State of South Carolina	)	
	)	Circuit Court
County of Richland	)	2021-CP-40-03205
MPA Strategies, LLC	)	
	)	
vs.	)	Transcript of Record
	)	
Town of Blythewood	)	

August 9, 2023
Richland, South Carolina

B E F O R E:

The Honorable Clifton Newman, Judge.

A P P E A R A N C E S (All present by video or telephone):

J. Paul Porter
Attorney for the Plaintiff

David Black
Alexandra Austin
Attorneys for the Defendant

Ellen S. Kolman
Transcriber

I N D E X

E X H I B I T S

NO.	DESCRIPTION	ID.	EV.

NO EXHIBITS INTRODUCED

THE COURT: Next in line is MPA Strategies v. Blythewood.

MR. PORTER: Good morning, Your Honor.

THE COURT: Morning.

MS. AUSTIN: Morning, Your Honor.

THE COURT: Morning.

MR. BLACK: Morning, Judge.

THE COURT: Morning.

This is a motion to strike the jury demand.

The defense's motion, you may proceed.

MR. PORTER: Your Honor, which motion would you like to start? The first listed is my motion to strike; the plaintiff counterdefendant's motion to strike?

MS. AUSTIN: And Your Honor, if I may -- and we'll, of course, defer to the Court's preference on the order -- we've requested that the defendant's discovery motions be heard first, because there are discovery issues and spoilation of evidence issues that we believe are dispositive of the other motions that are before the Court today.

THE COURT: Which motion is that?

MS. AUSTIN: There are three discovery motions, all brought by defendant, the Town of Blythewood. Two really can be addressed together, which are the defendant's renewed motion to compel and for sanctions and rule to show cause. And then they also have a motion to quash or for protective order of a subpoena.

MR. PORTER: And Your Honor, the plaintiff -- Paul Porter for the plaintiff -- would respectfully request that the motions be heard in order. I don't think there is any reason to hear them out of the order. And the discovery motions would not be dispositive to the previously filed motion to strike. Or the summary judgment motion, for that matter.

THE COURT: We'll start with the motion filed by Ashley Hunter.

MR. PORTER: Thank you, Your Honor.

Your Honor, my name is Paul Porter. I represent MPA Strategies, Ashley Hunter, and the State and Frink Foundation. There are five motions pending before the Court.

The first is plaintiff's motion to strike -- or plaintiff and the counterdefendant's motion to strike. In this hearing, I may refer to them generally as the plaintiff. If I do, I'm referring to both plaintiff and counterdefendants. I apologize. I'll try not to be confused with the parties, but this is a bit of a messy case.

THE COURT: Yeah. Well, it would move you to not be confusing if you want me to understand what you're arguing.

MR. PORTER: I'm going to I'm going to do my best to make it understandable, Your Honor.

So plaintiff filed this case as a FOIA case on June 28th, 2021. The defendant filed eight counterclaims, of which seven are pending: fraud, negligent misrepresentation, a SCUDTPA

claim, a South Carolina frivolous proceedings act claim, a civil conspiracy claim, a federal false claims act claim, a claim for punitive damages, which has been dismissed, and a claim for negligence/gross negligence.

I'm going to start with the facts from a 50,000-foot view, because I think they inform why these are not permissive or compulsory counterclaims.

Blythewood -- the Town of Blythewood, who the defendants are, issued a request for proposals for marketing and grant writing on December 30th, 2020. The RFP did not say that the bidder needed to be a nonprofit of any sort or a nonprofit under 501(c)(3) specifically. My client, MPA Strategies, bid. So did the Blythewood Chamber of Commerce and the company NP Strategy.

The Blythewood Chamber is a nonprofit, presumably organized under 501(c)(6), which specifically applies to business leagues and nonprofits. NP Strategy is a for profit, and MPA Strategies LLC is a for profit.

By a vote of three to two, the counsel and Blythewood, with Mayor Bryan Franklin and another councilmember opposing awarded the contract to the plaintiff, MPA Strategies, in February of 2021.

The mayor, who is a strong mayor under a mayor council form of government, vehemently opposed MPA Strategies getting the contract.

After the contract was awarded by vote, the mayor, the Town attorney, Ms. Shannon Burnett, who is not a counsel of record in this case, and the Town administrator, were tasked with negotiating the final terms of the contract with Ms. Hunter and her then lawyer, Joseph Dickey.

At that time, the Town asked that MPA Strategies form a nonprofit organization so that they could receive so-called 30 percent money from accommodations tax under South Carolina Code annotated 6-4-10. That statute says that 3 percent of the balance of a tax money received by a municipality after the first 25,000 dollars it receives must be spent on a designated marketing agency such as, "A chamber of commerce, a visitor, or convention bureau or regional tourism commission". The statute requires the DMO to be a nonprofit, but it doesn't say what kind.

26 U.S.C. 501(c), for instance, references 29 different kinds of nonprofit. Nevertheless, both sides mistakenly used the terms 501(c)(3) and nonprofit interchangeably.

The entire gist of the defendant's seven counterclaims that are pending is that plaintiff lied about forming a 501(c)(3) so that she could get the contract.

The contract was negotiated back and forth in multiple drafts by Ms. Hunter's former counsel, Joseph Dickey, and the Town attorney, Ms. Shannon Burnett. The final contract was fully signed on 5/1/21. It said nothing about the formation

of a nonprofit, or formation of a nonprofit under 501(c)(3), and it had an explicit merger clause on page 3. It was signed by Ashley Hunter, the principal of MPA Strategies, and the mayor. State and Frink, the other party in this case is a nonprofit entity borne by MPA Strategies and Ashley Hunter.

Separately, while the terms of the contract were being vigorously debated by Joseph Dickey and Ms. Burnett, Joseph sent a FOIA request on behalf of MPA to the Town on April 14th, 2021. The request asked for several things, including text and emails from Mayor Bryan Franklin relating to the plaintiff and the contract.

In late April, Joseph Dickey and David Black, who's the attorney of record for the Town, or one of them, argued back and forth over a 500-dollar-plus fee which the Town said the request would cost. At the same time, two competing newspapers in Blythewood sent their own FOIAs asking for related material and communications.

On May 7th, 2021, the Town said it would waive all FOIA charges previously quoted, and that a response by May 24th, 2021, which was the statutory deadline, was, "highly optimistic". The Town never asked for an extension, and MPA never gave one.

When the statutory deadline came, 5/24/21, Joseph Dickey emailed Mr. Black asking if the FOIA materials were en route. Mr. Black said that there were multiple councilmembers'

communications requested, and that as a result their third-party IT vendor was delayed. Recall, though, that the only person whose communications were requested by the plaintiff's FOIA was the mayor, Mr. Franklin.

Joseph Dickey, in response, asked for a time frame. Mr. Black, in response, said that he couldn't say one. The FOIA statute specifically says that the deadline is 35 days in the case of documents that are 2 years or older, these are younger than 2 years, so the deadline was 30 calendar days, which was May 24th absent -- and the statute explicitly says "absent an extension by written mutual agreement of the public body and the requesting party at issue".

The Town provided a FOIA response to one of the two competing newspapers: the newspaper that supported the mayor on or before June 15th. We know that as a result of a news article that's in the record. But it still didn't provide one to the plaintiff, even though the plaintiff's request came in before that newspaper.

This FOIA lawsuit followed on June 28th, 2021, filed as a simple nonjury FOIA lawsuit to compel the production of documents and seek attorney's fees under the FOIA statute for the failure to produce documents.

This was the state of affairs when I became involved in this case. This case had been filed in June of 2021. Joseph Dickey was the plaintiff's lawyer until January of 2023 when

he went to work at a defense firm. Ryan Hicks and I then took on the case.

At that point, a year and a half in, no depositions have been taken, written discovery had been performed, a Rule 12 motion had been argued, and the case had been mediated to an impasse. I immediately observed that this case was a mess.

With seven competing counterclaims against a nonjury FOIA claim, my first order of business was to file this motion of strike, which is the first motion up in this case. I then sought to take depositions while this was pending.

The counterclaims, Your Honor, are legally deficient for very straightforward reasons, and this case desperately needs to be cleaned up, or if not cleaned up it needs to get moving.

So I will confine my argument solely at this point to the motion to strike, and then I'll address the discovery motion in response to the defense's arguments, and then the motion for summary judgment at the end. I will not give you a big background description with respect to the other motions unless Your Honor has questions.

So on the motion to strike, this is a motion to strike the counterclaims, or alternatively, the jury demand. The counterclaims and third-party claims do not arise from the FOIA request that caused this FOIA lawsuit. The third parties brought into this case, Ashley Hunter and State and Frink are not necessary parties to decide the FOIA claim. This motion

is made not under Rule 12, but under Rules 13 and 14. If not granted, Your Honor, then the jury demands should be stricken.

