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| STATE OF SOUTH CAROLINA<br>COUNTY OF RICHLAND | ) | IN THE COURT OF COMMON PLEAS |
| HARLAND JONES,<br>Plaintiff,<br>v.<br>KAREN ROBINSON,<br>Defendant. | ) | Civil Action No. 2018-CP-40-01518<br>**ORDER GRANTING DEFENDANT'S MOTION FOR SANCTIONS** |

This matter comes before this court on Defendant's Motion for Sanctions. Defendant filed this Motion on June 27, 2019 and served a Memorandum in Support on Chief Administrative Judge Jocelyn Newman on the same date. Defendant's Motion sought sanctions pursuant to SCRCP Rules 11 and 37, ADR Rules 6, 8, and 10, and for "repeated discovery abuses and violations" as outlined in the Motion, Memorandum, prior Orders of this court, and exhibits presented at the hearing. A hearing on this matter was held before the undersigned on September 27, 2019. Present at the hearing were Lane Jefferies, counsel for Plaintiff and Brett Bayne and Andy Delaney, counsel for Defendant. Based on the reasons set out herein—including repeated discovery violations, mediation violations, and disobedience of court orders—Defendant's Motion is GRANTED in full. Plaintiff's Complaint is dismissed with prejudice and costs and fees sought in the Motion are awarded.

## I. Factual Background

This case involves an automobile on bicycle accident on Old Bluff Road in Columbia, South Carolina on June 7, 2017. Plaintiff has accused Defendant of, among other things 1) driving erratically, 2) speeding, 3) crossing the double yellow line, 4) changing lanes into oncoming traffic,

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and 5) striking Plaintiff in Plaintiff's lane of travel. Defendant has asserted the accident occurred when Plaintiff, while riding a bicycle on the roadway, turned left across a double yellow line directly into the path of Defendant's vehicle causing an accident.

## II. Legal Standard

The decision of whether or not to award sanctions is generally entrusted to the discretion of the trial court. See Fields v. Regional Med. Ctr. Orangeburg, 354 S.C. 445, 581 S.E.2d 489 (Ct. App. 2003) (decision of what kind and whether to impose discovery sanctions is left to sound discretion of (Circuit Court)); Karppi v. Greenville Terrazzo Co., 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997) (noting that imposition of sanctions is generally entrusted to sound discretion of Circuit Court).

When a party fails to obey an order relating to discovery, the trial court may strike that party's pleadings and enter a default judgment. Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193 at 198, 511 S.E.2d 716 at 718 (Ct. App. 1999) (citing Rule 37(b)(2)(c), SCRCP); see also Karppi, 327 S.C. at 542, 489 S.E.2d at 682 (explaining that Rule 37, SCRCP, expressly grants trial court power to order judgment by default for either the violation of a court order or, upon motion, for party's failure to respond to certain discovery requests). The sanction should be aimed at the specific misconduct of the party sanctioned and should not be used improvidently to prevent a decision on the merits. Griffin, 334 S.C. at 198, 511 S.E.2d at 719; Karppi, 327 S.C. at 543, 489 S.E.2d at 682. The sanction imposed should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case. Karppi, 327 S.C. at 543, 489 S.E.2d at 682. Finally, when a sanction "would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction." Griffin, 334 S.C. at 198-99, 511 S.E.2d at

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## III. Plaintiff's Claims About Eyewitnesses

In response to the Complaint, Defendant filed an Answer with various affirmative defenses and a claim pursuant to the South Carolina Frivolous Claims Act.[1] In response, Plaintiff filed a "Notice of Motion, Motion to Dismiss, and Memorandum of Law in Support Thereof" on June 5, 2018. Within this signed filing, Plaintiff claimed to have eyewitnesses to the accident who would testify and stated:

> "...discovery in this case is expected to reveal witnesses to the events giving rise to the subject motor vehicle collision who believe that Defendant was speeding, that Defendant was not paying attention to the roadway at the time of the subject collision, and/or that Defendant unlawfully attempted to unlawfully pass a vehicle immediately in front of her at the time she (Defendant) unlawfully caused Plaintiff to strike Defendant's vehicle."
>
> See June 5, 2018 Memorandum, Page 5.[2]

In response to Plaintiff's claims, Defendant served "Defendant's First Supplemental Interrogatories and Requests for Production" on Plaintiff on August 14, 2018.[3] As part of these discovery requests, Defendant requested information regarding the identity and existence of *any and all* witnesses who would have knowledge of the events giving rise to the subject motor vehicle accident. Specifically, Defendant asked: "State the full name, address, and contact information (including telephone number and email address) of the witness and/or witnesses referenced in Paragraph 2, Page 5 of 'Plaintiffs Notice of Motion, Motion to Dismiss, and Memorandum of Law in Support Thereof.'

[1] Defendant's Answer filed May 22, 2018.
[2] As will be outlined within this Order, Plaintiff later admitted in discovery responses there actually were no eyewitnesses as Plaintiff claimed in the June 5, 2018 filing.
[3] Defendant's Tab 5 from September 27, 2019 Hearing.

