THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Maite D. Murphy, Circuit Court Judge

Case No. 2019-001719

Innovative Waste Management Inc., Respondent,

v.

Crest Energy Partners, GP, LLC, Dunhill Products GP, LLC, Henry Wuertz, Innovative Waste Management, Inc., Crest Energy Partners LP, Dunhill Products LP, Edward H. Girardeau, C. Russ Lloyd, Defendants, Of Whom,

Crest Energy Partners GP, LLC, Crest Energy Partners LP, Dunhill Products GP, LLC, Dunhill Products, LP, and Henry Wuertz are the Appellants.

PETITION FOR REHEARING

David B. Marvel
P.O. Box 22734
Charleston, South Carolina 29413
Phone: (843) 853-4877
Fax: (843) 773-2877
Email: dave@marvel.lawyer

INTRODUCTION

Pursuant to Rule 221(a), SCACR, Appellants Crest Energy Partners GP, LLC, Crest Energy Partners LP, Dunhill Products GP, LLC, Dunhill Products, LP, and Henry Wuertz hereby petition this Honorable Court for a rehearing of Unpublished Opinion No. 2023-UP-126, filled March 29, 2023.

Rehearing is warranted because, initially, the Court erred in holding that the circuit court's October 1, 2019 Order was the only order subject to appeal. This error appears to be based on a misreading of Supreme Court precedent which, if correct, would leave all litigants in South Carolina courts with no means to review discovery orders of the circuit courts, no matter how misguided they may be.

Rehearing is also warranted because the Court's Opinion fails to address Appellants' arguments that 1) there was no actual violation of any order below, 2) lessor sanctions were available to the circuit court and never considered, and 3) that the circuit court's October 1, 2019 order was simply a recitation of Respondent's arguments, written and submitted by Respondent's counsel, which was not without support in the record, and actually contradicted therein. Further, Appellants respectfully submit that the Court's holdings that circuit court was within its discretion in issuing the orders below are incorrect and, anticipating that the Court may not be inclined to directly reconsider its rulings, those arguments are included herein to preserve them for review pursuant to Rule 242(d)(2).

OVERVIEW

The history of this case was extensively briefed by the parties and the Court's opinion displays familiarity with the record. Thus, in the interest of brevity, the as stated in Appellant's Initial Brief are incorporated herein by reference.

In pertinent part, the orders below and subsequent appeal concern a long running discovery dispute in a case that has been in litigation for twelve years, having been dismissed in the federal courts and then having been the subject of a prior appeal up to the South Carolina Supreme Court. Appellants briefs addressed several circuit court orders filed prior to the first appeal, dated April 5, 2013, August 21, 2013, October 3, 2013, and April 6, 2015. Those orders were never intended to be subjects of the instant appeal, but were integral to the history of the issue that culminated in the orders issued by the circuit court after the case was remitted. The post-appeal orders were filed on June 18, 2019, August 1, 2019 (denying Motion to Alter or Amend), and October 1, 2019. Those orders were contested in the lower court and properly appealed pursuant to the procedures outlined by the Supreme Court in Davis v. Parkview Apartments, 409 S.C. 266, 762 S.E.2d 535 (2014), Metts v. Mims, 384 S.C. 491, 682 S.E.2d 813 (2009), and the precedent cited therein. Nonetheless, following oral argument, this Court held that the October 1, 2019 order was the only order subject to the appeal, that the prior orders were within the discretion of the Circuit Court, and that the record supported the findings in the October 1, 2019 order striking Appellant's pleadings, essentially leaving Appellants in default and nullifying Appellant's cross claims below.

Appellants respectfully submit that these rulings are in error and should be reheard and reconsidered for the reasons set forth herein.