First, Rule 14. The defendant in their brief does not contest that this would not be appropriate to join State and Frink or Ashley Hunter under a third-party practice. So I think I can jump over that unless I'm mistaken. We'll address it in reply. They instead contend that they're proper parties under Rule 13, and then Rule 19 and 20 by joinder thereby. So I will skip Rule 14, which would simply say they can't be brought in unless they're being brought in for purposes of indemnity.

That leaves all of these parties, only in this case, as potential counterdefendants. The counterclaims are not permissible or compulsory, so they should be stricken under Rule 13.

First, they're not compulsory, because this action has filed a case to enforce a FOIA request turns on different issues of fact and law than the counterclaims, which are premised on an allegation by the defendant that MPA Strategies defrauded it to win a contract. Put simply, a case that says you owe me documents under the statute, and you did not give me the documents, does not turn on the same facts and issues as the defendant's various tort claims.

Second, and I'll admit this is a closer call, but I still do not believe these are permissive. Second, they are not

permissive because the subject matter underlying the claim -- and that's the key word, the claim, not the background, but the claim is what the rule says -- the subject matter of the opposing party's claim does not arise out of the same transaction or occurrence, here being a FOIA request.

I think -- and this is the argument I believe the defense will make -- that the subject matter of the background would make it a permissive counterclaim, but the rule, Rule 13(b), says the subject matter, it has to be the subject matter of the opposing party's claim.

I'm not asking you under this motion to dismiss their claims with prejudice. I'm simply asking you to strike their claims. And it would be without prejudice. They're all still within the statute of limitations, and what that would do thereby is clean up this case, which is supposed to be a simple FOIA case.

FOIA cases are supposed to be heard. Now, we know they rarely are, because -- unless a litigant says, hey, we need to be heard, but under the statute, they're supposed to be heard within six months. We're two years and two months. That's 26 months in. And these counterclaims never should have been filed in response to a FOIA claim. The Court is empowered by the rules to strike them. The defendant is not prejudiced by them being stricken, other than they'll have to turn around and refile them. We'd be in the same position we are now in

that action with no depositions having occurred. And it's not like we're going to have to redo the discovery, the written discovery.

Alternatively, if this Court finds that these counterclaims are permissive, then under black letter law the jury demand should be stricken because they filed jury counterclaims in response to a nonjury claim. They acknowledge this, but contend that they're compulsory.

Your Honor, as we talked about earlier, while I think an argument could be made that these are permissive, these are certainly not compulsory, because the claims do not turn -- do not arise out of the same transaction or occurrence that is the subject matter of the party's claim. Therefore, by making this a mess, they have to live with the consequences, and the consequences is they don't get to make it a mess in front of a jury where you have a simple FOIA claim decided by the judge and then seven counts -- seven wide ranging counterclaims.

So my relief in summary is that you strike the counterclaims and thereby the counterdefendants, under Rule 13 not 14. I think there's no argument at this point from either side that these are brought in as third-party practice. So under Rule 13, you strike them because they're neither permissive or compulsory. If Your Honor does find they're permissive, then you strike their jury demand.

I know that was long-winded, but this is a mess of a

case, and I apologize for being a little wordy. If Your Honor has any questions, I'm happy to answer them.

THE COURT: Response?

MS. AUSTIN: Thank you, Your Honor. May it please the Court, Alexandra Austin for the defendant, Town of Blythewood, attorney with Maynard Nexsen, and I'm joined with my co-counsel, David Black. And we also have Angela O'Neal, who's the Director of Nextra Solutions, joining. Nextra Solutions as an ediscovering computer forensics vendor. We do not necessarily anticipate Ms. O'Neal speaking, but because there's spoilation issues that are central to these motions related to electronic data, she's here to the extent that there are any technical or forensics-related questions that I am unable to answer with the Court's permission, of course.

And if I may address one more preliminary matter applicable to all the motions, we would renew our request to strike the memoranda that were submitted and were untimely by the plaintiff and counterdefendant. The directive of the Court was for all memoranda related to these motions to be submitted to the Court by August 2nd. The memoranda that the plaintiffs and counterdefendant submitted were not until August 5th and August 7th, respectively. And so we would like to put that on the record, our request to strike those untimely memoranda.

If I may, I will also, while still incorporating

arguments in our memoranda so that we don't beat any of these points to death, I do think that there are -- is some background relevant to all of these motions and with respect to the motion to strike in particular, that would be helpful. And again, as Mr. Porter said, I will not go through the extended background for all the motions.

This case is related to a contract that was entered into between the plaintiff, MPA Strategy, and the Town pursuant to an RFP, request for production, and subsequent contract negotiations. The RFP pertained to marketing services for the Town, including for certain Town event destinations.

The Town wanted to utilize its thirty percent state aid tax funds for this purpose. They're funded through the collection of the accommodations tax, and it requires that thirty percent of the funds be used for advertising and tourism.

In order for an organization to be eligible to receive thirty percent state aid tax funds, it must be organized as a nonprofit or it must be a destination marketing organization such as a chamber of commerce or a convention center.

MPA was informed very early on that the Town wanted to be able to utilize its thirty percent state aid tax funds. The Town received several bids to the RFP, one of which was MPA Strategies.

On February 22nd, 2021, the Town voted to begin

negotiations with Ms. Hunter, who is the sole member of her company, MPA. The vote to begin negotiations with Ms. Hunter and with her company, MPA, was based on the representation of Ms. Hunter's then attorney at the time, Joseph Dickey, on February 22nd, 2021, the day of that vote, that MPA would obtain 501(c)(3) tax exempt status through MPA and Ms. Hunter's wholly-owned subsidiary, State and Frink Foundation.

That same day, Ms. Hunter represented, at a Town council meeting, that her firm had acquired 501(c)(3) status and was eligible to receive the Town's thirty percent state aid tax funds. And those documents are -- have been submitted to the court as exhibits.

Those representations turned out to be false, and MPA knew them to be false and the Town relied on them and entering into a contract with MPA in April of 2021.

At that point, the Town had begun to have real concerns about several other things as well. Among other things, it became apparent that MPA had a conflict of interest that had not been disclosed, because it owned a subsidiary entity, State & Frink, that was also an event venue that they could directly compete with the purpose for which she was contracted here. It also became apparent that Ms. Hunter was trying to change material terms that were negotiated by the parties.

It also became apparent that the -- that Ms. Hunter may have agreed with Councilman Brock, a Town council member, to

provide campaign services in exchange for helping her secure this contract with the Town.

Ms. Hunter threatened litigation if the contract didn't move forward and filed a FOIA request on April 15th, 2021, requesting all documents and communications related to the RFP, the RFP process, the contracts, the contract negotiation, communications by the mayor regarding MPA or Ms. Hunter, and documents underlying and related to Town council meetings.

At one point, it's our understanding Ms. Hunter told the Town she would withdraw the FOIA if they paid her 75,000 dollars.

The Town's contract with MPA was based on intimidation, threats, fraud, and misrepresentations. Ms. Hunter's misrepresentations continued after entering into the contract. She continued to represent to the Town that she was eligible to receive the funds. She said this in a text message to the Town on May 7th, 2021 that she was eligible to receive the Town's thirty percent state aid tax funds. That has also been filed and is of record for the Court.

The Town made payment of those funds to her based on those misrepresentations. Ms. Hunter subsequently refused to give the Town documentation showing its qualified tax exempt status for a routine audit of the Town's nonprofit contracts. The fraud and misrepresentations came to light when the Town was trying to respond to MPA's FOIA requests. The Town

consulted with an ethics expert who gave the opinion that the arrangement between a Town council member and Ms. Hunter for campaign services in exchange for helping to secure a contract is a violation of fiduciary duty because it uses Town funds for the benefit of the public for a councilmember's private benefit.

The Town was also advised that it needed to recover the funds that were paid to Ms. Hunter because she was not eligible to receive them. The Town's then attorney, Joseph -- the Town and MPA's then attorney, Joseph Dickey, went back and forth extensively on the FOIA request.

Mr. Black, my co-counsel for the Town, informed Mr. Dickey that the Town had also received three or four additional FOIA requests from the County Chronicle and The Voice, several of which requested substantially similar documents. There was one that contained a much simpler request that basically asked for contracts between MPA and the Town. The Town was able to respond to that FOIA request fairly easily.

The other FOIA request also contained very similar requests to the FOIA requests that the Town got from MPA. And in addition to all communications by the mayor, there were also of all Town councilmembers.

The Town went to a forensics consultant to pull data from the councilmembers' phones. It was going to be very

expensive. The Town negotiated -- I mean thousands of dollars. The Town negotiated a reduced price with the forensics consultant if it did the pull of all the phones together. However, there were two councilmembers: Councilman Brock and Councilman Sloan Griffin, who have refused to turn over their phones for the data pull and have to this date.