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Plaintiff did not respond to the supplemental discovery requests which specifically sought the identity of the alleged eye witnesses referenced in the June 5, 2018 Memorandum. As a result, Defendant filed a Motion to Compel for various outstanding discovery requests. On September 28, 2018, Plaintiff served responses to the first set of discovery but did not name any eye witnesses as alleged in the June 5, 2018 Memorandum.[4] While Plaintiff responded to the first set of discovery requests, Plaintiff did not respond to the supplemental requests for the alleged eyewitnesses.

## IV. Judge Benjamin's Order and Rule to Show Cause

All outstanding discovery issues were heard by The Honorable DeAndrea G. Benjamin on October 1, 2018. On October 3, 2018, Defendant's Motion to Compel was granted by Judge Benjamin and Plaintiff was ordered to produce any supplemental discovery information within twenty (20) days. Specifically, Judge Benjamin stated "Motion to compel-granted. Remaining records and all supplemental responses should be received in 20 days."[5]

Despite being given a 20-day deadline to respond to discovery and identify the alleged eyewitnesses from the June 5, 2018 Memorandum, Plaintiff failed to comply with Judge Benjamin's Order and failed to provide discovery responses. On October 23, 2018, Defendant was forced to file a Motion for Rule to Show Cause. The Rule to Show Cause was granted through written Order of Judge Benjamin on October 30, 2018. After issuance of the Rule by Judge Benjamin, Plaintiff finally responded to discovery on November 7, 2018 and admitted within those responses that he did not have *any witnesses* he had previously represented to the Court on June 5, 2018.[6] Despite claiming the existence of eyewitnesses, refusing to provide discovery responses, and causing Defendant to file a Motion to Compel and a Rule to Show Cause, Plaintiff never

[4] Defendant's Tab 6 from September 27, 2019 Hearing.
[5] See Judge Benjamin's Form 4 Order filed October 3, 2018.
[6] Defendant's Tab 10 from September 27, 2019 Hearing.

identified the claimed eyewitnesses.

## V. Ongoing Discovery Violations

Thereafter, on March 6, 2019, Plaintiff, while giving his sworn deposition testimony, revealed for the first time that he had a friend named "Alex" who Plaintiff claimed witnessed the motor vehicle accident that is the subject of this lawsuit. As outlined in Defendant's March 7, 2019 Motion to Compel and Judge Couch's July 3, 2019 Order, Plaintiff admitted he was aware of "Alex" from the time immediately following the accident but did not disclose the existence of "Alex" to the defense. Plaintiff could not give "Alex's" last name, where "Alex" lived, a mailing address, a phone contact, or any way to find or get in touch with "Alex." Additionally, Plaintiff consistently referenced another individual who remains unidentified, yet, according to Plaintiff, witnessed the accident. According to Plaintiff, this unidentified individual is his wife's cousin. Plaintiff admitted he had spoken to this individual and this individual came to his house after the accident. Plaintiff represents he did not disclose this individual because she did not want to be involved in the case. However, Plaintiff sought to rely on testimony or inferences arising from this individual, as they allegedly were operating the vehicle in front of Defendant immediately prior to the accident. According to Plaintiff this individual observed the accident, and spoke with Plaintiff about the accident at a later date.

As a result of these new disclosures by Plaintiff during his deposition on March 6, 2019—which directly contradicted the November 7, 2018 discovery responses—Defendant was required to file a second Motion to Compel. The second Motion to Compel, filed on March 7, 2019, outlined in detail the prior discovery abuses from 2018 and the prior non-compliance with Judge Benjamin's Order and Rule to Show Cause. The March 7, 2019 Motion to Compel included a request for sanctions against Plaintiff for the late disclosures and prior discovery abuses.

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Defendant's March 7, 2019 Motion quoted prior filings by Plaintiff where Plaintiff agreed that significant sanctions were appropriate for discovery abuses. For example, Plaintiff previously stated the following related to discovery:

> "The intent of South Carolina's discovery rules…is to provide information, not to hide information. Indeed, the 'entire thrust of the discovery rules involves full and fair disclosure.' Samples v. Mitchell, 329 S.C. 105, 113, 495 S.E.2d 213, 217 (Ct. App. 1997)."
>
> "…failure to fully answer thwart [sic] the purpose of discovery—they prolong litigation and unnecessarily increase costs to the parties and the Court. They are simply another example of 'Rambo style obstructionist discovery tactics… [that] if not stopped dead in their tracks by appropriate sanctions, [will] have a virus like potential…' in this case and only serve '…to corrupt the fairness of our civil justice system.' St. Paul Reinsurance Co. v. Commercial Fin. Corp., 198 F.R.D. 508, 517 (N.D. Iowa 2000)."

