all, legal representation if needed to protect BPC from Carolina Cool and/or Bonding Company. Legal representation shall be of BPC choice.
- Garrard Group agrees to pay the Labor Rates and OH & P percentage as laid forth above in full to BPC with-in net 30 days, regardless if Garrard Group has received reimbursement from the Owner or Bonding Company.
- BPC to supply Garrard Group with a list of man hours, list of material and any additional cost for review for payment.

[53] Billys Plumbing Time and Material Subcontract, ROA 525.
[54] Email from Scott Gasque, January 23, 2017, ROA 527.
[55] Email from Shawn Gill, January 23, 2017, ROA 529.
[56] Change Order #2 dated 5-12-17, ROA 346.
[57] Billys Plumbing Time and Material Subcontract dated January 23, 2017, ROA 525.

C. **Depositions of Garrard's Witnesses:**

During this same time, Garrard hindered Carolina Cool's ability to depose individuals named as witnesses by Garrard. Carolina Cool's witnesses had already been deposed and the parties had originally discussed having all depositions conducted the same week. Carolina Cool made many attempts to schedule Garrard's witnesses, but each time a date was scheduled and deposition noticed, Garrard would come up with an excuse as to why they had to be continued.

On February 15, 2019, Carolina Cool filed a Motion to Compel Depositions of Defendants' Witnesses and to Impose Sanctions.[58] A hearing was held on April 1, 2019 before Judge Benjamin H. Culbertson, the same judge who issued the orders currently on appeal.[59] Carolina Cool presented the following facts which were not disputed by Garrard:

- Carolina Cool had been attempting to schedule the depositions of William Bromley, Shawn Gill and Pat Watson since June 2018 and had numerous correspondence documenting its attempts;

- All discovery, including depositions, was supposed to be completed by October 19, 2018 pursuant to the original Consent Scheduling Order filed June 29, 2018;

- Carolina Cool made its witnesses available, but Garrard kept giving excuses as to why their witnesses could not be deposed during the months of October, November, December, or January 2019.

- Finally, on November 20, 2018, Garrard's counsel consented in writing to the depositions being held February 12th, 13th, and 14th at his office in Mount Pleasant. He also advised Carolina Cool's counsel to email the notices of depositions to him instead of serving them on the witnesses;

- Carolina Cool agreed to enter into the Amended Scheduling Order, filed December 11, 2018, in order to accommodate Garrard with the scheduling of its witnesses' depositions in February;

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[58] Motion to Compel Depositions, February 15, 2019. ROA 689.
[59] Hearing Transcript, April 1, 2019. ROA 830.

- On January 29, 2019, Garrard's counsel notified Carolina Cool's counsel that Mr. Bromley was now working in Massachusetts and was not available for deposition. Garrard's counsel also claimed he could not attend depositions on February 13th due to a hearing scheduled in Dorchester County. (Carolina Cool's counsel later learned that hearing was cancelled.) Garrard's counsel also reneged on his prior agreement and required the depositions of Shawn Gill and Pat Watson take place in Atlanta and Bill Bromley's in Massachusetts. Furthermore, the witnesses were no longer available in February and their depositions needed to be pushed back to March or April;

- Because Garrard still had not answered Carolina Cool's supplemental discovery requests served November 2018 and knowing its motion to compel would most likely be granted, Carolina Cool agreed to re-notice the depositions to take place in Atlanta in April so that it would have all the requested documents prior to taking the depositions. The straw that broke the camel's back was thereafter being informed that Garrard's witnesses were no longer available to be deposed in April.[60]

After hearing the undisputed recitation of facts, Judge Culbertson granted Carolina Cool's motion to compel.[61] He ordered the witnesses appear for their depositions on such date, time and at such place chosen by Carolina Cool, provided Carolina Cool pay any fees required by the SCRCP. Additionally, Judge Culbertson granted judgment against Garrard for $3,261.74 for attorney fees and costs incurred by Carolina Cool in bringing the motion. Thereafter, Carolina Cool was finally able to depose the witnesses. Their testimony revealed additional discovery violations by Garrard.

1. **Deposition of William Bromley on April 16, 2019:**

William Bromley, the interior job superintendent for Garrard, testified he had not looked for any relevant emails, nor had he been asked to look.[62] Mr. Bromley was asked if he recalled a particular email provided by Billys Plumbing of which he was a recipient. He replied "[n]o. But it doesn't surprise me any. I mean, that's common

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[60] Hearing Transcript, April 1, 2019, ROA 830, 835-841.

[61] Order filed April 1, 2019, ROA 10. Hearing Transcript ROA 847, line 20 – ROA 848, line 19.

[62] Deposition of William Bromley, ROA 398, lines 16-24.

communication."[63] He agreed the email evidenced that a decision had already been made by Garrard to hire Billys Plumbing prior to terminating Carolina Cool.

Even though the emails were between Garrard and Billys Plumbing and copies of all materials received from Billys Plumbing was provided by Carolina Cool to Garrard, Garrard's counsel interrupted:

Ms. Neill:	I will give you a copy of an email, again from Scott Gasque ...Billy's Plumbing Bates stamp 66.
Mr. Countryman:	You-all didn't produce this or identify this before the deposition. Right?
Ms. Neill:	No. You (sic) actually provided this.[64]
Mr. Countryman:	Did you identify it as a potential deposition exhibit for the deposition as Rule 30(j)(8) requires?
Ms. Neill:	This is not a deposition exhibit right now.
Mr. Countryman:	It's a document that you're showing the witness. I can read you the language of the rule if you'd like.
Ms. Neill:	Well, it's something that you had and it came from Scott to Shawn Gill, but it's something that apparently you-all have not produced in discovery, even though you had it in your records.
Mr. Countryman:	That has nothing to do with the rule, which says deposing counsel shall provide to opposing counsel a copy of all documents showing to the witness during the deposition, either before the deposition begins or contemporaneous with the showing of the document to the witness, which you obviously have not done. You've identified the labels. That's fine –
Ms. Neill:	We provided this to you before, though.
Mr. Countryman:	That's not what the rule says, does it? I'm just asking if you specifically identified that document as something that you would use in the deposition before. I don't think you have.[65]

This exchange reveals no denial by Garrard's counsel of having the emails or being aware of the emails. There was no denial that Garrard failed to produce the emails to

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[63] Deposition of William Bromley, ROA 405, lines 5-14.
[64] The document was actually produced by Billys Plumbing in response to the subpoena.
[65] Deposition of William Bromley, ROA 400, line 9 – ROA 401, line 21.

Carolina Cool. Remarkably, even after the deposition, Garrard failed to produce the communications it had with Billys Plumbing.