This was extensively communicated by counsel for the Town to counsel for MPA. And counsel for MPA said we will let you know before we file any lawsuit. They did not. They proceeded to file a complaint alleging that the Town had failed to comply with the FOIA request.

Approximately a week later, the Town produced all responsive documents that it had, even without having all councilmembers devices. MPA's complaint that it alleges it's a straightforward FOIA action contains factual allegations about the RFP, the RFP process, the contract negotiations, and the contract. These are the same transactions and occurrences that give rise to the Town's counterclaims.

The Town's counterclaims were discovered in responding to the FOIA. And because of the expert opinions that the Town received regarding the need to recover the funds paid under the contract, the Town was required to file its counterclaims.

With respect to the motion to strike specifically, the Court should deny the motion for several reasons, any one of which we believe is sufficient.

The first is that the court has already ruled on these exact same arguments. Back in August of 2021, MPA and the counterdefendant filed a motion to dismiss for judgment on the pleadings or in the alternative for summary judgment. They argued there that the counterclaims failed because they were neither compulsory nor permissive.

Judge Keesley held a hearing on the motion and denied the motion on July 14th, 2022, and held that the Town had sufficiently asserted the causes of action alleged in its counterclaims.

The one caveat was that it did recognize that punitive damages is not a separate cause of action. It is a remedy. But Judge Keesley held that the Town had sufficiently asserted the causes of action alleged in its counterclaims and denied the motion. They raise the exact same argument here. And so for those very same reasons, the Court should deny their motion now.

Additionally, the Court should deny the motion to strike now because it is not timely, and it has been waived. This motion to strike is brought 18 months after the defendants filed their counterclaims. The courts have attempted to mediate the case. They have engaged in discovery on the counterclaims for 18 months and have had to resort to extensive motion practice to obtain discovery on the counterclaims.

Rule 12(f) regarding striking matters from pleading requires that it be filed prior to answering. Here, we are 18 months later. The plaintiff and counterdefendant do not allege that they are prejudiced by the Court hearing these claims -- that the claim and the counterclaim together. But to the contrary, the Town will be prejudiced if they are -- if its counterclaims are dismissed because they are crucial to the understanding of the FOIA, the Town's defenses to the FOIA, and to a finder of fact understanding the issues to resolve the FOIA.

The counterclaims are compulsory because they arise from the same transaction or occurrence. The complaint, which they allege is a straightforward FOIA action, goes through these same facts. These same facts will be -- will require discovery and will have to be resolved with respect to both their FOIA claim and the counterclaims. They are logically related, and they're based on these same facts.

But what they claim is a straightforward FOIA request is really just a pretense for discovery that they -- that without the ability for the Town to raise its own arguments with respect to the fraudulent circumstances, giving rise to the contract that it's seeking FOIA documents of. This is not a straightforward FOIA action.

They have -- the plaintiff and counterdefendants have noticed the deposition of Shannon Burnett, who is also an

attorney for the Town and represents the Town in this action and in other matters. And then we will get into that. That is a subject of a motion to quash, which we'll address later. But in opposing the notice of her deposition and the taking of her deposition, the Town asks you haven't identified any topics. What is it that you're trying to depose her on? And again, that will be addressed in more detail later. But they said -- they responded that they are going to ask about the -- Ms. Burnett's -- Attorney Burnett's involvement in receiving the -- and involvement in receiving and negotiating the contract. And that they may -- and that is a quote -- that they may ask things related to the FOIA. If this was a straightforward FOIA action, they would not be requiring discovery on these matters.

So that the counterclaims are compulsory. For all the reasons we've stated and those in our memoranda, they are at the very least permissive.

With respect to the counterdefendant and specifically that they are saying that Ms. Hunter and her -- the wholly-owned subsidiary State and Frink Foundation are not proper parties. However, they are moving under a rule that is -- that applies when a defendant is trying to shift its liability to the plaintiff to another party. That's not what we're doing here. Here, we are saying that the interests of the parties are so aligned that they are required parties for

resolution of the counterclaims.

And finally, on the motion to strike, they are not entitled to strike. The jury trial and the Court should deny their motion to strike the jury trial, because as discussed previously, the counterclaims are legal and compulsory.

In an equitable action, a counterclaimant is entitled to a jury trial on any counterclaims that are legal and compulsory. Here, all of the claims are legal and compulsory with the exception of the punitive damages and any remedial action. But all causes of action and laid out in our in our memoranda are legal and compulsory. And so their motion to strike the jury trial should be denied as well.

THE COURT: Where is the order of Judge Keesley?

MR. PORTER: The order of Judge -- was that question for Ms. Austin? I don't want to interject.

THE COURT: Anyone who knows the answer.

MR. PORTER: There was a Form 4 order dated 6/27/21. If Your Honor -- if I have share screen, I can share it on the computer screen for the Court. Let's see.

MR. BLACK: Your Honor, David Black, if I may, while he's trying to find that, we -- and this dovetails into the next motions. But during that hearing is when we put onto the record opposing counsel is Joseph Dickey, and Eric Bland at that point for Joseph Dickey, explaining that they would comply with our discovery. It's not in the Form 4 order that

resolves it, but that is in all the transcripts.

Additionally, in terms of bringing this as a counterclaim related to the FOIA, the Town sought out advice because of the magnitude of what MPA had done, those misrepresentations, and even sticking a fee that's, frankly, unconscionable into this contract. The Town knowing that it would be unusual to have a counterclaim within a FOIA, sought out expert advice of Professor John Freeman, who advised us to bring it within the same action as it really deals with the same factual situation.

So the Town has treated this case very seriously. Any delay is due, frankly, to MPA, their requests for paternity leave, and their other requests. And then only trying to take the deposition of an attorney that, frankly, under their own analysis, they've already waived.

Joseph Dickey and Eric Bland specifically took the position previously as attorneys for MPA that depositions of attorneys were not proper. They've already waived that argument, Your Honor.

MR. PORTER: Your Honor, that's a greatest mischaracterization of everything that's happened, but we'll address that when it comes.

The order is before you. It did not address the motion to strike under Rule 13. And the motion to strike wasn't made under Rule 13. There was a Rule 12(f) motion to strike Joseph

Dickey as a witness, both from the pleadings and from the defense's witness list. There is in the Rule 12(b)(6) motion by Mr. Dickey, full disclosure, a statement that these are permissive or compulsory counterclaims and thus aren't proper. The Court never rules on that. So this is a two-page Form 4 order. If you'd like me to turn to page 1, I can. Let me know.

THE COURT: And I pulled it up in the public index.

MR. PORTER: So hopefully that answers your question, and I'm happy to answer any more. And if I may briefly reply to her argument, whenever you're ready.

(Pause.)

THE COURT: Yes, sir.

MR. PORTER: Your Honor. They went where I expected they would go with this argument that because there are background allegations about the contract, that allows them to bring these counterclaims in this action. That's not what the rules say.

So compulsory counterclaim specifically says that is the subject matter of the opposing party's claim. Permissive counterclaim, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. This cannot be compulsory because it does not arise out of the subject matter of the FOIA request, or the claim for a FOIA violation, better said. The Court has not ruled on

these arguments. The Form 4 order is before the Court. And further, this is a motion under Rule 13. It's not a motion under Rule 12. So it hasn't been filed yet.

They mention a Rule 12(f) motion to strike being waived. Again, this isn't a Rule 12(f) motion. Rule 12(f) applies to scandalous or scurrilous allegations.

This argument that FOIA is a pretense for discovery, well, that's what the statute says. The statute says if you're the government, you have to play by certain rules that other people don't, which is you have to show your -- certain documents to the people. And that seems to be a misconception that we've run into in this case, that that the government doesn't understand that it has to behave a little differently under law than others.

The idea of this being a pretense for discovery and us wanting to take depositions, the reason for these depositions is all these counterclaims. And counsel said, you haven't -- we haven't said we're prejudiced. Well, we're definitely prejudiced by this. Can you imagine us having to go to trial, a trial before the Court in equity on this FOIA request as a -- as the plaintiff on the plaintiff side of the V? So we're sitting where we have the burden of proof, we put on our claim. Our claim takes ten minutes because it's the request were due this day, they didn't send them in, they didn't agree to an extension. Now, for the next three days, we're going to

hear from the defendant who they get to hear their claims in front of the jury, and that's the only claim you, the jury, are going to decide.

We're going to be grossly prejudiced both by leaving these in, because it's turned this FOIA claim that should have been heard by the Court at the six-month mark under the statute into a two year and two month plus long proceeding. And they're arguing to you that it's compulsory, which would mean it gets heard before the jury.

So respectfully, Your Honor, I don't think it's permissive or compulsory. If it's either, it's permissive, and that means they don't get to make it any more of a mess than it already is, and their jury demand must be stricken under black letter law. Thank you.