GROUNDS FOR REHEARING

1. **The Court erred in holding that its review was limited to the October 1, 2019 order.**

Without question, discovery orders such as the June 18, 2019 and August 1, 2019 orders in the instant case "are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute, involve the merits of the action or affect a substantial right." Grosshuesch v. Cramer, 377 S.C. 12, 30–31, 659 S.E.2d 112, 122 (2008) (citing Hamm v. S.C. Pub. Serv. Comm'n, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994); Wallace v. Interamerican Trust Co., 246 S.C. 563, 568–69, 144 S.E.2d 813, 816 (1965)). See also Lowndes Products, Inc. v. Brower, 262 S.C. 431, 205 S.E.2d 184 (1974).

However, South Carolina appellate courts have historically reviewed interlocutory orders when such orders are presented on appeal as companion issues to orders that are ordinarily immediately appealable. See, e.g., Brown v. Cnty. of Berkeley, 366 S.C. 354, 362, 622 S.E.2d 533, 538 (2005) (citing Morris v. Anderson County, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002); Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 338, 574 S.E.2d 502, 512 (Ct.App.2002)).

Shortly after the South Carolina Rules of Civil Procedure replaced the Rules of Practice for the Circuit Courts, the Supreme Court applied this principal to a discovery order directed at a non-party, explicitly adopting existing procedure under the federal rules for the appeal and review of a discovery order, Ex parte Whetstone, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986). The Court stated the procedure succinctly: one who is aggrieved by a discovery order "may either comply with the discovery order and waive any right to challenge it on appeal, or refuse to comply with the order and appeal after he is held in contempt for his failure to comply. Id. 347 S.E.2d at 881–82.

An example of how this procedure was historically utilized is found in Ross v. Med. Univ. of S.C., 312 S.C. 532, 435 S.E.2d 877 (Ct. App. 1993) *rev'd* 317 S.C. 377, 379, 453 S.E.2d 880, 882 (1994). In that case, the defendant appealed a discovery order, which was dismissed as interlocutory. Following remittitur, the defendant continued its refusal to answer two requests for admissions, and the plaintiff moved for sanctions. Upon the defendant's continued refusal to comply with the circuit court's order, the defendant was held in contempt, sanctions were imposed, and the court deemed the Requests admitted. Upon a second appeal, the Court of Appeals rightly reviewed both the discovery order and the contempt/sanctions order, vacating both. On certiorari, the Supreme Court also reviewed the merits of the underlying discovery order, reversed the Court of Appeals, and reinstated both the discovery order and the order imposing sanctions for contempt.

The Supreme Court most recently expounded on this procedure in Davis v. Parkview Apartments, 409 S.C. 266, 762 S.E.2d 535 (2014), which was discussed at length at oral argument. In Davis, the plaintiffs appealed an Order dismissing their claims with prejudice as a sanction following a multifaceted discovery dispute that proceeded nearly two years in the circuit court. The Supreme Court certified the case for review pursuant to Rule 204(b), SCACR. affirmed, finding that the plaintiffs had not complied with the procedure outlined in Whetstone. In result, the Supreme Court's rationale in Davis may appear to limit this Court's ability to review an interlocutory discovery order in conjunction with an appealable order granting sanctions. However, Davis actually upheld and restated the Whetstone procedure, which the Appellants here followed explicitly.

The Davis opinion notes three reasons supporting its affirmance of the circuit court, all of which distinguish the facts and proper outcome of this matter. First, the Court noted that the plaintiffs "only appealed the order awarding sanctions, . . . the Dismissal Order." Id., 762 S.E.2d

at 542-43. In contrast, the Notice of Appeal in the instant case explicitly sought review of the April 6, 2015, June 18, 2019 and August 1, 2019 discovery orders, as well as the October 1, 2019 order striking Appellants' pleadings.[1] In this case, Appellants never stopped challenging the June 18, 2019 order. Appellants filed a Motion to Alter or Amend, which was denied by the August 1, 2019 Order. At that point, Appellants advised the Court that they intended to seek Appellate review of the discovery orders, and even asked the court to find them in contempt, going so far as to cite Davis in the process. citing Second, the Davis Court found that the plaintiffs had not followed the Whetstone procedure because they "continued on tin the litigation" and "continued to accept the circuit court's formulation of discovery." Id. at 543. Finally, the Davis Court found that the discovery rulings at issue in that case were "unreviewable on appeal" because the appellants "only raise[d] general issues with those orders", making no "specific objections to each item of discovery deemed discoverable by the circuit judge". Id., at n. 15. In this appeal, Appellants objections to the propriety of the individual orders and the items deemed discoverable in great detail, covering an expansive prior of their briefs and being fully argued before the Court. Clearly, none of the reasons underlying the Davis Court's decision to affirm the sanctions ordered below apply to this case. The procedure restated in the opinion, on the other hand, was followed by the Appellants, allowing this honorable court to review the underlying discovery orders.