Mr. Bromley also testified his permanent residence was in Waleska, Georgia, and he had no intention of living in Massachusetts.[66] He was only temporarily living in Massachusetts because Garrard had sent him there to work on a project located in Cape Cod. Prior to his deposition, Garrard's counsel requested Carolina Cool reimburse Mr. Bromley mileage and witness fess of $1,081.76 for roundtrip travel from Massachusetts instead of calculating mileage from his residence in Georgia.[67]

2. **Deposition of Shawn Gill on April 17, 2019:**

Mr. Gill, who was Garrard's Project Manager for the entire Dave & Buster's construction, also testified about the existence of emails between himself and Billys Plumbing that Garrard failed to produce:

Ms. Neill:	And did you tell Billy's Plumbing that?
Mr. Gill:	I did. And I believe I also told him in an e-mail to hold tight; you know, we don't know what direction this is going to go.
Ms. Neill:	And from this period of time, January 25, 2017, where are all your e-mails stored?
Mr. Gill:	In Office 365, our e-mail server, I guess you would call it.
Ms. Neill:	And have you looked for e-mails you may have had with anybody at Billy's Plumbing?
Mr. Gill:	Yes.
Ms. Neill:	And have you found e-mails?
Mr. Gill:	Yeah. So we did a -- it was requested through the second discovery request, Rebekah and I went into my e-mails and did a search for anything that was Scott Gasque or Billy's Plumbing. And anything that came up on that, Rebekah printed a PDF and provided to our attorney.
Ms. Neill:	And you've provided those documents?
Mr. Gill:	Yes.

[66] Deposition of William Bromley, ROA 406, line 8- ROA 407, line 7.
[67] Correspondence dated April 12, 2019. ROA 531.

Mr. Countryman: I don't recall there being any e-mails in that production in April.

Ms. Neill: I have not received any e-mails regarding Billy's Plumbing except for what Billy's Plumbing just gave us in response to the Subpoena.

Mr. Countryman: Let me check on that -- I didn't receive something and failed to give it to you in that regard. Let me see if there's something that I overlooked.

Mr. Gill: Me and Rebekah did that, and I assume she got that to you. I can check with Rebekah, but we did do a search for that.

By Ms. Neill: So there are more e-mails possibly out there from you to Billy's Plumbing?

Mr. Gill: In addition to what?

Ms. Neill: The zero that I have.

Mr. Gill: There were some, and I served all those up. We printed them to PDF, and I'll circle back with Rebekah and make sure those are part of - - but there were e-mails between me and Billy's Plumbing.[68]

Mr. Gill also testified regarding Billys Plumbing's Times and Material Subcontract dated January 23, 2017 which Garrard failed to produce:

Ms. Neill: Now, after Carolina Cool left the project, according to the job site reports, it looks like Billy's Plumbing was there the following Monday; is that correct?

Mr. Gill: Correct.

Ms. Neill: And I'll show you what is Bates stamped - let's see. What is it? Defendant's 17- -- I'm sorry -- Billy's Plumbing 1787. And it looks like a document from Billy's Plumbing, and it's dated January 23rd. Do you remember receiving that?

Mr. Gill: Yes.

Ms. Neill: And is that your signature on the document?

Mr. Gill: It is.

Ms. Neill: And would this be a document that you would keep a record of in your file?

Mr. Gill: So this was basically based on the -- the plumbing lines that were roughed in incorrectly and the ones that weren't finished. There was no way to put a hard number on that to complete it. So Billy's Plumbing gave me rates to -- hourly rates to repair that and replace,

68 Deposition of Shawn Gill, ROA 551, line 20 – ROA 553, line 13.

because there was no way to put a hard number on it. In addition, Billy's Plumbing did not want to be -- the stuff that wasn't going to be touched that was installed, they did not want to be responsible for any issues down the road.

Ms. Neill: That Carolina Cool had been involved with?

Mr. Gill: Correct.

Ms. Neill: And this looks like a contract to me, correct?

Mr. Gill: Correct. It's an hourly rate agreement is what it is.

Ms. Neill: An hourly rate agreement. And you maintained that in your file for the Myrtle Beach Dave & Buster's project?

Mr. Gill: Yes. It would have been -- yes.

Ms. Neill: And are there any other documents that you would have had with Billy's Plumbing, any other agreements?

Mr. Gill: We had a subcontract with them at a later date to do the -- everything from the slab up. This was specifically for the underslab. And then we had a formal subcontract similar to what our subcontract was with Carolina Cool for all the work above the slab.

Ms. Neill: And during the course of this lawsuit, did you look for your agreements you had with Billy's Plumbing?

Mr. Gill: Yeah. When we were asked for discovery, we were asked for their subcontract, their checks, their pay applications and all that.

Ms. Neill: And would this document be regarding their subcontracts?

Mr. Gill: Would be what?

Ms. Neill: A subcontract you would have with Billy's Plumbing?

Mr. Gill: Yes. This should be on -- in our files, yes.

Ms. Neill: Because Billy's Plumbing, they didn't contract directly with the owner, right?

Mr. Gill: No.

Ms. Neill: They contracted with Garrard?

Mr. Gill: That's correct.

Ms. Neill: And do you have any idea why Garrard wouldn't have produced this document in discovery?

Mr. Gill: I don't know why we wouldn't have. I mean, if it wasn't provided -- if it wasn't provided, it wasn't intentional.[69]

[69] Deposition of Shawn Gill, ROA 554, line 19 -ROA 557, line 13.

Mr. Gill was also asked about an invoice dated March 31, 2017 received from by Billys Plumbing which had not been produced by Garrard. The invoice is entitled "Dave & Buster's Under Slab T&M" and references "UG Contract dated January 23, 2017."

Ms. Neill: You mentioned a few moments ago an invoice, and I just want to see if this is the invoice you were talking about. It's dated March 31st.

Mr. Gill: Yes. This would be the invoice related to those hourly rates.

Ms. Neill: Again, would an invoice from a subcontractor be something that you would regularly keep in your project file?

Mr. Gill: This would be with the accounting file, yes. With -- any invoices paid to Billy's Plumbing, this would be with it, yes.

Ms. Neill: And do you have any information as to why it wasn't produced by Garrard?

Mr. Gill: I don't know why it wouldn't have been. It wouldn't have been intentional.

Ms. Neill: Let's mark that as Plaintiff's 26.

Mr. Gill: I believe we provided all the checks that we paid Billy's Plumbing, so there should be a check in the amount of whatever this invoice was.

Mr. Countryman: I think that's right. And for the record, I produced a ton of material. If there are things that arise out of this deposition that you don't have and you think you should, I'll happily get you that material. But there was nothing withheld intentionally. To the extent that you don't have something that you think you should have, I'm happy to address that.