MS. AUSTIN: If I may briefly respond?

THE COURT: Yes.

MS. AUSTIN: So simply repackaging this motion as a motion to strike does not change the nature of the motion. A motion to strike is in the nature of a motion to dismiss. The permissive and compulsory argument was raised in their briefing on that motion that the court ruled on, and the court determined that the -- Judge Keesley determined that the Town had stated sufficiently causes of action for its counterclaims.

And I would argue that really the issue here is that this

case has gone on. This motion is 18 months after these counterclaims were brought. There's been attempted mediation, there's been discovery, there's been significant motions practice. And so to be addressing this issue when they're not even alleging its prejudice, seems to me like an exorbitant waste of resources, of the parties and of the Court.

In other areas in their briefing, the plaintiff and counterdefendant have said that, oh, these counterclaims are just a delay tactic, and the Court should just get rid of them so that they can proceed to take depositions in this straightforward FOIA action.

If it is a straightforward FOIA action, why are there depositions needed? It is just patently false to say that this is a straightforward FOIA action. And all of the things that we are talking about, these factual issues, the transactions and occurrences at issue are alleged in their FOIA action.

So by waiting until this time to bring this motion when they will not be prejudiced, the Court has discretion. If they think the jury will be confused on something as an equitable issue, the Court will have discretion at that time to have those tried separately. And they have not alleged any other prejudice to the contrary. The Town would be prejudiced by losing 18 months of a case, potentially waiving counterclaims that are compulsory and that it has been advised

and received an expert opinion that it was required to bring in this action and that raised all the same factual issues that are related to and that are the same facts, the same transactions and occurrences that are at issue in the FOIA action however they've designated it. Thank you, Your Honor.

THE COURT: All right. What's the next motion? I'll take that under advisement.

MS. AUSTIN: The next motion in order when they're filed is the three motions filed by the Town of Blythewood. All three are discovery motions. I think that two of them can really be addressed together, which are the renewed motion to compel and for sanctions and rule to show cause. And then the third being the motion to quash or for a protective order.

THE COURT: Okay.

MS. AUSTIN: So I'll address the two motions together: the renewed motion to compel and for sanctions and rule the show cause first.

Those motions relate to discovery requests that were served by the Town on MPA two years ago, in August of 2021. MPA failed to produce anything: written discovery or documents requiring the Town to file a motion to compel in February of 2022.

At the hearing that we've discussed in front of Judge Keesley, that was one of the motions that was before the Court. However, before any argument could be raised, opposing

counsel said -- interjected and said if I may, we have no issue turning over this responsive discovery. We'll turn over the documents and information. And Mr. Black, who was present for the Town at the hearing and argued at the hearing, said if they agree to turn over all nonprivileged discovery, that would resolve the motion.

The Court gave MPA 20 days to cure its discovery deficiencies. That would be April 2nd, 2022. And when the Court entered its Form 4 order, the parties had asked that the Court wait to enter -- to make its ruling pending an attempted mediation. And by the time that the Court entered its order and it indicated that that motion had been resolved at the hearing, which is true. However, the Court was unaware that MPA had subsequently failed to cure the discovery deficiencies that it had represented and agreed at the hearing that it would resolve.

On April 5th, 2022, in a 3,200-page PDF document, only about 200 of those documents are nonduplicative, meaning that they were produced by some other party on FOIA. The party asked for an update on curing the deficient discovery and regarding a data pull from Ms. Hunter's phone.

Opposing counsel is Attorney Dickey and formed counsel for the Town that there were about 15 text messages that needed to be produced. So that is at least one item of discovery that we know have not been produced. When we asked

for an update, they told us that the -- that Ms. Hunter's phone had been given to their forensics provider in late July. Late July, is three months after the Court had ordered them to cure their deficient discovery. And the three months is sort of a crucial date, which will become apparent in a minute, I think.

The Town sent another deficiency letter in November of 2022. It ultimately had to renew its motion to compel in February of 2023. The Town has repeatedly communicated the remaining deficiencies to now new counsel for MPA, who has repeatedly indicated that they would cure them. There were sort of four categories -- main categories of deficient discovery.

One was that we'd gotten no written responses, incomplete document production, failure to turn over Ms. Hunter's phone to the Town's forensic consultant, which their attorney, Attorney Dickey, had agreed it would do, and identification of MPA's forensics provider.

In March of 2023, counsel -- new counsel for MPA provided written discovery responses that it claimed should have been produced back in April of 2022 but weren't produced. So we reviewed the written discovery and immediately got back and said, yes, we're looking at this. It does not resolve discovery deficiencies. There's issues with this written discovery. It certainly did not resolve any issues on

unrelated things like document production.

In July, counsel for MPA indicated it was addressing the deficiencies, but nothing further has been produced. They made minimal productions, I believe, yesterday, the day before the hearing, which do not resolve the discovery deficiencies.

Counsel for MPA has acknowledged in its briefing to the Court, which was again untimely, but that it's acknowledged that certain of the objections are improper, that they shouldn't be made, that certain discovery will be produced, and that it's working on it. This is discovery that was served two years ago.

And importantly, we are asking for sanctions not only for the Town's deficient discovery and willful disobedience with its representations to the Court, the agreement with the Town and the Court's order that it cure its deficient discovery within 20 days so it's on the record at the hearing, but also for spoilation of evidence.

And going back to this issue about the text messages from Ms. Hunter's phone and that her phone was submitted in late July, again, three months after the Court had ordered the Court (sic) to comply, the phone was submitted to Blanco IT, and when counsel for the Town followed up with counsel for MPA to say, hey, what's the status, and do we have your permission to reach out to this forensics provider to understand what format they're producing these -- the electronic data in? And

when we reached out, we were informed that they had no pending request or order to pull anything from any device or cell phone of Ms. Hunter. And we requested the name of the person that she had spoken with. We got the name. We followed up. And this is -- we have transcripts of these voice mail messages that have been submitted as evidence that are from MPA's forensics provider that said the text messages on the settings on Ms. Hunter's phone were set to delete every three months, and that during this time nothing was backed up or saved to the cloud.

Now, the Town had -- and when MPA had first served its FOIA request, the Town had issued a litigation hold letter specifically to Ms. Hunter and specifically saying to preserve this type of evidence, and she failed to do that. She failed to take any reasonable steps whatsoever.

And in their briefing that, again, was filed late, it seems as if they're saying, well, those were the retention policies that they had in place, that's her solely owned company. But once a litigant has or a party has notice of the potential for litigation, much, much less having received a preservation document hold letter specifically referencing this type of evidence, she's precluded from saying I relied on whatever the document retention policies were. She had to take some affirmative steps to reasonably ensure that this evidence was preserved, and she has failed to do that.

As a result, the Town has not -- we've not gotten any of MPA's -- Ms. Hunter's text messages. And while we've gotten some email correspondence, we do not believe that we have gotten everything. These documents are directly relevant. I believe it's at best coincidental that Ms. Hunter brought her phone to do -- to purportedly do a data pull three months after the Court ordered her to comply when conveniently her text messages were set up to delete every three months. This has -- it prejudiced the Town. These discovery deficiencies and the spoliation issue have prevented things from moving forward in this case.

We would like to proceed with appropriate depositions, and we'll discuss the motion to quash on the specific depositions in a minute. But we would have to hold these depositions open because we don't have all of the discovery. We've been told now after two years that they're working on it, agreeing that certain things should be produced that they agreed to produce in the first place. And then this spoliation issue that we believe is dispositive of these other issues, given that it's relevant evidence; it is relevant to the party's claims and defenses. She was on notice to preserve it, and she failed to take any steps to do so.

And so for that reason, we've renewed our motion to compel, and we also ask for sanctions for the discovery violations, for the and for appropriate sanctions for

spoliation of evidence which, as Your Honor knows the Court has wide discretion to determine what is appropriate, including a negative inference for the spoliation. Or in the alternative, a rule to show cause for contempt for violation of the court's order and its agreement on record before the Court that it would make this production.

THE COURT: Mr. Porter?

MR. PORTER: Thank you, Your Honor.

There's been two statements that we've made on timely filings with respect to memoranda. So let me address that.

Nothing's untimely under the Rules of Civil Procedure or any statute or other rule. Now, the clerk's notice to the parties did say please file your memoranda by last Wednesday, and a back and forth that -- I am not the type who likes to have back and forth with counsel, with Your Honor involved, but Your Honor was a party because I felt I needed to address it.

I laid out the good cause on why we just didn't see it on that memorandum. Largely, I'm freshly back from paternity leave. My COO has just left on maternity leave, and my paralegal is covering for my COO. So it was a mistake. It's not characteristic, but the memoranda were filed one Saturday and one Monday in advance of this hearing. All the motions are ready to be heard and ripe under the rules. The MSJ, for instance, had attachments when it was filed well in advance of

ten days in advance of the hearing. So it's all timely under the Rules. But that was a mistake on my part. I don't know of any law or authority which would say these must be stricken from the record. But I do acknowledge what happened and I own it completely and it's not my way. All right.