The procedure adopted in Whetstone is described in Davis and subsequent cases relatively simply: to obtain review of an interlocutory discovery order, a party must refuse to comply with the lower court's formulation of discovery, and file an appeal from an immediately appealable

[1] Appellants sought review of the lower court's April 6, 2015 Order, which denied a motion to quash a third party subpoena on the basis that the financial records sought by the plaintiff below were relevant and material to the case. While Appellants continue to believe that ruling was in error, they were ultimately not aggrieved by that ruling, as the Order did not require the Appellants to do anything. It is incorporated into the issues relating to the October 1, 2019 ruling only to the extent the respondent was the party that failed to abide by the ruling, and therefore it can not be found as a basis for sanctions against Appellants.

order resulting from the party's failure to comply. See Richardson v. Halcyon Real Est. Servs., LLP, No. 2019-000671, 2023 WL 2995102, at *2 (S.C. Ct. App. Apr. 19, 2023); Whitfield v. Schimpf, No. 2019-001716, 2022 WL 17174886, at *1 (S.C. Ct. App. Nov. 23, 2022). Est. of King ex rel. King v. Richland Cnty., No. 2008-UP-274, 2008 WL 9841679, at *2 (S.C. Ct. App. May 21, 2008) Likewise, it has been reiterated by the Supreme Court as "well settled" precedent. See Montgomery v. Montgomery, No. 2018-001233, 2019 WL 2295405, at *1 (S.C. May 29, 2019) Memorandum Opinion No. 2019-MO-027 Heard May 9, 2019Filed May 29, 2019. Whether the subsequent order finds a party in contempt or issues sanctions is of no consequence, as either result subjects an order to immediate appeal, allowing the appellate court to review companion issues decided in otherwise interlocutory rulings.

Here, the circuit court issued discovery orders adverse to Appellants, which Appellants believed to be procedurally defective, factually incorrect, beyond the scope of discovery, and outside of the discretion of the court. Appellants refused to comply with certain aspects of those orders, advised the court that they intended to seek appellate review, and suffered an excessive sanction as a result. This is precisely what the procedure outlined in Whetstone and Davis requires, and the Court must grant rehearing so that the discovery orders are subject to review.

2. The Court's Opinion fails to recognize or address the deficiencies in the underlying discovery order.

The Court's Opinion in this matter held that Rule 34, SCRCP provides and avenue for a party to request, and for a circuit court to compel, the execution of financial authorizations by an adverse party. Notably, the two cases relied upon by the Court in reaching that conclusion addresses an altogether different situation, where the party compelled to execute such

authorizations placed the subject of those authorizations at issue. E.g., Barnette v. Adams Bros. Logging, Inc., 586 S.E.2d 572 (S.C. 2003). Appellants do not contest the concept that the wealth of a defendant is relevant to the assessment of punitive damages, but it would seem to be incorrect statement of law to say that the documents sought by Respondent must be produced simply "[b]ecause IWM asked for punitive damages". In fact, Respondent repeatedly represented to the lower court that the documents were sought solely for the purpose of assessing credibility. Appellants assert that the Court's ruling is in error, and respectfully request that the Court reconsider its ruling and rehear this matter for the reasons stated in Appellant's Initial Brief.

Moreover, the Court's ruling on this issue, as stated in the Opinion, appears to miss several points argued below and in brief.