By Ms. Neill: That's the problem in discovery. One side doesn't know what the other one has. And then you get bits and pieces, and we got that from Billys.[70]

Shawn Gill testified regarding the existence of additional emails between Garrard and its subcontractors, as well as Broadway and Dave & Buster's:

Mr. Gill: You know, there was always e-mails from him to subcontractors, subcontractors to him, as well as myself between me and my superintendent, me and Bill or Pat on that project.

[70] Deposition of Shawn Gill, ROA 558, line 21- ROA 560, line 9.

Ms. Neill:	And have you gathered those e-mails related to this project?
Mr. Gill:	To the best of my knowledge, I've submitted -- we did a -- when you get that many e-mails, you did a search for that whole thing and turned them over to Rebekah, and then she submitted them with the -- to Andrew with the discovery requests.
Ms. Neill:	And when would that have taken place?
Mr. Gill:	Um, there were -- I believe there were some e-mails on the first discovery request and then we figured out how to go in and consolidate them and print them to PDF, and so there were more that were sent with the second discovery request.
Ms. Neill:	Okay. And approximately when was that second discovery request?
Mr. Gill:	Two months ago.
Ms. Neill:	Did you -- how did you communicate with Seth McCoy with Broadway?
Mr. Gill:	Via phone and e-mail.
Ms. Neill:	And how did you communicate with Dave & 8 Buster's folks?
Mr. Gill:	Both phone and e-mail and through Expesite when we submit RFIs or change requests or submittals. I guess that would be considered communication as well.
Mr. Countryman:	Mary Anna, I didn't withhold anything from that. I'm looking at what I produced to you all recently. I don't see e-mails, other than the ones that were between -- it looks like stuff that was between Garrard and Burroughs & Chapin. But if there's something we missed, that's fine. But I was not withholding anything.[71]

Mr. Gill's testimony also revealed documents had not been produced in the manner they were routinely maintained. For example, in looking at construction schedules, it was difficult to ascertain to which calendar week the schedule corresponded because they were not dated. In order for Mr. Gill to determine the dates of schedules he himself created, Mr. Gill looked at Mr. Countryman's laptop during the deposition to view the files in the format

[71] Deposition of Shawn Gill, ROA 538, line 8-ROA 539, line 20.

in which they were provided to Mr. Countryman.[72] Mr. Gill explained that each report had been created and saved in separate files and each file name would have included the date it was created. Mr. Gill testified:

> I know all this gets - - what it looks like to me is it gets lumped in as a PDF. And if they were the individual files, like we have them saved, it would - - you know, you would be able to pull it up and look at that percentage and say, okay, this is that schedule by the file name.[73]

Mr. Gill's testimony revealed other documentation which had not been produced. For example, Garrard produced weekly construction reports regarding the interior portion of the project, but the week three report, one of only five weeks Carolina Cool was on the jobsite, was missing. After Mr. Gill was asked why week three had not been produced, Mr. Countryman found it in his files on his laptop and stated "I apologize for that oversight. I don't know why that didn't come through the first time."[74]

Mr. Gill was also asked if he created schedules for the time period after Carolina Cool was terminated. This information was relevant because in its Counterclaim and Answers to Interrogatories, Garrard claimed Carolina Cool caused a three-week delay for the project, resulting in increased overhead costs as damages. Mr. Gill testified there were additional schedules he created after January 19, 2017 which he had not been asked to supply for discovery.[75]

Mr. Gill also testified regarding a timeline he drafted in January 2017 that had not been produced.[76] Later during the deposition when the missing timeline was once again

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[72] Deposition of Shawn Gill, ROA 546, line 3 – ROA 547, line 9.
[73] Deposition of Shawn Gill, ROA 545, lines 18-23.
[74] Deposition of Shawn Gill, ROA 540, line 17- ROA 541, line 5; ROA 543, line 25- ROA 544, line 7.
[75] Deposition of Shawn Gill, ROA 548, line 20 – ROA 549, line 17.
[76] Deposition of Shawn Gill, ROA 535, line 20 – ROA 537, line 15.

referenced, Garrard's attorney offered the following while looking at his own laptop computer:

Mr. Countryman:	I think I have that.
Ms. Neill:	Mr. Countryman, you believe you have what Mr. Gill is talking about?
Mr. Countryman:	Yeah. I'm looking at it to see if it's privileged. I'm looking at a discovery folder that I have not had access to before today. I produced stuff that I'd received. So I didn't remember whether I had gotten this and produced it before. And I don't know as we sit here right now if I have. But would you let me talk with him for a second privately to see if there's any issue with privilege or work product? If there's not, then I can produce it to you.[77]

Mr. Countryman's statement, if accurate, reveals Garrard's counsel had just received on April 17, 2019 a discovery folder which contained relevant documents not produced in discovery.

Mr. Gill's deposition testimony revealed serious violations of the Rules of Civil Procedure by Garrard. Mr. Gill personally executed Billys Plumbing's Time and Materials Subcontract contract and personally received the invoice from Billys Plumbing. The documents would have been maintained in the same file in which other documents had been pulled and produced to Carolina Cool. This indicates someone deliberately determined not to produce those documents. Had not Carolina Cool subpoenaed Billys Plumbing and then aggressively followed up with motions to compel and a motion for sanctions, key evidence in Garrard's possession would have never come to light.

[77] Deposition of Shawn Gill, ROA 550, lines 10-23.

3. **Deposition of Pat Watson on May 8, 2019:**

Pat Watson, the project manager for the shell portion of the project, testified regarding emails that should exist and notes he personally drafted. He testified he had not been asked to find documents relevant to the project:

Ms. Neill: How did you stay in contact with Shawn Gill regarding this Myrtle Beach Dave and Buster's site?
Mr. Watson: We had several phone calls every day and e-mails back and forth a lot.
Ms. Neill: Would there be notes on the project from you after February 20th?
Mr. Watson: I would think so, but at some point in time I do quit taking them, when I see that I don't need to take them no more. I ain't gonna have no issues, I'm getting close to being done, then I'll quit taking them.
Ms. Neill: In February of 2017, you weren't close to being done though were you?
Mr. Watson: I should have still been making notes.
Ms. Neill: Have you been asked to find any notebooks or notes for this lawsuit?
Mr. Watson: No, ma'am. [78]

4. **Deposition of John Mulleady on May 15, 2019:**

On May 15, 2019, Carolina Cool conducted the 30(b)(6) deposition of Dave & Buster's. John Mulleady testified regarding payments to Garrard for the interior portion of the project:

Ms. Neill: And did Dave & Buster's make the payments as requested from Garrard Construction?
Mr. Mulleady: Yes, I think we did. Doesn't show that we have anything withholding.
Ms. Neill: And how would the payments have been made?
Mr. Mulleady: Either check or wire. I don't know. They do it both -- accounting does it both ways.
Ms. Neill: And would the accounting department retain documentation of making those payments?
Mr. Mulleady: They should, yeah.