So this motion to compel, it asks for three things. It's a motion to compel production. It's a motion for sanctions based on presumably the actions of prior counsel. And it's a motion for some relief. With respect to spoliation, I view the facts quite a bit differently, and I don't think there's anything to compel.

And in my memo, I put pretty much every relevant email of counsel, because I think it's pretty compelling to look at the timeline. The big question is why now? Why is this motion over discovery, over things that happened in 2021 and 2022 being filed in February of 2023? And I think when the Court looks at that question, the real motive behind this motion becomes apparent.

So first and foremost, all known discoverable documents within our possession have been produced. The defendant in a letter that's incorporated fully in our memorandum is expressly using this motion as an excuse to avoid participating in properly noticed depositions.

Now, Mr. Black said earlier that we were only seeking to depose Ms. Burnett. That is untrue. Our notice included the

mayor, as well, and a councilmember. Yet they also use these discovery motions to avoid their depositions, where there's presumably no attorney-client privilege argument.

The defendant's 26-page memorandum can be pared down to the following three ask: their motion to compel what they call full production, a request to hold the plaintiff in contempt or sanction her for spoliation and/or a violation of that 2022 Form order, which they say mandated full production.

On the first issue, "full production", the plaintiff, to the best of her knowledge, and that of me has produced everything there is to produce. That means there is nothing to compel us to produce.

The spoliation issue relates to a preexisting text message retention policy on plaintiff's cell phone tied to her industry, her work as a public relations specialist including crisis management. There is no information in the record indicating any evidence or other discoverable material has actually been destroyed.

There's also not enough information in the record to understand the full contours of this unique issue. I ask on this particular issue, given its nature that you deny this issue without prejudice, the issue of spoliation, and that it be left to the trial judge when, as Ms. Austin pointed out, a curative instruction may be appropriate, but there's nothing we can do about that now. And so they're asking you to decide

what to do about spoliation well in advance of the trial in this case.

Finally, on the -- and this is in summary -- but the final issue is the Form 4 order, which they say says that it mandated full production. The actual Form 4 order references a comment by counsel in the hearing where they say there's an agreement. And Mr. Dickey, who was late on discovery, dealing with a very compelling personal tragedy at the time but was late on discovery said that yes, I'll produce everything that's not privileged or subject to "other objections". Those are the lines from the order that they say they violated.

The timeline here is suspect. Mr. Dickey served, according to the discover responses, these discovery responses on 4/5/2022. I was retained in January of 2023. I reached out to defense counsel to confer about my motion to strike, which you just heard before filing, as is required by Rule 11, and seeking a "lay of the land" from their perspective. I received no response. That email is in the record.

I reached out to defense counsel on 2/10/23 because I wanted to get things moving, not to depose people over our FOIA, but all these counterclaims for deposition dates for Shannon Burnett. Again, no response.

There being no response, on 2/21/23 I sent out a notice of deposition and a subpoena to defense counsel by email. Again, no response.

This motion was filed the very next day on 2/23/23, or two days later; 2/23/23. The motion was very wordy. I'm brand new to this case. I can't make heads or tails out of what they're actually asking for, what they're actually saying deficient. Frankly, from looking at the memoranda, I still can't.

So the next day I write them an email asking for a simple list of what they're saying is deficient. I tell them I don't play games in discovery. If there's something you need, I've got it, and that's my style. If I've got something, I'll give it to you. If it's good, bad, ugly, I don't care, let the cards fall where they may.

Defense counsel did respond to that email, and among other things, they said MPA produced no written responses and that they wanted responses to the first set of interrogatories and RFPs. I thought this was weird. We were almost two years in and they're saying we never produced any discovery written responses whatsoever.

I had my discovery meeting with Ms. Hunter. During that meeting, I discovered hey, written responses with a certificate of service and a letter from Joseph's paralegal certainly look like they were sent on 4/5/2022. So I send their lawyer an email saying hey, check these out. Either y'all didn't notice you got these, or prior counsel thought they had sent them and didn't. That was nearly a year ago.

No one said anything about it until we tried to take Ms. Burnett's deposition, but here we are. Let me know if this cures your problems.

There were four other issues. They said they wanted the name of the IT provider. Obviously, they have the IT provider Blanco. And I said, I think that's in the responses. But you've got it because you've called Blanco, and a few other things. And I said, you know, we'll give you the documents. We're not going to give you your cell phone. At some point they'd ask for Ms. Hunter's whole cell phone to be given to their wholly-owned IT subsidiary to look at and analyze. And we said no, but otherwise we'll give you what we got.

Ms. Wayne (phonetic) writes back -- and this is one of the defense lawyers who's not on the call -- these are the express words she says. She says there are still a number of deficiencies and, "there will be a forthcoming email outlining those deficiencies". I did tell her at the same time we'd look at what we produced and see if anything was left out. At the same time, I'm waiting for that email outlining their forthcoming deficiencies.

This hearing was scheduled on 7/19. On 7/23, we finally received the email outlining this forthcoming deficiency. So I think two weeks ago, or approximately two weeks ago. In my opinion, Your Honor, and you can't really tell the deficiencies from the memoranda, so I've put the entire email

in our motion. While they're several cited, they're not really that big of a deal.

Like for instance, the first RFP they cited deficiency is you've given us no documents talking about your damages. Well, it's a FOIA claim. What are the damages? You know, Joseph's answer was none. There are none. The damages are produce the stuff, or if you violated the statute, pay the lawyer fees if the Court so orders.

We've since gone through all those deficiencies in advance of the hearing. Now, it's the day before the hearing and the day before and the day before, which is not what I'd prefer. And if this hearing had been -- if we had received that email outlining those deficiencies 30 days ago, it would have been quicker. But we received it less than two weeks ago. We've since produced -- there were eight documents we came up with that needed to be produced, that weren't produced, that we had, all about the formation of State and Frink. That's there. There's nothing else that we have that we can produce. We need to be taking depositions.

We've produced all the documents that we have. They're expressly, by their own language, using this as a basis to avoid depositions. There's nothing for you to compel us to produce. Even if there was, those deficiencies in the 7/23 letter aren't ripe for your consideration because that's not what the motion was filed about. The motion was filed about

under a mistaken fact. And I don't know who made the mistake. Either there's a certificate of service, so presumably they got it. But I wasn't counsel. So either Joseph thought he sent it and didn't or they didn't get it, and they got it and didn't download it, which happens a lot with file share links, which is how this production was done. But the fact is everything's been compelled.

It seems like they're asking you to sanction me for conduct by Mr. -- by prior counsel from a year and a half ago. I don't think that's appropriate under Rule 11 or under the Rules. And then the issue of spoliation, I think we need a full picture of that. And the only way to get a full picture of that is to take some depositions.

The big thing on spoliation that calls me to question whether or not this is all pretextual is what they're saying has been destroyed is text messages. Okay. Well, subpoena the text messages from the other people. There's been no subpoenas sent by them throughout the life of this case that I'm aware of. In my experience, text messages require more than one person.

There may be an issue for spoliation. There may be a basis for a curative instruction. Now is not the time to decide that. I ask that you deny that request without prejudice. I ask that you deny their motion to compel with prejudice. I ask that you deny their motion for sanctions

with prejudice. I'm happy to answer any questions Your Honor has.

THE COURT: Response?

MS. AUSTIN: Thank you, Your Honor. I will try to be brief on this.

Regarding the initial issue on the timeliness of the memoranda, and while I do understand Mr. Porter, that he was saying he returned from paternity leave, there is another attorney of record in this case who would have received that notice, and certainly preparations could have -- should have been made. So we would still ask the Court to strike them as untimely.

We are not asking for sanctions against attorneys. We are asking for sanctions for the acts of the plaintiff and the counterdefendant. And while I understand that there has been a change in attorneys in this case, that doesn't change the facts and the history of what has happened in discovery.

They do not deny that the text messages, and potentially other electronic data, was destroyed. It was set to delete every three months. Was not backed up. They don't deny that fact. That information what Ms. Hunter as the one who negotiated this contract as the sole owner or member of MPA and the wholly-owned subsidiary State and Frink Foundation, the conversations that she would have had about the RFP, about the RFP process, about the contract, about the terms under

which she has acquired the contract, the circumstances of that, what she represented or understood regarding what the Town was relying upon or regarding the nonprofit, I mean, that is the core of all of these claims. And we know from other discovery that there were text messages are very frequent form of communication here. And so all of that is gone. I mean, we don't even have -- I mean, they don't deny that it's gone. But they also won't turn over her phone, which their prior attorney agreed that they would do.