First, a review of the record, particularly IWM's Third Motion to Compel (the subject of the orders at issue) establishes that **IWM never actually served a Rule 34 request for the signed authorizations.** Rather, IWM served subpoenas on the third parties at issue, lost a motion to quash in a Louisiana state court, and then filed its Motion to Compel, where the issue of executing authorizations was raised for the first time. Even assuming the Court's ruling as to the breadth of Rule 34 is correct, the concept that a party can use Rule 37, SCRCP to seek an order compelling a party to produce a document that the moving party never actually requested under Rule 34 ignores the plain language of the Rule, and would seem to make the South Carolina courts bastions of common law discovery. For a circuit court to order the production of such documents that were never formally requested, and then strike a party's pleadings when that party has indicated an intent to seek appellate review of that order, would seem to be a prime example of abuse of discretion.

Second, this Court's opinion plainly overlooks the fact that **the circuit court failed to order Appellants to execute any specific authorizations, despite Appellants' request via their**

Motion to Alter or Amend that explicitly requested that the circuit court amend its order to include them. Rather, the June 18, 2019 order referred to authorizations described as being "appended as Exhibits A – E to this order", when there were no such authorizations included. The Record on Appeal is likewise void of reference to these phantom authorizations. The circuit court had ample opportunity to amend its order to include the authorizations, and it chose not to. Appellants should not be faulted, and cannot be sanctioned under the rules of civil procedure, for failing to execute authorizations that do not exist. The plain language or Rule 37(b)(s) only subjects a party to sanctions for "fail[ing] to obey an order to provide or permit discovery". Here, there can be no willful failure to obey an order when compliance with that order is a technical impossibility. The authorizations at issue simply did not exist.

Third, the circuit court ignored, and this Court's Opinion fails to address or recognize, that IWM bears the responsibility for its own failure to obtain the records it allegedly sought via the authorizations. The scope of discovery set forth in the civil rules contemplates that a party seeking discovery will use the allowable tools judiciously. See Rule 26, SCRCP (the "use of discovery methods . . . shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought".). IWM patently ignored the circuit court's 2015 Order that directed it to issue subpoenas to the entities in question. Then, when IWM issued subpoenas in 2019 to the entities in question, it failed to appear and argue under the Uniform Interstate Depositions and Discovery Act that it was entitled to the documents. If IWM had followed through on either of these discovery methods, in all likelihood it would not have needed to request signed authorizations from Appellants to obtain the information it sought.

The discovery orders at issue exceeded the circuit court's authority because Rule 34 should not be utilized to compel the execution of authorizations allowing the release of sensitive documents addressing issues not put at issue by the responding party. Even if that is a correct use of Rule 34, Respondent IWM never actually made a Rule 34 request for the authorizations, and the Court never ordered Appellants to execute any specific authorizations due to its own refusal to provide the authorizations as attachments to its order. Under these circumstances, where Respondent IWM abandoned its otherwise proper use of discovery tools to obtain the same documents, Appellants should not have been subject to sanctions under Rule 37, and certainly not the extremely harsh sanction of striking Appellants' pleadings.

3. **The Court's Opinion incorrectly found that the October 1, 2019 order striking Appellants' pleadings was within the circuit court's discretion.**

Here, the circuit court struck the Appellants' pleadings as a discovery sanction, leaving appellants with no defense, and also without a substantial counterclaim. In doing so, the circuit court abused its discretion because, in fact, the circuit court failed to exercise that discretion at all.

"When the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is harsh medicine that should not be administered lightly." Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct.App.1999). A sanction that results in a default or dismissal is a severe punishment that should be imposed only if there is some showing of bad faith, willful disobedience, or gross indifference to the rights of the adverse party. Id. at 198–99, 511 S.E.2d at 719 "[T]he sanction imposed should be reasonable, and the [c]ourt should not go beyond the necessities of the situation to foreclose a decision on the merits of a case." Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct.App.1990).

"An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "In deciding what sanction to impose for failure to disclose evidence during the discovery process, the [circuit] court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice." Jamison v. Ford Motor Co., 373 S.C. 248, 270, 644 S.E.2d 755, 767 (Ct.App.2007). "A failure to weigh the required factors demonstrates a failure to exercise discretion and amounts to an abuse of discretion.". Id.