After filing the March 7, 2019 Motion to Compel, Defendant attempted to continue discovery related to the alleged eyewitnesses and served a Second and Third Set of Requests for Admission. On April 4, 2019 Plaintiff answered the Second Set of Requests for Admission. Plaintiff provided the following answer:

> "After conducting written discovery and depositions, it appears that Defendant was no longer traveling in the lane of oncoming traffic when she wrongfully struck Plaintiff. Nevertheless, it was Defendant's illegal passing maneuver, in which she unlawfully travelled in the lane of oncoming traffic, which caused her to strike Plaintiff immediately after she returned to the westbound lane of travel." [7]

This answer was given following the March 6, 2019 deposition in which Plaintiff admitted he did not witness the accident. Further, at this time, Plaintiff still had never disclosed any of the alleged eyewitnesses from the June 5, 2018 Memorandum. This answer to the Second Set of Interrogatories clearly lacked any good faith basis in fact at the time it was made.

[7] Defendant's Tab 12 from September 27, 2019 Hearing.

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As a result of this response, Defendant served a Third Requests for Admission on Plaintiff. Defendant asked only one question:

> "Admit that there is no deposition testimony, witness, or any other material to support the allegation asserted in Plaintiff's Responses to Defendant's Second Set of Requests for Admission that state 'it was Defendant's illegal passing maneuver, in which she was unlawfully traveling in the lane of oncoming traffic, which caused her strike Plaintiff immediately after she returned to the westbound lane of travel."

Plaintiff answered the Third Requests for Admission on April 26, 2019, responding only with "Denied."[8] This answer was given despite Plaintiff's March 6, 2019 testimony where he admitted he did not see the accident. Further, at this time, Plaintiff still had never disclosed any of the alleged eyewitnesses from the June 5, 2018 Memorandum. This answer to the Third Set of Interrogatories clearly lacked any good faith basis in fact at the time it was made.

## VI. Judge Couch's Ruling and Order

Judge Couch heard Defendant's Motion for Summary Judgment and Defendant's second Motion to Compel on March 7, 2019. Judge Couch heard the Motion for Summary Judgment first. Plaintiff relied upon the unidentified and unnamed eyewitness in his arguments against summary judgment and summary judgment was denied. Judge Couch then heard the second Motion to Compel. Following a hearing on the second Motion to Compel, Judge Couch discussed the possible penalties and sanctions he was considering for Plaintiff. Specifically, the following exchanges occurred between Judge Couch and counsel:

> MR. JEFFERIES: Your Honor, I don't know that we can find it. If Your Honor wants to give us 30 days and say that's all you've got, we're comfortable with that.

[8] Defendant's Tab 13 from September 27, 2019 Hearing.

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THE COURT: Well, I mean, what I would do is I would bar them from presenting the witness to give you time to be prepared if they don't produce the person by a certain point in time.

MR. BAYNE: Certainly, Judge.

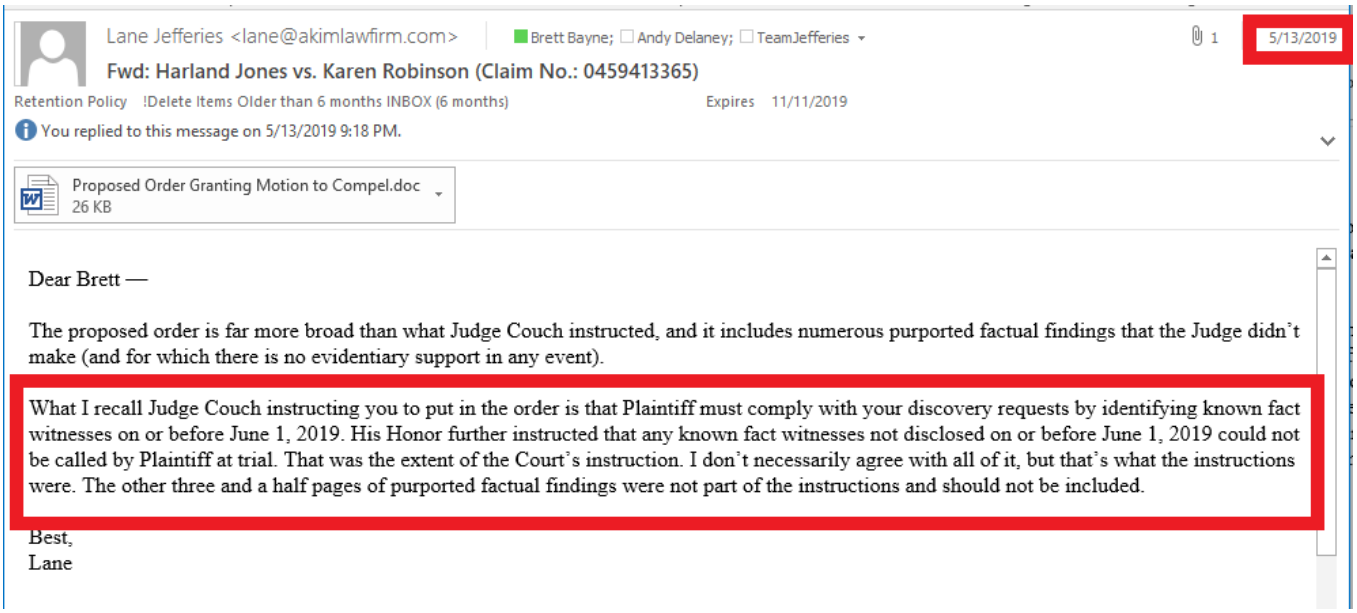
MR. JEFFERIES: And we agree with that, Your Honor. We're perfectly comfortable not being able to use that witness.

