THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Sep 19 2023

S.C. SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Maité D. Murphy, Circuit Court Judge
Case No. 2015-002024

Appellate Case No. 2023-001045
Ct. App. Case No. 2019-001719

Innovative Waste Management Inc., Respondent,
v.
Crest Energy Partners GP, LLC, Crest Energy Partners LP, Dunhill Products LP, Henry Wuertz, and Edward H. Girardeau, Petitioners.

RETURN TO PETITION FOR WRIT OF CERTIORARI

FOR RESPONDENTS:

s/ Wm. M. Gruenloh
Attorneys for the Respondent:
Gruenloh Law Firm
Wm. Michael Gruenloh, Esq.,
SC Bar #12418
67 Moultrie Street, 2nd Floor
Charleston, South Carolina 20403
Phone: (843) 577-0027
Email: mike@gruenlohlaw.com

And,

Frederick Jekel, SCBAR# 66491
930 Richland Street, Suite 300
Columbia, SC 29201
(803) 888-7130

STATEMENT OF ISSUES ON APPEAL

1. The Court of Appeals properly interpreted this Court's holding in *Davis v. Parkview Apartments*, 409 S.C. 266, 280–81, 762 S.E.2d 535, 543 (2014) correctly finding that the only order preserved for appeal by Petitioners was the October 1, 2019 Order and, therefore, there is no basis under Rule 242(b) for this Court to grant Certiorari.
2. The Court of Appeals correctly found that the trial court was within its discretion to strike Petitioner's Answers and Counterclaims under Rule 37(b), SCRCP and Petitioner has raised no basis under Rule 242(b) for the Supreme Court to review the Court of Appeal's Holding.

CONSIDERATIONS GOVERNING REVIEW

Petitioners, Crest Energy Partners GP, LLC, Crest Energy Partners LP, Dunhill Products LP, Henry Wuertz, and Edward H. Girardeau (hereafter "Petitioners") have filed a Petition for Certiorari seeking review of the decision of the South Carolina Court of Appeals affirming the trial court's October 1, 2019 Order striking Petitioner's Answers and Counterclaims under Rule 37(b), SCRCP. Petitioners argue that the Court of Appeals misreading of *Davis v. Parkview Apartments*, 409 S.C. 266, 280–81, 762 S.E.2d 535, 543 (2014) is the sole grounds for this Honorable Court to grant Certiorari pursuant to Rule 242(b). Rule 242(b) South Carolina Appellate Court Rules

According to a plain reading of *Davis v. Parkview Apartments*, only the October 1, 2019 Order striking Petitioners' pleadings was properly preserved. There is nothing about the Court of Appeals decision that conflicts with *Parkview* or misconstrues the holding of any other South Carolina Supreme Court case. Nor is there any new case law or precedent which has any bearing on the Court of Appeals interpretation of *Parkview* in this matter.

The Court of Appeals correctly found that the trial court's October 1, 2019 Order was warranted and within the lower court's discretion and expressly addressed each of Petitioners' current arguments in its unanimous opinion. Petitioners' arguments are nothing more than the third, in some case fourth or fifth, attempt to reargue and thereby reform the facts to manufacture some basis for an appeal under SCACR Rule 242(b). The Petition should be denied because there is no conflict between the Court of Appeals opinion and *Parkview* (or any other decision of this Court) and because the Petition raises no issue which meets the requirements of Rule 242(b) SCACR.

COUNTER STATEMENT OF THE CASE

Petitioners' statement of the case and procedural history are inaccurate and Respondent provides the following factual and procedural history to properly contextualize the Appeal and Petition for Writ.