The findings of fact cited in the circuit court's Order are nothing more than a recitation of IWM's argument, which was without support in the record when IWM's counsel said it, without support in the record when signed by the court, and without support in the Record on Appeal. The Order cites these statements, and no others of material consequence, in support of the finding that the Crest Defendants had engaged in willful, bad faith, dilatory conduct in disobeying the Court's discovery orders. The circuit court failed to undertake any effort to weigh any other factor in ruling that Appellants' pleadings should be stricken, and also failed to assess whether any lessor sanction was available to cure any perceived disobedience by the Appellants. This is clearly an abuse of the circuit court's discretion, and this Court should Grant rehearing, and reverse the October 1, 2019 Order.

The false statements cited in Appellants' Brief are as follows:

The circuit court found that, in the March 15, 2013 proposed Consent Order, "Defendants' promised to provide discovery requests, including the financial information sought by Plaintiff and to pay Plaintiff's attorney's fees as a sanction for its discovery abuse" (ROA 47, p. 2). This

statement not only lacks support in the record, it includes at least three statements that are directly contradicted by the record and the language of the March 15, 2013 Order itself (ROA 4-6).

The circuit court found that "[t]he Defendants failed to comply with the Consent Order and Plaintiff filed an Amended Motion to Compel" (ROA 47, p. 2). This statement is contradicted by the record. In fact, the Defendants filed a Motion Protective Order because IWMs discovery was patently in violation of Rule 33 (b)(9), SCRCP. When defendants filed their motion, and IWM subsequently filed their Amended Motion to Compel, the court had not yet issued an Order that could have been violated.

The circuit court found that "[t]he Court granted that motion on August 22, 2013 and ordered Defendants to produced [sic] discovery including sworn, certified financial statements." Judge Dickson did not grant IWM's Motion, in fact drastically limiting the discovery sought by IWM. The Order also, at defense counsel's suggestion, Ordered "sworn *or* certified" financial statements (ROA 7-10, ROA 146, (p. 37, lines 13-17)). There is no evidence in the record that the Crest Defendants violated that Order.

The circuit court found that "Plaintiff was forced to file a second Motion to Compel on August 27, 2013 when Defendants again failed to comply with the Court's Order." In fact, defendants filed a Second Motion for Protective Order because IWM continued to engage counsel with issues that had been raised and resolved by the prior motions and Judge Dickson's ruling (ROA 327-393). IWM subsequently filed a Motion to Compel, after the hearing had been set, and ten days before it was heard.

The circuit court found that "[i]ssues from the failed settlement were appealed and the case was stayed pending and [sic] order of the Court of Appeals for three years." While this statement

is technically correct, the Order implies that the court's denial of IWM's motions to restore the case and IWM's appeal of those rulings, is somehow fault attributable to the Defendants.

The record directly contradicts the order's description of the April 22, 2019 teleconference, and there is no record that defendants ever agreed to provide any responses prior to May 7, 2019 (ROA 49, p. 4).

There is no evidence in the record supporting the court's finding that "[p]laintiff had previously provided defense counsel with copies of these authorizations."

The circuit court's order contains a paragraph about a previously served, but not filed, Notice of Appeal that the court found was "intended to cause delay." There is no evidence of intent to delay or actual delay relating to this issue. Moreover, the record directly contradicts that finding. Counsel's letter to the Court of August 30, 2019 informed the court of its intent to appeal and requested a finding of contempt to expedite that process. The circuit court Certificate of Service referenced by the Court's Order was exactly correct, the Notice was placed with a courier on August 30, 2019. Moreover, the Notice was actually delivered to IWM's counsel on September 3, 2019, which would have constituted effective and timely service under Rule 262, SCACR. The record establishes that Counsel actually declined to file the Notice of Appeal after service but before the time designated by Rule 262(d)(1)(B) as the court had indicated it was willing to rule further, and counsel wanted to avoid any contention that the appeal was interlocutory. (ROA 760-761).