First, they said, we'll have our people pull it. Oh, no, actually, there's no order for us to do a pull. And then it turns out there's no order for them to do a pull of her phone because they looked at it. And again, this is an exhibit. There's a voice mail from their forensics consultant saying, look, settings were set to delete every three months, there were no backups. They have not refuted that.

Regarding going back to some of the discovery issues, the written discovery thing that the late -- finding that late and giving it to us late is sort of a red herring, because there were many issues that were raised with discovery and importantly, document production that would not be cured by written discovery responses. We have -- we have multiple deficiency letters. And understandably, when they were trying to get caught up on the case when counsel came in, they said what's been produced? We sent them links to what they

themselves had been produced. We said we have not gotten written discovery response. They said we're not aware of any. We really tried to get them up to speed, as he says. And as Mr. Porter says -- and it was ultimately found and later produced that there were these written discovery responses dated from April of the prior year that have a certificate of service for email only with no email addresses provided. It only has a mailing address. So we don't know where they went, who received them. Nobody has anything. They don't have any record of showing that they were emailed. We don't have any record -- or at least we have not been provided one. We have no record of having received them.

Regardless, we looked at them. We said okay, these don't resolve any of the document production issues, because you haven't made any additional production. But the written discovery responses which we outlined in detail, and respectfully, Mr. Porter sort of cherry-picked some of those objections, but there are objections everywhere.

The ones that we would argue our waived because these weren't timely produced in the first instance. And at the hearing where it was -- the prior motion to compel was resolved based on Attorney Dickey's representation that we have no issue producing this stuff. Mr. Black said if they are agreeing to produce all nonprivileged document production, then that should resolve the motion.

Mr. Dickey did respond back and said yes, we will agree to produce all nonprivileged, and then it says indistinguishable or other objection, as long as it's not privileged or some other objection to be indistinguishable.

The nature of the agreement, the Court understood, and certainly the Town understood, was that they were going to produce everything that was not privileged. This was not a second opportunity that despite having failed to comply with all of this, you can assert whatever objections you want.

There are objections in the written discovery to things like, well, we don't believe that 501(c)(3) was a requirement of the RFP, so we're not going to give you anything about that. Or we object to certain documents related to financials or to corporate documents because we think that if at all, those will become relevant post-trial. It cherry-picks the objections.

They have withheld documents on the basis of objections. They've objected to providing information on the basis of objections. And then it, again, it brings us back full circle to the spoliation issue. We're not under any obligation to, despite all these discovery deficiencies, and despite the Court not having the opportunity to have heard spoliation issue, to try to move forward with depositions and hold them open, because we don't have, not only complete information, the spoliation issue goes to the core relevant information

that's not in the financial interest of any of -- the parties to have to do depositions twice.

And I made one other chicken scratch note, but it's not occurring to me. Certainly, this motion was not pretextual. The motion to -- the renewed motion to compel and for sanctions and for the rule to show cause were filed. And this also becomes relevant later on the summary judgment motion. But they were filed before the Town moved for summary judgment. This was -- this is not something that the Town is alleging at the last minute saying, oh, wait, there's spoliated evidence, we filed this motion, which again, is having to be a renewed motion because we've already tried to deal with these issues for now two years, that was filed before that ever became something they could claim was a pretextual -- was a pretextual motive.

And it certainly -- it's sort of ridiculous that the argument is maybe there spoliation, but let's wait to decide that and what to do with it, but in the meantime, grant the summary judgment. I mean, again, we'll get to summary judgment in a moment, but that's essentially what they're arguing.

And it's -- they have not denied that this is -- that they received this document preservation letter. They have not denied that no actions were taken to reasonably preserve any evidence or prevent its destruction. They have not denied

that that information was deleted. They will not provide her cell phone so that we can see if it's recoverable, even though their prior attorney agreed that they would. And now they're saying grant us summary judgment. That sole issue and their admission on that issue and the exhibit that we have of the transcript of the voice mail saying the settings were set to delete every three months, that in and of itself should warrant appropriate recourse to prevent prejudice to the Town. And it's also relevant to the summary judgment and is sufficient to deny summary judgment. But again, we'll address that in a moment. Thank you, Your Honor.

MR. BLACK: Your Honor, if I could be heard very briefly, since Mr. Porter keeps talking about my conversations with Mr. Dickey?

THE COURT: Yes, sir.

MR. BLACK: Thank you, Your Honor.

During that past hearing, we did talk briefly about this issue of preservation and that's what this is. And MPA was on notice one hundred percent through the preservation letter. And Joseph Dickey then sent one to us saying you have to preserve everything. And that's what this is about. And I think Your Honor can see through this.

At 10,000 feet, this is a case where the Town relied on the vendor, MPA, to do certain work. That vendor made misrepresentations, some of which are fraudulent, and the Town

relied on that.

The Town also is aware of communications between Ms. Dickey and -- between Ms. Hunter and others that are relevant to this. That's the reason that we sent the preservation letter. It is unbelievable that an officer of this Court will come before the Court and say oh, we don't have to do that. This is a hundred percent preservation. There's black letter law on that, that when you receive a preservation letter, you adopt a new policy. And I think Your Honor can see through this.

Number one, counsel for MPA now is saying Your Honor's rules don't matter, just the circuit court rules matter. The Rules of Professional -- the Rules of Professional Conduct and the Model Rules Of Procedure, and that they don't have to pay attention to Your Honor's directive. They can file their memo whenever you want, Your Honor.

And secondly, now they say they get to ignore a preservation demand. And there's sound South Carolina law on you don't get to ignore a preservation demand. We put in the record, which is uncontested today, they have no affidavits. We have their own voice mail transcription from their vendor saying Ms. Hunter doesn't have this.

First of all, they said they didn't -- they hadn't talked to her. Secondly, they said she didn't preserve. And Your Honor, that's why we're entitled to curative instruction.

That's why she should be sanctioned. And that's what simplifies this case. A case that we look forward to trying and moving forward on.

And Your Honor, in our briefs, we drew attention to this, and there's nothing from MPA to counter it. And it's -- our courts there's a duty to preserve material evidence arises not only during litigation. So right now, presently --which, by the way, Your Honor, they're still not preserving evidence, she hasn't adopted a new policy, but also extends to that period before the litigation, when a party has reasonably -- reasonably should know that the evidence may be relevant to the anticipated litigation. That's Sylvestri v. General Motors Corporation, 271. That's a Fourth Circuit 2001 case.

They go further to say, "This duty may arise by way of communication between the parties here", which it did, "such as sending a preservation letter giving actual or constructive notice of reasonable, imminent litigation". We did that, Your Honor. And in the face of that, what Ashley Hunter and what MPA did was you know what; we don't have to do that. We think we're entitled under the rules of South Carolina, we can keep destroying evidence. It's unconscionable that they would now say oh, we get to destroy evidence, you don't have anything to rely on, and we're entitled to summary judgment, Your Honor. There's not a case in the nation that would allow a party to destroy evidence and then move for summary judgment. That's

why we have the case law out there that we get a cure of instruction at these parties that disobey court rules, they should be sanctioned. They should have to pay for our fees. Your Honor.

The fact that we had to file a motion to compel after Mr. Dickey in binding MPA said he would turn these documents over of which Mr. Porter has represented that they already turned everything over, and that was conveniently made a supplement right before this hearing, Your Honor. We're entitled to have our fees reimbursed for this unnecessary motion, and frankly disrespectful of this Court. Thank you.

THE COURT: All right. What's the next motion?

MS. AUSTIN: Think you, Your Honor. The next motion is also the Town of Blythewood's motion to quash, or in the alternative for a protective order. It pertains to a subpoena for the deposition of attorney Shannon Burnett. She is attorney for the Town. She represents the Town in this matter and in other matters. And we are moving under Rule 26 and Rule 45.

Just as an initial matter, we don't believe that the subpoena was properly served. A subpoena can be served in the same way that a -- that -- that a summons and complaint can be served. It was sent by certified mail to her business address. It was not restricted to her, and she did not accept service.

That being said, service issues aside, I do think that we would ask the Court to consider this issue because we've gotten two subpoenas for her deposition, both of which we've moved to quash, and the second one was served while this motion to quash is pending. So we're moving to quash and for protective order of both of those subpoenas for her deposition.

And again, Ms. Burnett is an attorney for the Town. This is certainly going to encroach on attorney-client privilege matters. There has been -- we've requested topics. You said you haven't told us any topics, and we've gotten a very general statement about we want to depose Ms. Burnett about nonprivileged matters related to her role in the contract negotiations. But they've already told the Court in their briefing, they've already said what their -- what her role was, was that the Town voted and the vote that we talked about produced the RFP to allow negotiation of the contract.