The underlying case was filed in Dorchester County Court of Common Pleas on May 11, 2012. This case stems from Respondent's allegation that Petitioners failed to pay the Respondent for over $1 million dollars of oil that Petitioners acquired by fraudulent means from Respondent in April of 2010. (ROA 66-72) In addition, Petitioners interfered with the existing and prospective business relationships of the Respondent, all for the purpose of taking Respondent's clients and misappropriating millions of dollars in business from Respondent. (ROA 66-72) Respondent's expert Oliver Wood calculated that Petitioners' conduct have caused Respondent no less than $12,000,000.00 in economic losses. (ROA 570-571) Petitioners filed a counterclaim alleging economic damage for an entirely different transaction between Petitioners and Respondent that was completed prior to the events set out in the Amended Complaint. Both parties alleged

economic losses and punitive damages and so the parties financial records were relevant. (R. ROA 91-93 ¶ 38-56)

On October 2, 2012 Respondent served Petitioners with Respondent's First Requests for Production and Interrogatories, including requests for Petitioners' financial information. (ROA 283, 221-234, 253-269) Respondents sought Petitioners' banking and tax accounting records and also included requests pertaining to the amount of business (by dollar and volume) that Petitioners had done with certain third-party business clients alleged by Respondent to have been taken by Petitioners. (ROA 283-286, 221-234, 253-269) The Petitioners did not provide any response to the discovery requests and Respondent filed its first Motion to Compel on January 31, 2013. (ROA 205-208)

Shortly after the Respondent's First Motion to Compel was set for a hearing, Petitioners agreed to and signed a Consent Order. (ROA 4-6) The Consent Order provided that "the Defendants shall serve responses, including all responsive documents and to all outstanding discovery requests on or before Wednesday March 20, 2013." (ROA 4-6) In addition, Petitioners' Counsel agreed to pay Respondent's Counsel's attorney fees related to bringing the Motion to Compel. (ROA 481, ¶ 14) This was the first occasion on which Petitioners had an opportunity, if it was so inclined, to inform the Court that it would not/could comply with the Plaintiff/Respondent's discovery requests. Instead, the Petitioners promised that they would answer the discovery requests. The Petitioners failed to comply with the terms of the March 15th Consent Order (R. ROA 282-290) and instead filed a Motion for a Protective Order (ROA 482, ¶17-20) that was inconsistent with the negotiated and agreed upon Consent Order requiring Petitioners to provide a response to all outstanding discovery by March 20, 2013. (ROA 398)

Respondent filed an Amended Motion to Compel that was heard on April 1, 2013 by Judge Dickson. (ROA 110-150) Judge Dickson ordered Petitioners to respond to Respondent's previously served interrogatories and to provide a sworn or certified financial statement indicating income and net worth. (ROA 7-10) The Court set a deadline of July 1, 2013 for Petitioners to comply with the June 3rd Order. (ROA 7-10) Petitioners failed to comply with Judge Dickson's June 3, 2013 Order and Respondent's counsel made many attempts to confer with Petitioners' counsel regarding numerous deficiencies. (ROA 286-289, 484-485, ¶23-32) At no time did Petitioners indicate that they could not or would not comply with the June 3, 2013 Order.

On July 3, 2013, Respondent served Petitioners with Supplemental Requests for Production seeking additional financial information. (ROA 400-401, 485 ¶26-32) Petitioners did not respond to the supplemental discovery requests and, in Rule 11 consultation, Petitioners' Counsel informed Respondent that he would "follow up on the discovery" and would provide responses by Monday, August 19, 2013. (ROA 485, ¶30) Instead, on Friday, August 16, 2013, Petitioners filed another motion for a protective order. (ROA 485, ¶31) This was the second instance where Petitioners filed a motion for protective order without any effort to confer, after the discovery deadline had passed and after providing assurances to Respondent's counsel that the overdue discovery responses were forthcoming. (ROA 395)