The description of the September 23, 2019 hearing contained in the Order is contrary to the record in that defense counsel never argued or stated that defendants had "substantially complied with the court's order", that "he could not file the threatened appeal . . . without being held in contempt", or that "he had been ordered by his client to appeal <u>any order</u> issued by the

Court." (ROA 52, p. 7 (emphasis in original); ROA 169-170 (p. 19, line 8-p. 20, line 3; p. 20, lines 11-13; p. 28, lines 2-4)). Judge Murphy's Order actually tracks the argument of IWM's counsel, who stated "I expect that Mr. Marvel will get up and say, "I gave him all the tax returns. That is substantial compliance" and "[t]here is no doubt that whatever order issues from this Court, it is going to be appealed by Mr. Marvel" (ROA 160 (p. 10, lines 13-14; p. 11, lines 4-6)). Undersigned counsel's only such statement on the last point was "[w]ith all due respect, Your Honor, I understand your ruling, and I disagree with it. My clients have asked me to appeal it" (ROA 164 (p. 20, lines 11-13)).

The Court's Opinion failed to address any of these factual issues, and also failed to address Appellant's legal argument that Appellants did, in fact, prevail on each discovery dispute before Judge Dickson and Judge Goodstein. That is the only conclusion that can be reached under the plain language of the South Carolina Rules of Civil Procedure. Moreover, given that reading, it is simply a misstatement of fact for the circuit court to find that Appellants had displayed a history of discovery abuse. Put simply, IWM did not receive anything close to the relief it sought from the hearings on the competing motions for protective orders and motions to compel, because each judge severely limited the scope of IWM's discovery. Quite plainly, that is not discovery abuse.

CONCLUSION

This Honorable Court's opinion incorrectly found that it could only review the circuit court's October 1, 2019 order, failed to address Appellants arguments relating the deficiencies in the underlying discovery orders from 2019, and also failed to address or recognize the factual inaccuracies and legal errors in the October 2019 order, which was drafted by opposing counsel to mirror IWM's argument, rather than the record, and was apparently subject to no scrutiny by the circuit court. For all of these reasons, this Honorable Court must grant this Petition for Rehearing,

and withdraw its prior opinion, and reverse the October 1, 2019 order of the circuit court, striking Appellants' pleadings below.

RESPECTFULLY SUBMITTED:

_s/ David B. Marvel_____
David B. Marvel
P.O. Box 22734
Charleston, SC 29413
(P) 843-853-4877
(F) 843-773-4877
dave@marvel.lawyer
ATTORNEY FOR THE APPELLANTS

May 8, 2023
Soddy Daisy, Tennessee

RECEIVED
May 08 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Maite D. Murphy, Circuit Court Judge

Case No. 2019-001719

Innovative Waste Management Inc., Respondent,

v.

Crest Energy Partners, GP, LLC, Dunhill Products GP, LLC, Henry Wuertz, Innovative Waste Management, Inc., Crest Energy Partners LP, Dunhill Products LP, Edward H. Girardeau, C. Russ Lloyd, Defendants, Of Whom,

Crest Energy Partners GP, LLC, Crest Energy Partners LP, Dunhill Products, LP, and Henry Wuertz, are the Appellants.

PROOF OF SERVICE

I hereby certify that the Appellants' Petition for Rehearing was served upon Counsel for the Respondent, Wm. Michael Gruenloh, 63 Moultrie Street, Second Floor, Charleston SC 29403, by Federal Express this 8th day of May in accordance with the South Carolina Rules of Civil Procedure and the South Carolina Appellate Court Rules.

RESPECTFULLY SUBMITTED:
s/ David B. Marvel
David B. Marvel (SCB# 68803)
P.O. Box 22734
Charleston, SC 29413
(P) 843-853-4877
(F) 843-305-3981
dave@marvel.lawyer
ATTORNEY FOR THE APPELLANTS

May 8, 2023
Soddy Daisy, Tennessee