[78] Deposition of Patrick Watson, ROA 563, lines 20-24.

Ms. Neill: Would those documents be something that Dave & Buster's would retain in their file for this project?
Mr. Mulleady: They should.
Ms. Neill: Do you know why those documents weren't produced to us?
Mr. Mulleady: No, I don't.
Ms. Neill: You think that is something that could be provided to us?
Mr. Mulleady: I guess.
Ms. Neill: Yes?
Mr. Mulleady: Yes.[79]

Additionally, Mr. Mulleady affirmed that because Garrard and Dave & Buster's entered into a cost-plus contract, monies paid to Garrard actually increased from $3,628,786.00 to $3,769,179.24 due to Garrard's increased costs.[80]

D. <u>Carolina Cool's Letter to Garrard dated August 22, 2019</u>:

Several months passed after the depositions without Garrard supplementing its discovery responses to produce the missing documentation. In a letter dated August 22, 2019,[81] counsel for Carolina Cool detailed all occurrences in which the witnesses testified regarding the existence of evidence not yet been produced:

> In reviewing the deposition transcripts of the other witnesses for Defendant Garrard, the witnesses confirmed the existence of other relevant documents that I have not found in my review of documents produced thus far during discovery. Specifically, the witnesses confirmed the existence of the following:
>
> - Documentation of payments from Dave & Buster's to Garrard Construction referenced by Mr. Mulleady on pages 68 & 69 of his deposition;
> - Change orders for the interior contract referenced by Mr. Mulleady on pages 71 & 73 of his deposition;
> - Work Orders with supporting documentation referenced by Mr. Mulleady on pages 75, 101 & 101 of his deposition;
> - Emails referenced by Mr. Mulleady on pages 87, 88 & 92 of his deposition;

[79] Deposition of John Mulleady, ROA 566, line 17- ROA 567, line 14.
[80] Deposition of John Mulleady, ROA 566, lines 6-16; ROA 567, lines 15-25.
[81] Correspondence dated August 22, 2019. ROA 569-570.

- Emails between Pat Watson and Shawn Gill referenced by Pat Watson on page 14 of his deposition;
- Pat Watson's complete notebook referenced by Pat Watson on pages 56-58 of his deposition;
- Pat Watson's emails with MH Brown referenced by Pat Watson on page 76 of his deposition;
- Pat Watson's progress reports for February 21, 2017 – March 24, 2017 referenced by Mr. Watson on page 100 of his deposition;
- Complete copy of the document marked as Exhibit 2 to Mr. Bromley's deposition discussed on page 155 of the deposition;
- Emails that Mr. Bromley may have as discussed on page 165 of his deposition;
- The meeting agendas Mr. Bromley created as discussed on page 189 of his deposition;
- NSO calendar discussed by Mr. Gill in his deposition at page 118;
- The four schedules (Exhibit 14 to Mr. Gill's deposition) that you attempted to email to Mary Anna on April 17, 2019 which was not received as discussed on page 137 of Mr. Gill's deposition;
- All schedule updates for the project as discussed by Mr. Gill on pages 138-139;
- All documentation that Mr. Gill referenced in his deposition on pages 183 and 184 regarding Billys Plumbing – he testified there were documents printed and provided.

In as much as these documents have been previously requested in Plaintiff's Request for Production of Documents, please provide these documents no later than **September 6, 2019**. If you believe you already provided them, please let me know when those documents were produced and how they were Bates stamped.

After Garrard failed to respond to the August 22, 2019 letter, Carolina Cool's counsel served a subsequent letter dated September 16, 2019 requesting the documents be produced within ten days to avoid the necessity of filing a motion to compel.[82]

E. <u>Garrard's Document Dump of September 25, 2019</u>:

On September 25, 2019, Garrard produced a disc containing over four thousand documents. The letter from Garrard's counsel enclosing the disc states:

[82] Correspondence dated September 16, 2019. ROA 572.

> I enclose a disc with material labeled "Garrard 9.25.19 prod. 1-4,401." This is material from Garrard responsive to your August 22, 2019, letter and is a supplement to my clients' production in discovery.[83]

In reviewing the documents on the enclosed disc, Carolina Cool discovered 4,201 pages on the disc, not 4,401.[84] The documents on the disc did not appear to be in any particular order. The chart represented on page eleven of Appellant's Brief was not included, and even if it had, the chart itself does not provide much information and certainly is not responsive to the specific deficiencies set forth in Carolina Cool's letter dated August 22, 2019. To add to the confusion and burden upon Carolina Cool, the disc contained copies of documents previously produced but with different Bates stamp. For example, hundreds of pages of duplicate Daily Progress Reports were once again produced but with different Bates numbering (Bates stamped Garrard 9.25.19 prod. 002947---3295). While the majority of these reports had previously been produced, buried within were some newly produced reports found at Bates stamped Garrard 9.25.19 prod. 002967---002974 and 003094-003169. Counsel for Carolina Cool was required to spend many unnecessary hours digging through the thousands of documents in order to determine which were duplicates and which contained new information.[85] The fact that the documents were not in chronological order added to the burden.

Shockingly, in the 4,201 documents produced, Garrard failed to produce all the specifically requested emails and subcontract documents Mr. Gill testified existed between Garrard and Billys Plumbing. Carolina Cool could only find three of them: an email from Scott Gasque dated January 18, 2017, Bates stamped Garrard 9.25.19 prod. 004119; an

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[83] Correspondence dated September 25, 2019. ROA 574.
[84] Exhibit 34 to Proposed Order, January 21, 2020. Publix Index, ROA 608-610.
[85] Affidavit of Mark Neill, ROA 604.

email from Shawn Gill dated January 18, 2017, Bates stamped Garrard 9.25.19 prod. 004122; and an invoice from Billys Plumbing dated March 31, 2017, Bates stamped Garrard 9.25.19 prod. 004009. Garrard continued its failure to produce the January 23, 2017 Time and Materials subcontract with Billys Plumbing.

Garrard did however produce a never before seen email dated April 17, 2017, Bates stamped Garrard 9.25.19 prod. 004008, from Shawn Gill to Bill Bromley. The subject of the email was "Billy's Plumbing Underslab Rough." Mr. Gill inquired:

> Can you get with Aprille and have her go back through the daily reports and put a list together of the documented manpower qty that Billy's Plumbing had on site from the day they started the underslab takeover to the day they completed it along with how many hours they worked each day so we can see if the hours match up with what they have submitted. This is part of the Carolina Cool Claim to their bonding agent and all of the attorneys so it will be in front of God and everybody so I want to make sure there is no significant gaps.[86]

This email clearly shows Garrard knew the information regarding Billys Plumbing's replacement of Carolina Cool was relevant and documents pertaining to such would be reviewed. The fact that Garrard's Project Manager recognized the significance of such documentation discredits the feeble excuse that the failure to produce the documentation was unintentional. It is simply not plausible Garrard "unintentionally" failed to produce documents such as the Time and Materials Subcontract with Billys Plumbing, the invoice related to that contract, or the emails discussing that contract.