On August 26, 2013 Respondent filed Plaintiff's Second Motion to Compel. (ROA 394-412) A hearing was held before Hon. Diane Goodstein on September 9, 2013. Respondent argued that Petitioners had failed to provide complete discovery answers as required by the March 15th and June 3rd Orders and failed to provide any answers to Respondent's July 3rd Supplemental Discovery Requests which included requests for financial information including Petitioners' tax records. (ROA 398-400, 406-407, 413-477) Respondent also argued that Petitioners' failure to

comply with the Court's prior orders appeared to be deliberate and willful, set out a history (to that point) of Petitioners' discovery abuse and requested that the court grant sanctions pursuant to S.C.R.C.P. 37 including but not limited to striking Petitioners' pleadings. (ROA 398-400, 406-407)

On September 23, 2013 Judge Goodstein granted Plaintiff's Second Motion to Compel. (ROA 11-13) Petitioners were ordered to provide responses to the Respondent's initial October 2, 2012 discovery requests by October 9, 2014. (ROA 11-13) In addition, the Court ordered the Petitioners to respond to the Respondent's supplemental discovery requests, specifically, that "Defendants shall produce the working papers such as W-2's, 1099s, K-1's, etc., used in preparation of Defendants' state and federal tax returns for the period 2008 – 2012. (ROA 11-13) The Order noted that "[n]othing set out in this paragraph shall be construed as any limitation upon Respondent's right to seek additional discovery on these issues in the future." (ROA 11-13) Judge Goodstein also found that Petitioners had failed to comply with the March 15, 2013 and June 3, 2013 Orders: "Petitioners failed to provide discovery responses in accord with this Court's March 15, 2013 and June 3, 2013 Orders and are hereby ordered to pay Respondent's counsel's attorney's fees and costs spent in drafting, preparing and arguing this Motion to Compel. Petitioners did not inform the court or the Plaintiff that it would not or could not comply with the September 23, 2013 Order.

Petitioner Henry Wuertz was deposed in May of 2014. Portions of his testimony conflicted with the financial information previously provided in discovery. (ROA 560-564) In addition to the inconsistencies between the court-ordered production and the testimony, Mr. Wuertz was unable to give answers to basic questions such as: (1) how much net income he had made in any of the last few years, (2) what year he had last filed his taxes, and (3) what Crest's net worth was. (ROA

560-564) Mr. Wuertz identified Margavio and Schmidt as Petitioners' accountant and identified Wells Fargo as their banking institution.

Given these inconsistencies discovered in Mr. Wuertz's deposition and the failure to provide full discovery responses in accord with Judge Goodstein's September 23, 2013 Order, Respondent issued subpoenas to Margavio and Schmidt seeking Petitioners' accounting records and to Wells Fargo seeking Petitioners' banking records. (ROA 560) The information was sought for the purpose of verifying income and alleged economic losses related to the matters in controversy and to verify the testimony of Mr. Wuertz. (ROA 560-564) The scope of the requests was 2009 to the present.

On December 5, 2014 Petitioners filed a Notice of Motion to Quash and Motion for Protective Order relating to the Margavio and Schmidt and Wells Fargo subpoenas. (ROA 539-540) Petitioners again failed to make any attempt to confer with Respondent pursuant to Rule 11 prior to filing their Motion. (ROA 540) Petitioners argued that (1) the subpoenas to Margavio and Schmidt and Wells Fargo were procedurally defective, (2) the information sought was protected by the Right to Financial Privacy Act, (3) and that the financial records sought by Respondent were not likely to lead to the discovery of admissible evidence. (ROA 539)

Respondent briefed all of these issues (ROA 557-559) and Judge Murphy heard arguments on Petitioners' Motion to Quash in chambers on April 6, 2015. In denying Petitioners' Motion to Quash and Motion for Protective Order in full, the court noted "[a]t the hearing the issues argued centered around relevancy and scope of the subpoenas at issue." (ROA 36-38) The court ordered "the subpoenas issued to Wells Fargo and Accountants Margavio and Schmidt are relevant; The scope of the subpoenas shall be limited to the years 2009 to the present; and Respondent shall re-issue the subpoenas in accordance with this order." (ROA 36-38) Respondent promptly re-issued

the subpoenas. (ROA 168, 572, 577-589) Petitioners did not inform the court or the Plaintiff that it would not or could not comply with the April 6, 2015 Order.