There were three individuals designated on behalf of the Town, one of whom was Ms. Burnett, the Town's attorney, to negotiate the contract pursuant to the RFP with MPA and Ms. Hunter. So it's not -- her deposition is not necessary, one, because if they're really restricting it as they say to nonprivileged matters related to her role, they've already said what her role was.

It's also not necessary, because by their own posts they

put in their briefing, she was only one of three Town individuals that was designated to negotiate this contract. So there are other avenues for them to pursue any necessary discovery on that issue.

And in addition, they said that they wanted to depose her about nonprivileged matters about her role in receiving and reviewing the contract and maybe about the FOIA. So again, it really shows what the issues in this case are.

Again, other avenues exist. It is not necessary. They have not shown that the evidence that they're seeking is crucial to their case or to their defenses.

No depositions have been taken in this case. Certainly -- well, if her deposition were allowed to proceed, it certainly should not be the first deposition or on the same day with all the first depositions, because we can't possibly know if her testimony is necessary or unavailable from other avenues. We know whether depositions have been taken.

If anything, it should be as a last resort, properly tailored on very narrow issues that has been decided cannot be obtained elsewhere, where we're not going to potentially infringe on attorney-client privilege matters, and likely have to seek -- have objections and motion practice and involvement from the Court when the questioning encroaches, which undoubtedly it will, given the nature of the subject matter and to attorney-client privilege matters. So if anything, her

deposition is premature.

The Court again, in the Court's prior order, similar issues were raised and addressed at the hearing, which I believe is instructive and potentially dispositive of this issue here, that the Town had in its discovery, had a previously designated Attorney Dickey, who you've heard mentioned several times here, as a witness. Attorney Dickey is mentioned in the counterclaims, and we've mentioned him as a witness.

The plaintiff and counterdefendant move to strike Attorney Dickey as a witness, and felt so strongly about it that they said that they hired another attorney to come in to make the argument and to say that just because you participated in contract negotiations of the underlying contract does not make him a witness and it should not be allowed, and it should never be allowed in the bar of this state, and they should be bound by that prior legal position that they took in this case.

And the Court ruled on that motion, that it denied the motion to strike Attorney Dickey as a witness, because he said that more discovery was needed to make the determination as to whether or not he might be an appropriate witness. And that is instructive here. If anything, this motion should be quashed or a protective order should be issued that the subpoena -- pardon; the subpoena, not the motion -- should be

quashed or a protective order should be issued because it is premature and plaintiff and counterdefendant have identified or demonstrated none of the requisite elements that courts look to in determining whether or not the presumption against deposing attorneys to negate the high standard that they have to overcome to show that it is necessary, that there are no other avenues and it is crucial to their case. They have showed none of those three elements. Thank you, Your Honor.

THE COURT: Response?

MR. PORTER: Thank you, Your Honor.

First off, Ms. Burnett is not an attorney of record in this case.

Second off, if I may briefly share screen, the statement that the subpoena was served the second time via certified mail unrestricted is false. This was filed into the court record yesterday, but it was, obviously, served in person at Ms. Burnett's office with her paralegal who affirmatively affirmed that she could accept on behalf of Ms. Burnett. So the technical defense they are raising is based on a falsehood.

Now, the first subpoena did have a technical issue. I told their counsel, look, I'm not going to fight you on that. And you've got the emails in the discovery motion. I said, I'm going to reserve it unless you'll accept service, which is what counsel cooperatively working together typically would

do. I even said, accept service and retain your privilege defenses. I got some response about dates, but no ultimate responses on that request and no ultimate responses on dates. And I had to just again, serve on my own. So we've spent a lot of money now serving this thing twice.

And the idea that this motion can be -- or this request can be premature, or anything can be premature for that matter, 26 months into a case is a little out- -- is not a little outlandish; it is outlandish.

Ms. Burnett's an integral witness, she goes to show that the counterclaims are absolutely facially, patently frivolous. And we'll get into why they're facially, patently frivolous in the motion for summary judgment, but her testimony is going to be --

THE COURT: Why don't you skip to the motion for summary judgment?

MR. PORTER: You want me to skip to the motion for summary judgment?

THE COURT: Yes, please.

MR. PORTER: Okay.

THE COURT: Yes. Yes.

MR. PORTER: All right.

Okay. Your Honor, if you're ready, I'll transition to the motion for summary judgment.

The defendant has filed eight counterclaims, of which

seven still exist in the simple FOIA case, which is to frustrate the FOIA process and punish Ms. Hunter or MPA Strategies for using it. Those counterclaims are fraud, misrepresentation, SCUDTPA, Unfair Trade Practices Act, the Frivolous Proceedings Act, civil conspiracy, and a federal False Claims Act claim, and negligence. The crux of those claims is an allegation that MPA Strategies lied about forming a 501(c)(3) to get the Town's business.

The principal undisputed facts, and you can -- these facts are not going to be changed by any evidence, and we don't have information that any evidence has been destroyed, but we can assume a smoking gun was destroyed. These undisputed facts will not change.

The RFP by the Town did not require a bidder to form a 501(c)(3) or a nonprofit of any form. The contract signed with a merger clause in which both Ms. Burnett, who's an integral witness as a result of her involvement in the contract formation as designated by the Town, not simply to advise the Town but to negotiate the Town, that contract does not require 501(c)(3) status or nonprofit status in any form. And MPA Strategies did form a nonprofit, albeit not under 501(c)(3). That brings us to a principle point of law that's never going to change.

The ATAC (phonetic) statute doesn't require anyone to be a 501(c)(3). It simply requires someone to be a nonprofit.

Chambers of Commerce who normally are the DMF are 501(c)(6)s. So those facts won't change. That point of law won't change. That brings us to each of the claims on their own merits.

First, with respect to fraud, there is no material misrepresentation. It doesn't matter whether or not MPA Strategies formed a 501(c)(3), a 501(c)(6), a 501(c)(29) The ATAC statute requires an entity to be a nonprofit. Nothing more, nothing less. State and Frink is a nonprofit. So how can there be damages?

Negligent misrepresentation. We haven't established a legal duty, and the defendant's response, they say that we haven't proven they didn't owe a duty. They don't cite any case law for why there is a duty. But they say we haven't proven they don't have a duty. Well, the burden's on us to show the absence of any genuine issue of material fact, which we've done, and we're entitled to judgment as a matter of law. We don't have to do the defendant's homework for them and show them where their elements might be proven or where it might not. They have the burden to establish their claims for that basis once we've carried our burden under Rule 56, which we have.

There's no detrimental reliance. We have a contract with a merger clause and there's no damages. Again, a 501(c)(6), a 501(c)(29), a 501(c) anything can collect a tax money. There's no SCUDTPA violation because there's no unlawful

practice under the code for those same reasons.

The Frivolous Proceedings Act is not an independent right of action under the plain language of SC Code 15-36-10. It attaches after a claim has been defeated and is a motion. So that's not even procedurally appropriate. It's not a claim. It's not a cause of action.

The civil conspiracy is alleged against Ashley Hunter, MPA Strategies, and State and Frink, which Ms. Austin has stated to you several times are wholly-owned businesses by Ashley Hunter.

The first element of a conspiracy is a combination of two or more people.

The next two elements of a conspiracy require unlawful action or lawful action by unlawful means. We don't have that element either, so we don't have a combo or a predicate, unlawful act or lawful act by unlawful means.

Their next counterclaim is a federal False Claims Act counterclaim. The federal False Claims Act requires an abuse of federal funds. I think the fact that they are still defending this claim shows the credibility of all these claims are in question.

First off, the Court doesn't have subject matter jurisdiction over a federal False Claims Act claim. U.S.C. of the provision 3730 says that "The district court shall have jurisdiction over any action brought under the laws of any

state for recovery of funds paid by state or local government if the action arises under the same transaction or occurrence as one brought under 3730", which is the federal False Claims Act.

3730(b) if you want to file a federal False Claims Act claim requires you to do certain things. You file it under seal with the federal court. We're not in the federal court. It wasn't filed under seal. At the same time as you file it under seal, you give it to the U.S. Attorney and you say hey, do you guys want to intervene in this? That, obviously, wasn't done. So that claim fails as well for similar blatant legal flaws like the Frivolous Proceedings Act, because there is no such cause of action.

Negligence, there's no duty. Now, the defendant said, we have a burden to show you there is no duty. I don't think that's how this works. If it was, I'm typically a plaintiff's lawyer in these postures, my job would be a lot easier on summary judgment, but let's give them the benefit of the doubt and say we have to prove to you that there's no duty.

Thomas Griffin Plumbing and Heating Company v. Jordan, Jones & Goulding, Inc., 320 S.E. 49 stands for the very basic premise, the economic loss rule, that absent a special relationship, no duty arises from a contract, which is what they're arguing exists here. So that dooms both their negligence claim and their negligent misrepresentation claim.

there can't be a duty here. Their only action is breach of contract, which interestingly is not a counterclaim but a fraud.