F. Discovery Responses of Billys Plumbing dated October 18, 2019:

After Billys Plumbing became a party, it was served discovery requests. After not receiving any response, Carolina Cool was forced once again to file a motion to compel on

[86]Email dated April 12, 2017, ROA 575.

September 9, 2019,[87] and a hearing was scheduled for October 15, 2019. Prior to the hearing, the parties entered into a consent order filed October 16, 2019.[88] On October 18, 2019, Billys Plumbing provided a very different answer regarding its subcontracts than previously disclosed by Garrard:

> 8. Identify each and every contract you entered into regarding the Myrtle Beach Dave & Buster's project setting forth the following information:
>   a. The parties to the contract;
>   b. The date of the contract;
>   c. The work you were to perform;
>   d. The dates you performed the work;
>   e. The compensation you received for performing the work.
>
> ANSWER:
>
> **1.** Dave & Buster's Underground Contract – **Contract entered into between Billy's Plumbing Company and Garrard on January 23, 2017** to furnish labor and materials to correct and complete the underground plumbing portion of the Dave & Buster's project. The work was performed on a time and materials basis and the dates of said work are contained in the time cards previously provided by Defendant and described as Plaintiff's bates stamp documents "Billy's Plumbing 75-80." Defendant **Billy's Plumbing was compensated in an amount of $23,237.22.**
>
> **2.** Dave & Buster's Interior Subcontract – Contract entered into between Billy's Plumbing and Garrard Construction Company on February 1, 2017. Defendant Billy's Plumbing Company would direct Plaintiff's attention to the scope of work and scope of work breakdown included in the contract as well as its attachments as referenced in Defendant Garrard Construction Company bate stamp documents "Countryman 10-8-18 38-68." Dates of said work are contained in the time cards previously provided by Defendant to Plaintiff's Counsel on July 9, 2019. **Defendant Billy's Plumbing was compensated in the amount of $356,171.24.**
>
> 3. Dave & Buster's Shell Subcontract – Contract entered into between Billy's Plumbing and Garrard Construction on March 16, 2017. Defendant Billy's Plumbing Company would direct Plaintiff's attention to the scope of work and scope of work breakdown included in the contract as well as its attachments as referenced in Defendant Garrard Construction Company bate stamp documents "Countryman 10-8-18 69-83. **Defendant Billy's Plumbing Company has no**

[87] Motion to Compel, September 9, 2019. ROA 738.
[88] Consent Order filed October 16, 2019. ROA 23.

> **record of ever being compensated for work performed under this contract.** Said work would have neem performed during the dates and times provided in the timecards previously provided by Defendant to Plaintiff's Counsel on July 9, 2019.[89] (Emphasis added).

Billys Plumbing identified the January 23, 2017 Time and Materials Subcontract. In contrast, Garrard concealed the contract and mischaracterized the monies paid Billys Plumbing as resulting from the change order dated May 12, 2017. Carolina Cool was also astonished to learn no compensation was paid by Garrard pursuant to Billys Plumbing's Shell Subcontract, the obvious conclusion being Garrard inflated its alleged damages.

G. Carolina Cool's Motion for Sanctions:

It took several days to review the materials in the 4,201 page document dump.[90] After reviewing the documents and the newly produced information from Billys Plumbing, Carolina Cool filed its Motion for Sanctions on November 4, 2019.[91]

H. Garrard's Withdrawal of its Counterclaim for Lost Profits:

In its Answer and Counterclaim filed July 6, 2017,[92] Garrard asserted causes of action for breach of contract, contractual indemnity, negligence, breach of warranty, breach of contract with fraudulent act, and failure to investigate pursuant to S.C. Code § 27-1-15. In paragraph 48, Garrard alleged it incurred actual and consequential damages, including those related to retaining subcontractors to correct and complete Carolina Cool's work, as well as lost profits. In paragraph 58, Garrard alleged it incurred damages as a result of acceleration and delay costs, attorney fees and additional overhead. In paragraph 75, Garrard alleged it was also entitled to punitive damages. In order to defend against these

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[89] Billys Plumbing's Responses, October 18, 2019. ROA 577.
[90] Affidavit of Mark Neill, ROA 604.
[91] Plaintiff's Motion for Sanctions, November 4, 2019. ROA 750.
[92] Answer, Counterclaim, Third-Party Complaint, filed July 6, 2017. ROA 643.

allegations, Carolina Cool continuously requested information from Garrard regarding what payments were made to Billys Plumbing, what work Billys Plumbing performed, Garrard's requests for payment to Broadway and Dave & Buster's, and monies received from those requests. After not receiving satisfactory responses, by way of Supplemental Requests for Production, Carolina Cool specifically requested financial statements, profit and lost statements, expense statements, and income statements.[93] Carolina Cool also noticed the Rule 30(b)(6) deposition of Garrard to inquire into these matters.

On November 18, 2019, more than two years after filing its Counterclaim, Garrard served Supplemental/Amended Answers to Interrogatories stating, "Garrard is not making a claim for lost profits and withdraws such a claim to the extent prior pleadings refer to one."[94] In a letter dated November 29, 2019, Garrard's counsel further stated:

> Garrard is not claiming lost profits as a damage in this case. Therefore, topics regarding profits and the like have no bearing on the claims between the parties and are unlikely to lead to the discovery of admissible evidence. In fact, these topics are not necessary for this litigation at all.[95]

On December 4, 2019, Garrard filed a motion for a protective order to prohibit its 30(b)(6) witness from testifying regarding financial topics including the project's profit or loss, Garrard's overheard, projected profits, profit margins, income and expenses, or payments received from Broadway at the Beach and Dave & Buster's.[96] On page four of the motion, it states Garrard is not claiming lost profits as a damage on it counterclaim and " [n]one of Garrard's claimed damages relates in any way to its profits on the project or the other financial topics at issue."

[93] Supplemental Requests dated November 4, 2019. ROA 586.
[94] Supplemental/Amended Answers dated November 18, 2019. ROA 596.
[95] Letter from Andrew Countryman dated November 29, 2019. ROA 602.
[96] Motion for Protective Order, December 4, 2019. ROA 754.