THE COURT: Okay. If they don't have it by June 1st if they don't have it, that witness will be prevented from testifying.

MR. BAYNE: That will work, Judge.

MR. JEFFERIES: Thank you, Your Honor.

Plainitff's counsel never objected to the June 1st deadline—he consented to it. Plainitff's counsel then re-affirmed his understanding of the June 1st deadline in a May 13, 2019 email to counsel:



Lane Jefferies <lane@akimlawfirm.com> Brett Bayne; Andy Delaney; TeamJefferies 1 5/13/2019

Fwd: Harland Jones vs. Karen Robinson (Claim No.: 0459413365)

Retention Policy !Delete Items Older than 6 months INBOX (6 months) Expires 11/11/2019

You replied to this message on 5/13/2019 9:18 PM.

Proposed Order Granting Motion to Compel.doc
26 KB

Dear Brett —

The proposed order is far more broad than what Judge Couch instructed, and it includes numerous purported factual findings that the Judge didn't make (and for which there is no evidentiary support in any event).

What I recall Judge Couch instructing you to put in the order is that Plaintiff must comply with your discovery requests by identifying known fact witnesses on or before June 1, 2019. His Honor further instructed that any known fact witnesses not disclosed on or before June 1, 2019 could not be called by Plaintiff at trial. That was the extent of the Court's instruction. I don't necessarily agree with all of it, but that's what the instructions were. The other three and a half pages of purported factual findings were not part of the instructions and should not be included.

Best,
Lane

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Judge Couch issued a bench ruling on May 7, 2019 and instructed Defendant's counsel to prepare a written order. Nevertheless, Plaintiff refused to identify the alleged eyewitnesses from the June 5, 2018 Memorandum and failed to disclose the alleged witnesses (and any other unnamed witnesses) as ordered by Judge Couch by June 1, 2019.

As discussed herein, Judge Couch's formal written Order was not filed until July 3, 2019 but there can be no doubt Plaintiff was both aware of the June 1, 2019 deadline and that Plaintiff agreed to the June 1, 2019 deadline.

When the formal Order was filed by Judge Couch on July 3, 2019, Plaintiff filed a Rule 59 motion for reconsideration within a matter of hours. Plaintiff raised three bases for reconsideration of Judge Couch's May 7th ruling and July 3rd Order: 1) the Order was "impossible" to comply with because it purported to "compel plaintiff to perform actions in the past"; 2) the Order barring witnesses invades the purview of the trial judge; and 3) the Order is "not based on any evidence." Essentially, Plaintiff has taken the position that he was not required to follow Judge Couch's ruling from the bench until it was reduced to writing. Plaintiff's position is that no judge in the State of South Carolina can order any party to do anything unless it is in writing. Plaintiff's counsel failed to comply with previous discovery requests, Judge Benjamin's October 2018 Order and Rule, and Judge Couch's May 7th Ruling and July 3rd Order.

## VII. Mediation

In the middle of Defendant's repeated and ongoing attempts to acquire discovery, and Plaintiff's continued willful failure to comply with orders from this court. The parties met for a mediation on June 21, 2019.

Plaintiff's counsel and Plaintiff's counsel's firm has history of demanding and compelling strict compliance with SCADR Rule 6 by defendants. Plaintiff's firm routinely demands each and

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every single person—adjuster, lead attorney, individual party, etc.—appear in person at the mediation and refuses to waive or ease the requirements.[9] Despite this, Plaintiff's counsel—Lane Jefferies—own letter admitting he was required by rule to be present (Exhibit A above), Mr. Jefferies did not appear at the mediation.

Rule 6(b)(3) requires the attendance of "[t]he party's counsel of record." Plaintiff's lead counsel of record are Lane Jefferies (the lead counsel who has appeared at every hearing, nearly every deposition, and who has authored nearly every filing in this case), Roy Willey (listed counsel who has appeared at one deposition), and Eric Poulin (who has appeared on every filing but has not appeared at any deposition or hearing). Any of these three would satisfy the Rule 6(b)(3) requirements. And it appears from Lane Jefferies's letter at Exhibit A, that Mr. Jefferies was well aware of this rule and further Mr. Jefferies interpreted the rule to require his own presence.