Those are all of their counterclaims. I've aimed to keep this concise because a lot of these arguments that they're raising are hey, there could be evidence that's been destroyed that would have helped us. We need to do more discovery in this 26-month old case, Your Honor. No more discovery. No magical missing needles in a haystack. It's going to change the unassailable facts that the statute doesn't require anybody to be a nonprofit, that there's a contract with a merger clause after these alleged representations, and that the representations aren't material because the statute doesn't require anyone to be a nonprofit, nor did the RFP or the contract.

Happy to answer any of your questions, but that's our motion for summary judgment in summary form, Your Honor.

THE COURT: You may respond.

MS. AUSTIN: Thank you, Your Honor.

As similarly raised in respect to some of these other motions, these issues have already been ruled on by the court, by Judge Keesley in the prior motion. The plaintiff and counterdefendant brought that prior motion as a motion to dismiss on the pleadings, or in the alternative for summary judgment. And as Your Honor can see in the Form 4 order that

was entered, the Court does address it as well as a motion for summary judgment.

Judge Keesley denied the motion and said that more discovery is needed. Contrary to MPA's representations, this is a complex, factual issue. And here, really, nothing has changed. We've still been embroiled in the same discovery disputes. They've presented no affidavits or other evidence from the time that Judge Keesley determined that more discovery was needed. And again, a lot of these arguments they're making are really motions to dismiss, which they instinctively failed to state a claim when Judge Keesley has already ruled that we have.

And it's sort of just incredulous that we're talking about the merits of these issues and the evidence supporting or absence of evidence supporting at all when we have these ongoing discovery issues that have been through no fault of the Town, and when they have spoliated evidence and that that really doesn't seem to be disputed. They certainly haven't introduced anything disputing that conclusion. And simply arguing they haven't submitted evidence of X, Y, or Z when there's spoliation issues on crucial evidence really just misses the mark and it should be denied on that basis alone.

Regarding the merger clause, Mr. Porter argues that the 501(c)(3) was not a requirement of the statute and this merger clause, and no representations or misrepresentations were made

after that fact. But one of the exhibits that we have filed with the Court is a text message to the Town from Ms. Hunter after the contract was entered in May of 2021, where she continues to say that the Town asked and you're okay with getting paid from thirty percent state aid tax funds, correct, and she says yes, attorney's email confirming I can receive state aid tax on April 15th. So these misrepresentations continued.

But regardless -- we don't -- regardless of getting into what the statute requires, what the RFP required, we have at least a minimum of three instances where this was affirmatively misrepresented to the Town during contract negotiations. And so what may or may not be said elsewhere is immaterial to the party's contract when these have been affirmative misrepresentations. And certainly we are entitled to discovery on these issues.

I also find it sort of incredulous that we're arguing about whether or not a party has a duty to communicate truthful information during contract negotiations. And I hesitate to get too deep into some of these issues because we don't have discovery on them, and it really comes down to a lot of these being matters of law. But I'm referring -- on the conspiracy they're saying, well, we can't conspire with ourselves. But they have not given us organizational and corporate documents we've asked for to make that

determination. We --

THE COURT: Concerning the federal False Claim Act causes of action, what's your response? That is not a state cause of action.

MS. AUSTIN: Thank you, Your Honor. And again, this was also addressed by Judge Keesley. However --

THE COURT: But Judge Keesley is not the judge today. So --

MS. AUSTIN: Yes. You're correct.

So brought this claim in as a compulsory counterclaim in this case in the venue that was chosen by the plaintiff. There are misuse of federal funds at issue because they have represented themselves to be a 501(c)(3) federal tax exempt organization authorized to receive state funds. And so we believe that it's applicable here because there are federal funds at issue.

THE COURT: Yes. Anything further from anybody?

MR. PORTER: If permitted, I would like to briefly reply, Your Honor?

THE COURT: Sure.

MR. PORTER: Thank you.

So they make prematurity arguments, Your Honor. They never filed a Rule 56 affidavit as required to do so. While Ms. Austin has made some very -- she's making some very strong and well-framed arguments, none of those arguments would lead

you to believe that there are any issues of fact or evidence that will ever change those obvious things that you did have to be a 501(c)(3) to get a tax fund. So Ashley Hunter, having formed State and Frink was absolutely right to say yeah, I can get any tax funds, and the contract has a merger clause. The RFP didn't require it, and the statute doesn't require it. None of that will ever change.

Your Honor, this case is a mess. It's 26 months old. The law and the arguments empower the Court to clean up this mess to the extent -- and I'm not saying that the plaintiff is blameless in creating this mess either. The case has moved slow, and it takes two to tango. But this case is going to be a gadfly, a nuisance on the Court for years if we don't fix it today.

THE COURT: All right. Mr. Porter, you're reiterating --

MR. PORTER: That is my conclusion. That's my last line, Your Honor.

THE COURT: All right. Thank you.

Starting from the last, or most recent motion that was argued, I deny the motion for summary judgment.

SUMMARY MOTION DENIED

THE COURT: Regarding a motion to quash subpoena, I deny the motion to quash the subpoena or the protective order.

MOTION TO QUASH SUBPOENA OR PROTECTIVE ORDER DENIED

THE COURT: The deposition may include any nonprivileged

issues or matters that does not violate attorney-client privilege to the extent that it may apply.

I find that the plaintiff has violated the discovery rules, and the defense is entitled to sanctions, the amount of which would be held in abeyance pending the resolution of the case to be addressed by the trial court at that time.

Similarly, regarding spoliation, the plaintiff has violated the rules prohibiting spoliation of evidence.

The remedy concerning that spoliation issue will be determined by the trial court.

The motion to strike the counterclaim is denied. I find that it is a permissive counterclaim, and I deny the plaintiffs motion to strike.

MOTION TO STRIKE COUNTERCLAIM DENIED

MR. BLACK: Thank you, Judge. Would you like us to draft the proposed order?

THE COURT: Yes, if you will, and share it with counsel.

MR. BLACK: Thank you Your Honor.

MR. PORTER: Your Honor, is there a ruling on the motion to strike the jury demand? So you ruled that it was a permissive counterclaim, which I believe under the law would mean that the alternative motion to strike the jury demand must be granted.

THE COURT: I'm not clear on that. I believe that may require a trial. There may be reviews to the issue of which

the counterclaim may be entitled to a trial. I don't know that they waive their right to trial by seeking a counterclaim. I'll leave that issue to a later time.

MR. PORTER: And two more things for clarification, Your Honor, and I know this has been a long hearing. Is our summary judgment motion denied without prejudice, such that with further evidence, we will be able to raise these arguments again?

THE COURT: My order of motion for summary judgment denied. I'm not qualifying it.

MR. PORTER: And then finally, is there a ruling on the motion to compel, and again, our representation is we produced every known document we have, so we'd like to get on with depositions. The defense's perspective has been until this motion is addressed we can't take depositions.

THE COURT: The defense's motion to compel sanctions, that motion is granted.

MOTION TO COMPEL SANCTIONS GRANTED

MR. PORTER: Certainly, Your Honor, but what can we produce is what I'm saying? So on that component of the motion, we've produced everything we have. They're using that as a basis not to engage in depositions. And what I fear is that we're going to be able to ask to produce something we don't have, we can't produce, and then we're never going to be able to take depositions.

THE COURT: Well, your -- I ruled that you can take a deposition of the Town lawyer. I haven't issued any order excluding depositions.

MR. PORTER: Thank you, Your Honor.

MR. BLACK: Your Honor, for the record, they supplemented -- someone needs to mute themselves. There's an echo.

But they supplemented just within the last 48 hours, we have not reviewed that to determine if the -- they already represented they turned over everything. Now, they've turned over more. If it turns out that they're correct, they've turned over everything; that's fine, we'll go through with depositions.

If it turns out that MPA still hasn't turned over the documents that, frankly, we have from other parties that they haven't turned over, then there will be another motion. That's --

THE COURT: Well --

MR. BLACK: I don't know what they've turned over, Your Honor.

THE COURT: Yeah. Well, you all seem to not mind filing motions. So I'll leave all that for another day. I don't know the -- I don't know the -- where the dust has settled. They violated the discovery rule. Granting the motion to compel and for sanctions, the review of what those sanctions

should -- will be will be determined at the end of the trial.

MR. BLACK: Thank you, Your Honor.

THE COURT: Okay. All right. Thank you all.

MR. BLACK: Thank you, Your Honor.

MR. PORTER: Thank you.

(End of Transcript of Record)

CERTIFICATE OF TRANSCRIBER

State of South Carolina)
)
County of Richland)

I, ELLEN S. KOLMAN, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Richland County, South Carolina, on the 9th day of August, 2023.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

August 17, 2023

Ellen S. Kolman

_____
Ellen S. Kolman, CET-568
Transcriber