It is clear Garrard only withdrew its claim for lost profits in anticipation of being ordered to produce documentation showing it had no such damages. It is also clear Garrard still has information relevant to Carolina Cool's complaint and its defense of Garrard's counterclaim. As discussed above, Garrard had a cost-plus contract with Dave & Buster's for the interior work.[97] According to Mr. Mulleady and the payment records, the contractual amount paid by Dave & Buster's to Garrard actually increased from $3,628,786.00 to $3,769,179.24.[98] Clearly, the financial information sought by Carolina Cool is relevant and Garrard's refusal to provide the information is another indicator of its continued obstruction of the discovery process.

I. <u>Hearing Held December 18, 2019:</u>

The hearing before Judge Culbertson lasted more than an hour and resulted in a forty-five page transcript.[99] During the hearing, counsel for Carolina Cool presented, by reading into the record, the written discovery and depositions discussed above. Documentation of such was also handed to Judge Culbertson for his review. The written discovery and deposition testimony were submitted as exhibits to the proposed order, along with the affidavit for attorney fees and costs.[100] The circuit court considered the record, the exhibits, and arguments of counsel prior to filing its order sanctioning Garrard. During the hearing, counsel for Garrard argued:

> But the key issues, Your Honor, are the material he's discussing and the material that he discussed with the witnesses, he had for their depositions regardless of where it came from. He had the material from Billy's. He was able to question the witnesses about that stuff. And this happens in

[97] Garrard-Dave & Buster's Cost-Plus Contract, October 25, 2016. ROA 133.
[98] Deposition of John Mulleady, ROA 566, lines 6-16; ROA 567, lines 15-25.
[99] December 18, 2019 Transcript, ROA 850.
[100] The proposed order was filed January 21, 2020. ROA 59.

> almost every case. Material comes to light in depositions, you get that after the depositions, if you ask for it.[101]

Counsel for Carolina Cool responded to Garrard's "just ask for it" argument as follows:

> The problem is, he just says, "Well, just let me know what I haven't given you." That's the problem. I don't know what they haven't given me. All I know is that I just keep finding out that there's all kinds of stuff that they haven't given me. We're on our third scheduling order in this case. Discovery expires again Friday, you know. And this is why. Because we can just never get the stuff. And it's always the same response, "Tell me what I'm not giving you." It's not my job to tell you what I'm (sic) not giving you, it's your job to give me what you have. And, clearly, they haven't done that by their own witness's testimony.[102]

In opposition to the motion for sanctions, Garrard relied upon the affidavit of Rebekah Rudd, who was not even a named witness.[103] Garrard twice supplemented its answers to interrogatories but never named her as a witness. There is no evidence Ms. Rudd even visited the jobsite. According to the affidavit, Ms. Rudd, instead of the deposed witnesses who testified they had first-hand knowledge, attempted to gather the requested documents. The affidavit offered no explanation as to why the January 23, 2017 Time and Materials Subcontract with Billys Plumbing, the damaging emails between Garrard and Billys Plumbing, or other missing documents had not been produced.

The circuit court's formal order granting Carolina Cool's motion for sanctions was filed January 27, 2020.[104] On February 6, 2020, Garrard filed it motion to reconsider,[105] which was denied by order filed February 10, 2020.[106]

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[101]December 18, 2019 Transcript, ROA 889, lines 1-8.
[102] December 18, 2019 Transcript, ROA 893, line 16- ROA 894, line 2.
[103] Affidavit of Rebekah Rudd filed December 9, 2019. ROA 790.
[104] Order Granting Motion for Sanctions, January 27, 2020. ROA 26.
[105] Motion to Reconsider, February 6, 2020. ROA 783.
[106]Order filed February 10, 2020. ROA 56.

STANDARD OF REVIEW

Our Supreme Court set out the appropriate standard of review in Davis v. Parkview Apts., 409 S.C. 266, 281-282, 762 S.E. 2d 535, 543 (2014):

> The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court. Therefore, an appellate court will not interfere with a trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters unless the court abuses its discretion. 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. The appealing party bears the burden of demonstrating that the lower court abused its discretion. (internal citations omitted).

In the present case, Garrard has failed to meet its burden of demonstrating that the circuit court abused its discretion. The lower court's order is based upon abundant, reasonable factual support. Accordingly, the lower court's order should be affirmed.

ARGUMENT

I. The circuit court properly sanctioned Garrard for violating discovery orders:

Trial courts have authority to sanction a party for violating discovery orders. S.C.R.C.P. Rule 37(b)(2) provides:

> If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among other the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleading or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and C of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

In the present case, the parties entered into three separate scheduling orders. The facts show Garrard entered into the scheduling orders knowing it had not produced requested relevant information and documentation. Garrard continued to violate the scheduling orders by not producing evidence and providing false and misleading information. As such, the circuit court was justified in sanctioning Garrard for intentionally violating its orders. Barnette v. Adams Bros. Logging, Inc., 355 S.C. 588, 586 S.E.2d 572 (2003). In Barnette, the Supreme Court held:

Pursuant to Rule 37(b)(2)(C), SCRCP, when a party fails to obey an order to provide or permit discovery, the court may "make such orders in regard to the failure as are just," including an order dismissing the action or proceeding, or any part thereof. *Accord* In Re Anonymous Member of South Carolina Bar, 346 S.C. 177, 194, 552 S.E.2d 10, 18 (2001)(noting that "judges must use their authority to make sure that abusive deposition tactics and other forms of discovery abuse do not succeed in their ultimate

> goal; achieving success through abuse of the discovery rules rather than by the rule of law."). Barnette, at 593, 575.

In the present case, the scheduling orders were filed in order to facilitate discovery and to ensure the parties were prepared for trial. As such, they constitute discovery orders which were violated by Garrard. In Kershaw County Bd. of Educ. v. United States Gypsum Co., 302 S.C. 390, 396 S.E2d 369 (1990), the lower court ordered Kershaw County Board of Education to notify defendant asbestos manufacturers prior to removing asbestos. The school board violated the order and United States Gypsum Co. moved to dismiss the complaint. In reviewing the trial court's decision not to dismiss the school board's claim, the Supreme Court held Rule 37(b)(2) was applicable:

> We believe the trial court's decision was proper under the facts of this case. Judge Smith's order was drawn to facilitate discovery in these asbestos cases. Although the order itself contains no provision regarding sanctions, as a discovery order, it is subject to those measures contained in SCRCP Rule 37. The relief sought by Gypsum is contained in Rule 37(b)(2)(C), which provides for failure to comply with a discovery order the sanction of "striking out pleadings or parts thereof...or dismissing the action or proceeding or any part thereof...."
>
> We conclude that the trial judge in this case exercised appropriate discretion in denying Gypsum's motion to dismiss the claim pertaining to Camden High School. Such a sanction would have been too severe under the facts of this case. Gypsum has not demonstrated on appeal that the ruling was unreasonable, that it was unduly prejudiced thereby, or that a sanction of dismissal would serve to protect the rules of discovery. We believe this is particularly true in light of the fact that there was no evidence of any intentional misconduct on the part of Kershaw or its counsel.