Instead, Plaintiff was represented at the mediation by Gus A. Anastopoulo. Mr. Anastopoulo could provide no explanation for why Plaintiff's counsel of record was not present. Mr. Anastopoulo is a 2018 law graduate who was licensed on November 27, 2018.[10] Mr. Anastopoulo has not appeared on a single pleading in this case, has not filed a Notice of Appearance, has not been on any email or correspondence in this case, has not been present at any deposition, and has not been present at any hearing. Mr. Anastopoulo is not a counsel of record for Plaintiff.[11] Plaintiff's counsel failed to provide a reason as to why the actual counsel of record

[9] See, Exhibit A and B to Defendant's Memorandum in Support of Sanctions. Exhibit A is a letter from Plaintiff's lead counsel Lane Jefferies from this specific case about the mediation, acknowledging his personal physical presence was required by Rule. Exhibit B is a collection of letters, emails, and filings from Mr. Jefferies and other members of Plaintiff's counsel's firm related to mediation rules and the absolute virtue of requiring attendance in person of the parties requires by SCADR Rule 6. There can be no argument from Mr. Jefferies that he was unaware of Rule 6(b)(3)'s physical attendance requirements.

[10] While Mr. Anastopoulo's level of experience would not typically be relevant, it gives context to what followed at mediation in terms of the opening statement, the lack of knowledge about the case and prior rulings, and the demands.

[11] This finding is not intended to conclude that merely failing to be listed on a pleading means that an attorney is not a counsel of record pursuant to Rule 6(b)(3). Indeed, plenty of attorneys appear for mediation and conduct successful and proper mediations despite not being listed on a pleading. But, rather, it is the totality of the circumstances, conduct,

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could not appear at the June 21, 2019 mediation.

Defendant's counsel asserted his belief based on the course of the mediation that Mr. Anastopoulo had not met with—or even spoken to—Plaintiff before the day of the mediation. Additionally, Mr. Anastopoulo appeared to lack any functional knowledge of the case, the facts, or the status of the prior hearings, rulings (for example, that witnesses were barred by Judge Couch), and/or Orders in this case.[12] As mediations typically proceed, the mediator presented a brief opening to each party then deferred to Mr. Anastopoulo to present the Plaintiff's opening statement. Mr. Anastopoulo got several key facts and details wrong about the case. He asserted medical damages that were inaccurate and that have never been produced in discovery. Later, he asserted that there were "several eyewitnesses to the accident who would be called to testify"—something that has been expressly barred by Judge Couch, but that Mr. Anastopoulo was completely unaware of. However, the most egregious part of the mediation occurred during Mr. Anastopoulo's opening wherein he openly admitted that Plaintiff had a "1 in 10 chance" of prevailing at trial but that "1 chance out of 10 is going to be costly to Defendant so you should settle." Mr. Anastopoulo openly and candidly admitted the lawsuit filed by Plaintiff had just a 10% chance of success—an open and brazen violation of SCRCP Rule 11.[13] Shortly after describing Plaintiff's case as a veritable "snowball's chance", Mr. Anastopoulo revised his prediction to a "1 in 6" chance and compared his case to "a game of Russian Roulette" wherein Defendant "may win

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and the numerous issues with Mr. Anastopoulo's appearance at the mediation which necessitate the determination that, while Mr. Anastopoulo is in the same firm as Mr. Jefferies, he was not a counsel of record for Plaintiff.

[12] Typically, mediation discussions and disclosures are confidential. However, there are limited exceptions to confidentiality pursuant to ADR Rule 8(c). Rule 8(c)(5) and (6) provide for disclosure of various mediation matters when it is 1) offered to report, prove, or disprove professional misconduct occurring during the mediation and/or 2) in a report to or an inquiry from the Chief Judge for Administrative Purposes regarding a possible violation of these rules.

[13] If a claim being made has, at best, a 10% chance of success it is the undersigned's opinion this claim cannot possibly meet the requirements of Rule 11(a)—that "to the best of [the attorney's] knowledge, information and belief there is good ground to support it." This simply is not the good ground standard applied to a Complaint filed in a case—that there is a 10% chance of success and a 90% chance of failure.

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5 out of 6 times but that one time there's a bullet in the chamber and we [Plaintiff] win." After this statement, the parties broke into separate rooms and the mediator started with Plaintiff. The mediator returned shortly with a demand of $500,000—20 times the insurance policy limits and, when the demand was rejected, Mr. Anastopoulo left the mediation.[14]

Defendant's counsel Brett Bayne attempted to resolve these mediation issues with Plaintiff's actual counsel of record—Lane Jefferies—via email on June 21, 2019.[15] Mr. Jefferies failed to respond to the email. The undersigned notes Mr. Jefferies' current email signature bars defendant's attorneys and other opposing counsel from contacting him in any manner other than by telephone between 4:00 PM and 4:30 PM and allocates only five (5) minutes to each opposing

[14] Plaintiff did not file a counter memorandum or memorandum in opposition to Defendant's Motion for Sanctions outlining the mediation behavior. Plaintiff similarly did not file any affidavits related to the mediation until *after* the September 27, 2019 hearing. At the hearing, Plaintiff did hand up a copy of an affidavit signed by Gus Anastopoulo on the same day as the hearing proceeded—September 27, 2019. Accordingly, I have reviewed Mr. Gus Anastopoulo's affidavit which was handed up at the hearing for the first time and filed after the hearing, Rule 6(d) requires opposing affidavits to be served "not later than two days before the hearing." The undersigned requested any supporting materials, which would include affidavits, from Plaintiff by email on September 24, 2019 and September 26, 2019. Plaintiff did not supply any evidence, materials, or affidavits in response to the undersigned's emails.