In the meantime, on April 8, 2015 the parties were ordered to mediate this case. At mediation a settlement was reached in which Petitioners agreed to pay a settlement amount within 30 days. The Petitioners failed to pay the agreed upon settlement amount and breached the settlement agreement. The case was mistakenly dismissed by the Clerk of Court and Respondent appealed the dismissal. In 2018, the Court of Appeals found the Form 4 order dismissing the case void, and the South Carolina Supreme Court affirmed this holding in February 2019. *Innovative Waste Mgmt. Inc. v. Crest Energy Partners GP, LLC*, 423 S.C. 611, 615, 815 S.E.2d 780, 782 (Ct. App. 2018), aff'd as modified, 425 S.C. 568, 824 S.E.2d 214 (2019). Having found the case erroneously dismissed, the Appellate Court remanded the case to the circuit court. *Innovative Waste Mgmt*, 425 S.C. at 571, 824 S.E.2d at 215.

Given the long delay, the financial information previously sought by Respondent in 2013 needed to be updated. On March 26, 2019 Respondent served an updated subpoena on Margavio and Schmidt. (ROA 572, 577-589) The subpoena requested updated records through the present. (ROA 572, pp. 577-589) Petitioners' counsel was copied on the correspondence to the Louisiana Clerk of Court and made no objection regarding the subpoena. (ROA 572, 577-589) On March 27, 2019, the Respondent wrote to Petitioners' Counsel and requested that Petitioners provide updated financial statements. (ROA 577)

Also, Respondent advised Petitioners that Harris County, Texas required an additional consent order to domesticate the Wells Fargo subpoena, attached a proposed consent order, and requested that Petitioners sign the consent order so that Respondent could effectuate the Wells Fargo subpoena in accord with the court's Order. (ROA 168, 577-579) Respondent also requested

that Petitioners produce the records themselves to avoid the unnecessary time and expense. (ROA 577-589). The time period specified for the Wells Fargo subpoenas was January 2009 through the present. (ROA 577-589). Respondent referred Petitioners to the Court's prior orders authorizing this discovery and requested an immediate response if Petitioners were unwilling to provide the executed consent order for the Wells Fargo subpoena and provide updated financial statements. (ROA 577-589). The parties had an April 22, 2019 telephone conference with the court to discuss these discovery requests pursuant to Rule 26(f). (ROA 572-573, 736-739)

During the April 22nd telephone hearing with Judge Murphy, Respondent's Counsel advised the court of Petitioners' failure to provide the updated financial statements and to sign the consent order necessary for the domestication of the Harris County Wells Fargo subpoena. (ROA 573) In light of Petitioners' refusal to provide the financial statements, cooperate with the Wells Fargo subpoena and third-party efforts in Louisiana to quash the court-ordered Margavio and Schmidt subpoena, Respondent moved that Petitioners be ordered to provide updated sworn financial statements and executed authorizations authorizing the release of their bank and accounting records held by Wells Fargo and Margavio and Schmidt. (ROA 573) On May 7, 2019 Petitioners' counsel offered to provide a financial statement that was being constructed for use in Petitioner Henry Wuertz's criminal trial in which he had been indicted for illegally dumping toxic waste from his fuel refinery into a federally protected bayou in Texas. (ROA 590-591) However, Petitioners failed to provide that financial statement. (ROA 573) The Petitioners did not advise the trial court that it could not or would not comply with the Order requiring the production of the financial statements or that it would not cooperate with Plaintiff in obtaining records from Wells Fargo and Margavio and Schmidt.