This Court has also recognized that the Rules of Civil Procedure, specifically Rule 16(a)(5) and Rule 26(f), allow trial courts to issue scheduling orders for discovery. Arthur v. Sexton Dental Clinic, 368 S.C. 326, 628 S.E.2d 894 (Ct. App. 2006). In Arthur, the appellants asserted the lower court erred in failing to set aside the scheduling order and

declining to extend the time for discovery. This Court referenced the trial court's orders as "rulings on discovery." Id., at 335, 899. This Court determined the trial court did not abuse its discretion in excluding the appellants' witnesses who were named after the expiration of the deadline imposed by the scheduling order, reasoning, "[g]iven Appellants failure to strictly comply with the scheduling order, the trial judge had the discretionary authority to impose the appropriate sanction if any was warrant. Thus, the question becomes where the judge abused his discretion." Id., at 338, 900.

The Supreme Court's holding in Kershaw and this Court's holding in Arthur shows an order does not have to be entitled "Order Compelling Discovery," or specifically require a party to produce a particular document in order for it to qualify as an enforceable discovery order. A trial court's order scheduling the timing and method of discovery qualifies as a discovery order. The trial court has authority to sanction a party for violating a discovery order.

II. The circuit court properly reviewed the entire record of the case and sanctioned Garrard for its pattern of obstructing the discovery process:

Trial courts have the authority to sanction a party for violating the South Carolina Rules of Civil Procedure. S.C.R.C.P. Rule 37(d) provides:

> If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to the request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and C of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless

> the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

In Downey v. Dixon, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987)(footnote 1), this Court recognized Rule 37(d) provides for sanctions against a party who fails to answer interrogatories and sanctions may be imposed even without obtaining an order compelling discovery. In the present case, there is ample evidence showing Garrard failed to properly answer and respond to Carolina Cool's Interrogatories and Requests for Production – even providing false and misleading answers.

"In deciding what sanction to impose for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice." Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997). In Samples, Mitchell failed to disclose the existence of a videotape relevant to Samples' claim for damages. Mitchell possessed the videotape for over two years but only disclosed its existence a few days before trial. This Court discussed the purpose of discovery rules:

> The entire thrust of the discovery rules involves full and fair disclosure, "to prevent a trial from becoming a guessing game or one of surprise for either party." State Highway Dep't v. Booker, 260 S.C. 245, 252, 195 S.E.2d 615, 619 (1973) (*quoting* Hodge v. Myers, 255 S.C. 542, 545, 180 S.E.2d 203, 205 (1971)). Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed. Downey v. Dixon, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987).

This Court in Samples determined Mitchell's failure to disclose the existence of the videotape resulted in his providing an inaccurate response to Samples' interrogatories. Because Mitchell's discovery responses were not accurate, sanctions were warranted, reasoning "[f]ew litigants would reveal the existence of video surveillance evidence if the

alternative were simply having the testimony of the investigator who filed the video limited at trial." Samples, at 114, 218. The Court referenced Rule 26(g), SCRCP which provides the signature of the attorney or party constitutes a certification in accordance with Rule 11. The Court further discussed Rule 11 which provides:

> If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction. Samples, at 111, 216 (footnote 3).

Likewise, in the present case, Garrard's inaccurate discovery responses violated Rule 11 and the circuit court justifiably sanctioned Garrard.

The violations by Garrard exemplified a course of conduct warranting a severe sanction. It was proper for the Circuit Court to consider the entire record which revealed repeated discovery violations. In Hundley v. Rite Aid of South Carolina, Inc., 339 S.C. 285, 529 S.E.2d 45 (Ct. App. 2000), this Court determined Rite Aid's continuous obstruction of the discovery process impugned its credibility. Rite Aid argued that by denying its request for a continuance, the trial court improperly imposed sanctions for unrelated discovery violations. This Court disagreed and determined:

> It would not be proper for a court to deny a continuance as a sanction for unrelated discovery abuse. Griffin Grading and Clearing, Inc. v. Tire Serv. Equip. Mfg.Co., Inc., 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999)(sanction should be aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits of a case). Nevertheless, in ruling upon a motion for continuance, the court must determine the merits of the moving party's argument, which entails an evaluation of credibility. Certainly a documented history within the case of discovery delay and abuse by a party may be properly considered when evaluating the credibility of that party's claim of surprise and prejudice.

The underlying facts in Hundley are based upon the tragic brain damage suffered by a young girl after ingesting the wrong medicine dispensed by a Rite Aid pharmacist. In

affirming the lower court, this Court included in its opinion an excerpt of the trial court's order detailing the numerous discovery abuses by Rite aid:

> The above litany of the conduct of Defendant throughout this litigation reveals a clear pattern of abusive and obstructionist behavior. It is obvious to this Court that a great deal of Plaintiffs' discovery and preparation in this case has been aimed toward establishing the fact of the mis-fill and the manner in which it occurred. Plaintiff early on in the litigation requested that Defendant admit that the mis-fill had occurred, and pursuant to Rule 36 of the South Carolina Rules of Civil Procedure Defendant declined to make that admission of fact. Now, over a period of more than a year since this case was filed, documents and materials which have been exclusively in the possession, custody and control of Defendant are surfacing which appear to make it highly likely that the claimed mis-fill did occur and give some indication as to how it occurred. Rather than come forward with all such information and evidence in the ordinary course of discovery, Defendant took the path of concealment and obstructed Plaintiffs' attempts to ascertain the truth. On the basis of the forgoing, I find that some of Defendant Rite Aid of South Carolina's conduct in this matter was intentional and in bad faith, that such conduct has accounted for expanding the scope of this action into a complex and laboriously pursued discovery contest with a commensurate unnecessary expenditure of court time and immeasurable diversion of resources, in terms of time and expense by Plaintiffs' counsel. Hundley, at 304, 55-56.

Carolina Cool certainly does not want to imply a comparison between its monetary damages to the injuries suffered in Hundley. There is, however, a comparable pattern of obstruction of the discovery process committed by Garrard. In the present case, the circuit court properly considered Garrard's course of conduct in evaluating its credibility. There were numerous documented abuses by Garrard contradicting the assertion its failure to comply with discovery rules was "unintentional."