[15] See Exhibit C to Defendant's Memorandum in Support of Sanctions

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attorney. Specifically, the email signature states[16]:

--
**Lane D. Jefferies**

**Division Chair and Trial Lawyer**

**Commercial and Construction Liability Division**
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By Appointment Only: Wilmington, NC

*There are two ways for opposing attorneys to reach me by phone:

(1) **Call my cell any day between 4:00 p.m. and 4:30 p.m.** If I am not already on the phone with another opposing counsel, I will answer and spend up to five minutes on the phone with you. At the end of our five-minute talk, I may instruct my staff to schedule a longer meeting with you if you satisfy the criteria set forth in #2 below. Please note that I spend just five minutes on each call, so if I don't answer when you call, wait a few minutes and try again. My cell is 843.814.7719. Call only between 4:00 p.m. and 4:30 p.m., as I spend the rest of my day focused solely on achieving my clients' goals.

OR,

(2) **Schedule a longer meeting.** Begin by providing my office with a *specific* agenda of items you would like to discuss (email TeamJefferies@GoogleGroups.com). Be sure to identify the tangible outcomes to be achieved as to each item, and persuasively describe how these outcomes, if achieved, would promote the greatest recovery for my client in the least amount of time and for the least expense. If you believe that a statute or rule of procedure requires us to speak by phone, then please specifically identify it. If your email persuades my staff that using my time to meet with you is legally required or is likely to be a worthy investment ***from the perspective of my client***, then they will schedule such a meeting (probably a meeting by phone initially). On the other hand, if you do not persuade my staff that scheduling a meeting is consistent with my promise to my clients not to try to do 1000 things at once that won't contribute much, if anything, to the results we are trying to achieve, then no meeting will be scheduled (though you will remain free to call any afternoon as described in #1 above). Fair warning: generalized requests to "discuss the case" or "talk about the status" or the like will be considered conclusive evidence of a request to waste time, and no meeting will be scheduled.

We have instituted the above procedure in order to accommodate your desire to speak with me by phone in a manner that does not interfere with my ethical obligation to to devote my time and attention to the pursuit of justice for my clients as quickly and economically as possible.

Naturally, the above procedure does not apply to Judges, judicial staff, clerks of court, my wife, or my children — they are all welcome to call or text me anytime.

During the sanctions hearing, Defendant's counsel candidly admitted he did not call Mr. Jefferies between 4:00 and 4:30 PM to discuss the mediation but, rather, believed the email sent about the mediation was sufficient. The undersigned agrees. Contrary to Mr. Jefferies email

[16] This email was sent to the undersigned on September 24, 2019 at 4:16 PM.

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signature, opposing counsel was not required to contact Mr. Jefferies only between 4:00 and 4:30 PM for a period of time not to exceed five (5) minutes.

Further, Mr. Jefferies provided no satisfactory explanation for his absence at mediation nor did he provide any satisfactory explanation for the actions of Mr. Anastopoulo. During the September 27, 2019 hearing, Mr. Jefferies asserted that Mr. Anastopoulo was "acting at his direction" and that "Mr. Anastopoulo appeared in the case by appearing at the mediation."

SCADR Rule 10 and SCRCP Rule 37 provide the framework for this Court to determine the appropriate sanction for Plaintiff's counsel's actions related to the mediation. SCADR Rule 10(b) states:

> "If any person or entity subject to the ADR Rules violates any provision of the ADR Rules without good cause, the court may, on its own motion or motion by any party, impose upon that party, person or entity, any lawful sanctions, **including, but not limited to**, the payment of attorney's fees, neutral's fees, and expenses incurred by persons attending the conference; contempt; and any other sanction authorized by Rule 37(b), SCRCP."

SCRCP Rule 37(b) provides several remedies authorized by Rule 10(b) including: "[a]n order striking out pleadings 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." SCRCP Rule 37(b)(2)(C).

## VIII. Judge Lee's Hearing

Following the mediation, this matter was scheduled for trial in Richland County the week of July 8, 2019. Plaintiff argued the trial could not go forward because of the pending Rule 59 for Judge Couch's July 3rd Order. Judge Lee conducted a full pre-trial hearing to evaluate the claims and issues prior to ruling on whether the case could go forward or had to be continued until Judge Couch could issue a rule on the Rule 59. However, of particular concern are statements made about

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the discovery abuses and Judge Couch's May 7th Ruling and July 3rd Order. Judge Lee asked:

> 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.

In response to this question by Judge Lee about whether Plaintiff disagreed with Judge Couch's ruling, Plaintiff's counsel answered:

> 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.

As is evident, Plaintiff took the position with Judge Lee on July 8th that he opposed the June 1st deadline and that he opposed the remedy of exclusion of witnesses. However, as already discussed herein, during the Judge Couch hearing on May 7, 2019, Plaintiff proposed the exclusion of witnesses with a time limitation and agreed with Judge Couch at the hearing on this decision:

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MR. JEFFERIES: Your Honor, I don't know that we can find it. If Your Honor wants to give us 30 days and say that's all you've got, we're comfortable with that.