On May 15, 2019 Respondent filed its Third Motion to Compel requesting an Order requiring Petitioners do the following: 1) Produce updated, sworn, certified financial statements for each Defendant, 2) Provide executed authorizations for the production of the Wells Fargo and Margavio and Schmidt records from 2009 through the present date or, in the alternative, produce the records themselves, 3) Pay Plaintiff's attorneys fees and costs related to re-litigating these issues, and 4) For any other relief deemed appropriate. (ROA 570-591) No written response to Respondent's Third Motion to Compel was filed by Petitioners until after the motion was heard and decided by the court.

On June 5, 2019, a hearing was held on Respondent's Third Motion to Compel. Petitioner represented to the court that he would provide the financial statement being constructed in connection with Henry Wuertz's criminal trial and that he would provide an executed 4506T form to allow Respondent to access the tax transcripts Petitioners had filed with the IRS. (ROA 162 lines 15-19) On June 18, 2019, the trial court, having received no response in opposition from Petitioners, granted Respondent's Third Motion to Compel. (ROA 40-42) Judge Murphy ordered Petitioners to sign authorizations for the release of their bank and accounting records within 7 days of the Order and to produce sworn certified financial statements within 21 days of the Order. (ROA 40-42) The Court also sanctioned Petitioners for their noncompliance with the Court's prior order, finding Petitioners had failed to comply with a prior order and required Petitioners to pay attorney fees in the amount of One Thousand Nine Hundred and Fifty Dollars ($1,950.00). (ROA 40-42)

Petitioners did not inform the court or the Plaintiff that it would not or could not comply with the June 5, 2019 Order. Instead, Petitioners waited 20 days and on June 25, 2019, the due date specified for the production of signed authorizations, Petitioners filed an after the fact response in opposition to Respondent's Third Motion to Compel (which had been granted on June

5, 2019) along with a Motion to Amend the Court's Order pursuant to S.C.R.C.P. 59 (ROA 765) The Court reviewed briefings from the parties and on August 1, 2019 issued an order amending its June 18th Order, still granting in full the relief requested by Respondent but altering its original Order allowing different classes of individuals to sign the requested authorizations. (ROA 43-45) The authorizations were to be signed within seven days and financial statements were to be produced within 21 days. (ROA 43- 45) Petitioners did not inform the court or the Plaintiff that it would not or could not comply with this Order. Instead, Petitioners' Counsel informed Respondent's Counsel that he did not believe there would be any issue getting all the signed authorizations to Respondent's counsel by August 16, 2019. (ROA 676, 692)

The executed authorizations were not provided by Petitioners by August 16, 2019. (ROA 676, 684-703) On August 19, 2019, Petitioners' Counsel wrote that Mr. Wuertz was "meeting with the accountant later today" and he expected to have "something by tomorrow morning." (ROA 676, 684-703) Respondent's Counsel responded via e-mail later that day asking for Counsel to provide the signed authorizations within two days. No response was received. (ROA 694)

On August 28, 2019, after the date for compliance set by the court had passed, Petitioners' Counsel e-mailed Respondent's requesting until the end of the day to comply with the Court's August 1, 2019 Order. Petitioners provided nothing further on August 28, 2019. (ROA 676, 684-703) On August 29, 2019, Petitioners produced certain documents purported to be the 2016 and 2017 tax returns of Crest Energy Partners, and a financial statement for Henry Wuertz. Petitioners' counsel wrote, "[s]tand by, more to come" (ROA 677, p. 698) On August 30, 2019, Petitioners produced a letter from Sean K. Butler, an accountant who represented in the letter to have previously prepared tax returns for Crest Energy Partners, L.P. This document was not a financial

statement for any entity and was not responsive to the Court's Order. (ROA 677) Petitioners' Counsel's e-mail transmitting these documents again stated "[m]ore to come…" (ROA 700)

However, no further discovery materials were produced. Petitioners never produced financial statements for the Crest or Dunhill or executed authorizations for the financial records. Also, Petitioners did not pay the $1,950.00 in monetary sanctions nor make any filing with the court regarding their inability to do so. (ROA 672-683, 176-204) On August 30, 2019, weeks after the deadline set by the court for compliance, counsel for Petitioners sent a letter to the court stating he had complied as much as he would with the August 1st Order and requested that the court hold him in Contempt for his client's refusal to comply with the remaining portions of the August 1, 2019 Order. (ROA 677-678, 704-706) Petitioner's counsel also wrote that he would be serving a notice of appeal that day. (ROA 677- 678, 704-706) This was the first time in the seven-year history of this case that Petitioners notified the court that he would not comply with an order, the first mention of any appeal relating to a discovery order and the first mention of being held in contempt.