III. <u>The circuit court's order was narrowly tailored and imposed appropriate sanctions for Garrard's intentional misconduct.</u>

In its Motion for Sanctions, Carolina Cool specifically requested Garrard's counterclaim be stricken.[107] The motion complied with Rule 7, SCRCP by clearly setting forth the grounds supporting a severe sanction. The motion referenced the depositions discussed above, the letter dated August 22, 2019, the 4,201 document dump, and the documents received from Billys Plumbing not produced by Garrard. There was more than sufficient notice to satisfy Rule 7, SCRCP. *See* Arthur, *supra* footnote 5, at 368 S.C. 334, 628 S.E.2d 898 (a party's letter expressing concerns regarding discovery matters combined with a proposed scheduling order provided enough particularity as to the grounds of the motion pursuant to Rule 7(b), SCRCP). Garrard had been caught red-handed and its feigned surprise is simply not plausible. During the hearing, Carolina Cool further moved for Garrard's entire pleading be stricken,[108] however the circuit court ordered just the dismissal of Garrard's counterclaim. The record contains abundant factual support for the circuit court's narrowly tailored decision.

In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice. Laney v. Hefley, 262 S.C.54, 202 S.E.2d 12 (1974). In the present case, the case had been pending for over two years and there was abundant evidence showing Garrard had willfully violated the discovery process on numerous occasions. The discovery deadline set by the third scheduling order was about to expire and Garrard still had not produced all requested documents. Garrard also refused to

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[107] Motion for Sanctions filed November 4, 2019. ROA 750.
[108] December 18, 2019 Hearing Transcript, ROA 882, lines 21-25.

produce financial records clearly relevant to the parties' claims and defenses. Striking Garrard's counterclaim was appropriate given the fact Garrard obstructed Carolina Cool's ability to defend itself against the allegations.

When a court orders default or dismissal, or the sanction itself results in default or dismissal the end result is harsh medicine that should not be administered lightly. Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 511 S.E.2d 716 (Ct.App. 1999)(*citing* Orlando v. Boyd, 320 S.C. 509, 466 S.E.2d 353 (1996)). In Griffin, this Court determined the trial court did not abuse its discretion in striking Tire Service's answer. Similar to the case at hand, the parties entered into a scheduling order and the record reflected numerous motions to compel discovery and depositions. The trial court determined Tire Service engaged in a pattern of non-compliance with the South Carolina Rules of Civil Procedure and the trial court's orders. The trial court noticed the case had been pending for nearly two years, Griffin had not been able to take the 30(b)(6) deposition of Tire Service, and had not received meaningful answers to its interrogatories and requests to produce. The trial court further found material, relevant evidence had been withheld. This pattern of non-compliance and discovery abuse evidenced bad faith and willful, intentional disobedience.

In affirming the trial court's order, this Court determined:

> Here, the trial court clearly considered the appropriate factors. In its order, the trial court gave a detailed account of Griffin's discovery requests and Tire Service's responses to the requests. While recognizing that Tire Service would be greatly prejudiced, the court nevertheless imposed the sanction, finding Tire Service's willful disobedience of previous orders warranted such a sanction. Under the circumstances here, we find the trial court did not abuse its discretion in striking Tire Service's answer. The orders of the trial court are not Shakespearean in nature "full of sound and fury, signifying nothing." (quoting William Shakespeare, Macbeth act 5, sc.5). If there was ever a case where striking a party's pleading was an

> appropriate sanction, it is this case where the record is full of multiple, egregious discovery abuses that blocked the opposing party's attempts to conduct meaningful discovery. Id., at 199, 719.

This Court also dismissed Tire Service's argument that it should not be punished for acts committed by its prior counsel, noting there was no evidence to support the assertion that Tire Service was unaware of the acts of its counsel. The acts of an attorney are directly attributable to and binding on the client. Id., at 200, 719, *citing* Greenville Income Partners v. Hollman, 308 S.C. 105, 417 S.E.2d 107 (Ct.App, 1992).

Likewise, in the present case, the record shows Garrard engaged in in a pattern of non-compliance with the South Carolina Rules of Civil Procedure and the circuit court's orders. The circuit court justifiably determined Garrard's discovery abuses evidenced bad faith and intentional misconduct warranting a severe sanction.

IV. The circuit court's order was necessary to protect Carolina Cool's rights of discovery provided by the South Carolina Rules of Civil Procedure and to deter future discovery abuses.

The imposition of sanctions should serve to protect the rights of discovery provided by the rules. "[O]verleniency [in the imposition of sanctions] is to be avoided where it results in inadequate protection of discovery." Downey v. Dixon, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987), *quoting* Diaz v. Southern Drilling Corp., 427 F. (2d) 1118, 1126 (5th Cir.) *cert. denied*, 400 U.S. 878, 91 S.Ct. 118, 27 L. Ed. (2d) 115 (1970). In the present case, had Carolina Cool simply relied upon information produced in discovery by Garrard, it would not have been prepared to defend against Garrard's counterclaim or prosecute its allegations. The true and actual facts of the case would have remained buried. Because of the numerous discovery violations, Carolina Cool was forced to incur unnecessary attorney fees and costs, aggressively pursue information from Billys

Plumbing, and file numerous motions to obtain information which should have been produced forthrightly at the very beginning of the litigation. Clearly, Carolina Cool has been prejudiced by Garrard's actions. Had the circuit court merely required Garrard pay attorney fees, Carolina Cool's rights would have been deemed irrelevant.

The imposition of sanctions should also serve as a meaningful deterrent to those who fail to submit to discovery in the future. In Downey, Mr. Dixon failed to respond to interrogatories and failed to attend his deposition. Mr. Downey sought an order striking Mr. Dixon's pleading, but the lower court instead fined Mr. Dixon $50.00. This Court determined the sanction was overlenient and failed to deter future violations of discovery rules by future litigants. This Court reasoned, "[i]ndeed, it can be argued that the sanction imposed in the instant case tended to encourage, rather than discourage, noncompliance with the Rules. Id, at 46, 319 (footnote 2). In the present case, Garrard was paid over eight million dollars for this project.[109] Garrard has not paid Carolina Cool anything for the materials and labor it provided in the amount of $113,350.00. Simply nominally fining Garrard for intentionally obstructing the discovery process and overburdening its opponent would equivalate a slap on the wrist. Future litigants willing to ignore the rules of discovery to avoid producing damaging evidence would not be deterred, but rather willing to roll the dice on getting caught.

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[109] Garrard-Broadway Fixed Price Shell Contract, September 1, 2016. ROA 89. Garrard-Dave & Buster's Cost-Plus Contract, October 25, 2016. ROA 133.

CONCLUSION

There was abundant evidence presented to the circuit court to justify the imposition of sanctions. Garrard has not met its burden of proving the circuit court abused its discretion. For the reasons set forth above, the circuit court's order striking Garrard's counterclaim must be affirmed.

Respectfully submitted,

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