THE COURT: Well, I mean, what I would do is I would bar them from presenting the witness to give you time to be prepared if they don't produce the person by a certain point in time.

MR. BAYNE: Certainly, Judge.

MR. JEFFERIES: And we agree with that, Your Honor. We're perfectly comfortable not being able to use that witness.

THE COURT: Okay. If they don't have it by June 1st if they don't have it, that witness will be prevented from testifying.

MR. BAYNE: That will work, Judge.

MR. JEFFERIES: Thank you, Your Honor.

The representations made by Plaintiff's counsel to Judge Lee on July 8, 2019 regarding the exclusion of witnesses were inconsistent with Plaintiff's agreement and representations made to Judge Couch on May 7, 2019.

## IX. Judge Couch's Rule 59 Order

Following Judge Couch's July 3, 2019 Order, Plaintiff filed a Rule 59 Motion to reconsider or alter the July 3rd Order and May 7th Ruling. This Motion was pending during the July 8, 2019 Judge Lee hearing. Judge Couch issued an order denying Plaintiff's Rule 59 Motion on July 24,

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2019. Judge Couch made a number of specific findings related to the multitude of discovery abuses, reiterated his sanction of exclusion of all unnamed witnesses, and determined additional sanctions may be awarded at a later date.

First, Judge Couch noted that the motions before him were "…the second time Defendant has had to file a Motion to Compel over the same witness issue" and "[o]n October 3, 2018 Judge Benjamin granted Defendant's first Motion to Compel this information. Judge Benjamin then issued a Rule to Show Cause to Plaintiff on October 30, 2018, over non-compliance with October 3rd Order. Following the issuance of the Rule to Show Cause, Plaintiff submitted discovery responses to Defendant on November 7, 2018, and stated there were no witnesses to disclose. Plaintiff then disclosed the purported existence of these same witnesses at his deposition on March 6, 2019—which caused this second Motion to Compel to be filed."

Next, Judge Couch reiterated his ruling based on the submissions, record, and facts of the case: "[b]ased on the filings, memoranda, and oral arguments of counsel for Plaintiff and Defendant, I determined there was just cause for granting the Motion. I issued a ruling from the bench on May 7, 2019 ordering Plaintiff to identify any unnamed the witnesses by June 1, 2019. I further ordered that if the witnesses were not identified by June 1, 2019, they would be barred from trial." Judge Couch then noted "Plaintiff agreed with both the June 1, 2019 deadline and to the exclusion of unnamed witnesses as a penalty for failure to meet the deadline." This is both consistent with the Judge Couch hearing transcript and inconsistent with Plaintiff's statements made to Judge Lee on July 8, 2019.

Judge Couch addressed Plaintiff's "impossibility" argument— "Plaintiff now takes the position that he was not required to comply with my May 7 ruling to produce witnesses by June 1, 2019 until he received a filed written order. It is clear from the record that Plaintiff then failed to

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identify any previously unnamed witnesses by the June 1, 2019 deadline. I note with particularity that Plaintiff took no issue with the June 1, 2019 deadline and has not disputed that he fully understood the nature of the deadline. For example, during the May 7, 2019 hearing, Plaintiff's counsel acknowledges the deadline…Plaintiff's counsel was fully aware of the June 1, 2019 deadline both at the May 7 hearing and on May 13, 2019…Plaintiff had approximately 16 months to identify witnesses and failed to do so. Plaintiff was given several more weeks to name witnesses at the May 7, 2019 hearing and failed to do so. Plaintiff then had another month after the June 1 deadline where he could have named witnesses and failed to do so. Based on representations of the parties, Plaintiff still—as of this Order—has failed to comply with the South Carolina Rules of Civil Procedure, Judge Benjamin's two October 2018 Orders, this court's May 7 ruling, and this court's July 3 Order." Plaintiff made the same argument before the undersigned, taking the position that Plaintiff was not required to follow orders or rulings of this court if not reduced to writing.

Following a recitation of the case, Judge Couch re-issued his ruling as follows:

"**IT IS HEREBY ORDERED THAT** compliance with my prior ruling and Order was required by June 1, 2019, and

**IT IS FURTHER ORDERED THAT** the record reflects Plaintiff agreed to the June 1, 2019 deadline and agreed to the discovery penalty of exclusion of unnamed witnesses for failure to comply with the June 1, 2019 deadline, and

**IT IS FURTHER ORDERED THAT** Plaintiff has failed to fully respond to Defendant's discovery requests regarding the identification, contact information, and summary of testimony of any unnamed factual witnesses by June 1, 2019, and

**IT IS FURTHER ORDERED THAT** Plaintiff has failed to comply with my May 7, 2019

ruling and my July 3, 2019 written Order, and

**IT IS FURTHER ORDERED THAT** the failure of Plaintiff to comply with my May 7, 2019 ruling and July 3, 2019 written Order results in Plaintiff's inability to use any witness that was unidentified as of June 1, 2019 at trial—as further agreed to by Plaintiff at the May 7 hearing, and

**IT IS FURTHER ORDERED THAT**, as a result of Plaintiff's failure to comply with my ruling and Order, Plaintiff may be sanctioned in any manner accordance with South Carolina Rules of Civil Procedure 37. The determination of sanctions, if any, as set out herein shall be referred to the Chief Administrative Judge for Richland County for a determination of sanctions, if any, based on this Order and for a determination on Defendant's pending Motion for Sanctions filed in Richland County."