On September 3, 2019 Respondent received by courier what purported to be a Notice of Appeal signed by counsel for Petitioners. However, the notice of appeal was not filed. (R. ROA 677-678, 707-719). On September 13, 2019, Respondent filed Plaintiff's Motion for Sanctions Pursuant to S.C.R.C.P. 37 (ROA 672-683) No written response to Plaintiff's Motion for Sanctions was ever filed by Petitioner (ROA 764-772) A hearing was held on Respondent's Motion for Sanctions on September 23, 2019. Respondent summarized Petitioners' noncompliance with the court's Order and provided support of its motion and allegation that such noncompliance was willful. Specifically, Respondent argued that Petitioners had failed to provide the court-ordered financial statements for the Crest and Dunhill, failed to provide the court-ordered executed

authorizations for the financial records, and failed to pay the $1,950.00 in ordered monetary sanctions. (ROA 677) Respondent further argued that it had been unduly prejudiced by Petitioners' failure to comply with the August 1st Order given that trial was scheduled to begin on November 3, 2019. (ROA 672-683, 176-204)

Petitioners' counsel argued that he had complied with the Order as much as he could, that his clients were unable to pay the monetary sanctions ordered by the Court and requested the Court to issue an order finding Petitioners in Contempt so they could appeal the August 1, 2019 discovery Order. (ROA 176-204, 707-719) The following exchange occurred between Judge Murphy and Mr. Marvel at the September 23, 2019 hearing:

> THE COURT: Mr. Marvel, let me ask you this question. You are obviously an officer of the Court. So what you are telling me is that I am going to take what you say as if you are under oath today; do you understand?
>
> MR. MARVEL: Certainly.
>
> THE COURT: All right. Your letter to me is basically to find your client in contempt. For contempt that requires a willful violation of this Court's order. You are under oath telling me that your client has willfully violated this Court's order so that you can appeal; is that correct?
>
> MR. MARVEL: My client has directed me to pursue an appeal.
>
> THE COURT: Because they have failed to comply with this Court's orders. You have multiple orders awarding sanctions and awarding compliance with the discovery process that have not been complied with. This has been going on for seven years. Judge Dixon's order of 2012, I do recall that motions hearing and motions subsequent to that, because circumstances have changed. As stated in that order, the grammar of what was discoverable in 2015, 2016 has changed. Your client has failed to abide by all of these Court orders – refuses to do so. Now you are asking me to hold them in contempt. So you are telling me that they are in willful violation of these Court's orders. Is that what you are asking me?
>
> MR. MARVEL: First of all, the record is clear –
>
> THE COURT: The record is clear, sir. Just answer my question. Yes or no, are you asking me to find your client in contempt for being in willful violation of this Court's orders? Is that what you are asking me to do?
>
> MR. MARVEL: I am asking for the Court to find us in contempt, not because we believe that we have violated any prior order, but to the extent that Mr. Gruenloh is requesting that my clients sign the authorizations that Mr. Gruenloh has provided us, to my knowledge, is the only thing that we have not done in compliance with that order.
>
> THE COURT: Well –

MR. MARVEL: Your Honor –

THE COURT: Please let me finish. I didn't interrupt you during your presentation. You have filed nothing to the effect that they couldn't afford the sanctions; that you would not be able to comply without any financial documentation. The documentation has been requested, and you have filed piecemeal responses and nothing to back up what was previously ordered by Judge Goodstein before I even heard the case. So you have multiple years of willful disobedience of this Court's order, and now you are asking me to find you in contempt, so that basically you can appeal and put this case off three or four more years. That is basically what you are asking me to do; is that correct?