Plaintiff did not appeal this Order and it is now final, including the findings therein.

## X. Judge Manning's Hearing

Finally, this matter came before Judge Casey Manning for trial on August 12, 2019. Judge Manning did conduct a pretrial conference related to Defendant's Motion in Limine to exclude witnesses based on the Judge Couch May 7th Ruling and July 3rd Order. Plaintiff appeared for trial and purported to identify new witnesses not named before June 1, 2019 and attempted to call those witnesses to testify. Judge Manning reviewed Judge Couch's July 3rd Order and questioned Plaintiff about his compliance with the June 1, 2019 deadline to name witnesses. Judge Manning deferred hearing and ruling on this underlying Motion for Sanctions until the conclusion of the trial. The trial ended in a mistrial and Judge Manning ultimately did not hear the Motion for Sanctions or rule on the same.



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Initially, Judge Manning sought clarification from Plaintiff's counsel with a very simple question:

> THE COURT: I -- I'm going to ask you this, did you comply with the terms of Judge Couch's order?
> MR. JEFFERIES: Yes, Your Honor --
> THE COURT: Did you fail to comply? Look, I can read this myself. I'm asking for a straight answer on the record, did you -- did you comply or not? "Yes" or "no"?
> MR. JEFFERIES: Yes, Your Honor.

This court has spelled out above how Plaintiff did not comply with the terms of Judge Couch's May 7th Ruling and July 3rd Order. That Order, referenced herein, required disclosure of all unnamed witnesses by June 1, 2019 or the witnesses would be barred from trial. Plaintiff, unquestionably, did not name any witnesses by June 1, 2019. Despite this unquestioned fact of this case—that the witnesses, were not disclosed by June 1, 2019–when asked specifically and directly if he had complied with the Order "did you comply or not? 'Yes' or 'No'?" Plaintiff's counsel stated "Yes, Your Honor."

Later in the same pretrial hearing, Judge Manning probed further into the issue with

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Plaintiff counsel:

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

Judge Manning again establishes Judge Couch's May 7th Ruling and July 3rd Order bars witnesses after June 1, 2019. Plaintiff's counsel acknowledges this Order. Judge Manning again asks "[d]id you meet the deadline imposed by Judge Couch? Yes or No?" Despite clear evidence to the contrary, Plaintiff's counsel states "Yes" and asserts compliance with the Order.

Judge Manning inquired one final time about compliance with the Ruling and Order:

> But my question to you is simple, did you disclose these names before Judge Couch's order or not? Yes or no?
> MR. JEFFERIES: Yes, Your Honor. We disclosed them on -- pardon me --
> THE COURT: All right. Stop --

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Again, Plaintiff's counsel asserts he did comply with the Order and did disclose the witnesses by June 1, 2019–a fact which is not true.

## XI. Sanctions

Defendant has sought full sanctions for Plaintiff's repeated discovery abuses, failures to comply with Rulings and Orders of this court, and ADR violations. This Court agrees that, based on the totality of the circumstances, sanctions pursuant to Rule 37 for violations of SCADR Rules, SCRCP Rule 11, and SCRCP Discovery Rules are warranted.

Despite two Orders from Judge Benjamin, a Ruling from Judge Couch, an Order from Judge Couch, and pre-trial and trial rulings by Judge Manning, Plaintiff continues to violate discovery rules and willfully ignore the prior orders of this court. Plaintiff has acted in bad faith, with willful disobedience of numerous court orders and rulings, and with gross indifference toward the court and counsel highlighted herein.

The only proper remedy is to strike the Complaint, with prejudice, pursuant to SCADR Rule 10(b) and 37(b)(2)(C). With this decision, this Court grants the entirety of Defendant's attorney fees and costs incurred to date.

Accordingly, Plaintiff's Complaint is hereby dismissed with prejudice. Plaintiff's response to Defendant's counterclaim is not dismissed and this matter shall proceed to trial on Defendant's counterclaims.

Plaintiff's counsel is ordered to pay Defendant's attorneys costs and fees incurred to date. Based on the affidavit of Defendant's counsel submitted, costs and fees in the amount of $23,277.14 are hereby awarded.

IT IS SO ORDERED!

***(Judge's Electronic Signature Page to Follow)***

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Richland Common Pleas

**Case Caption:** Harland Jones vs Karen Robinson , defendant, et al

**Case Number:** 2018CP4001518

**Type:** Order/Other

So Ordered

s/ R.E. Hood #2164