MR. MARVEL: We do intend to appeal the Court's order. That is correct, Your Honor. I don't believe that the failure to pay the attorney's fees is willful.

THE COURT: But you didn't file anything that you couldn't pay. There has been nothing filed with Court, that I am aware of, that once that order was issued, you filed any financial statement saying, "We just can't pay it." You just didn't do it.

MR. MARVEL: That is correct, Your Honor. We didn't file anything.

THE COURT: So multiple Court orders. You just didn't do it. Multiple Court orders you just didn't do it. So, counsel, anything else you would like the Court to consider at this juncture?

MR. MARVEL: No, Your Honor. I guess my only point on that issue is that we wanted to produce everything that we could and that we felt was available to produce.

THE COURT: Sir, wanting to do something and then backing it up is a whole different ballgame from just appearing in court and saying, "I will do it one of these days." You are wanting to do it and not providing responses as to why you can't do it or your inability to do it is a whole different ballgame, sir. So this constant manipulation of the process really is, quite frankly, not reasonably optimistic that you will ever comply with this Court's orders.

(ROA 197-200)

The Court granted Respondent's Motion for Sanctions on October 1, 2019 and stated: "Defendants have engaged in a deliberate pattern of discovery abuse and willfully failed to follow this Court's August 1, 2019 Order. For these reasons, as set out in detail below, the Court grants Respondent's Motion for Sanctions pursuant to Rule 37 of the South Carolina Rules of Civil Procedure and hereby strikes all pleadings of the Wuertz Petitioners." (ROA 46-47)

The Court of Appeals heard oral arguments on December 5, 2022 and on March 29, 2023 it unanimously confirmed the circuit court's October 1st, 2019 Order finding that:

1. Petitioners have waived appellate review of all discovery orders prior to the October 1, 2019 order granting sanctions;
2. The circuit court did not abuse its discretion or exceed its authority in ordering Appellants to execute authorizations for the release of their own records, and
3. The June 18/August 1, 2019 orders did not improperly overrule another circuit court's order in the same case.

Based upon these findings, which thoroughly address Petitioners' current arguments to this Court, the Court of Appeals unanimously held "the circuit court was within its discretion to strike Appellants' pleadings as a sanction for discovery abuse." *Innovative Waste Mgmt., Inc. v. Crest Energy Partners GP, LLC,* Op. No. 2023-UP-126 at *5 (S.C. Ct. App. filed March 29, 2023). Petitioners filed a motion for rehearing on May 8, 2023 which was denied by the court of appeals on June 5, 2023. The Petition for Certiorari was filed on August 1, 2023 and, notably, it argues the exact same points that were argued in the appeal and in the motion for rehearing.

LAW AND ARGUMENTS

1. The Court of Appeals properly interpreted this Court's holding in *Davis v. Parkview Apartments*, correctly finding that the only order preserved for appeal by Petitioners was the October 1, 2019 order and, therefore, there is no basis under Rule 242(b) for this Court to grant Certiorari.

Petitioner's first contention is that the Court of Appeals erred in finding that only the October 1, 2019 Order of the circuit court was properly preserved for appeal. Much of Petitioner's brief is spent challenging the validity of the June 12, 2019 Order granting Respondent's Third Motion to Compel. That order sanctioned Petitioners and ordered them to sign authorizations for the release of banking and accounting records, provide sworn certified financial statements, made the finding that Petitioners failed to "produce relevant discoverable material to Plaintiff" and awarded attorney fees. Appellants had two choices at the time the order was entered, request contempt and challenge

the order on appeal or, comply with the order and waive their right to appeal it later. Appellants chose to accept the August 1, 2019 ruling, did not follow the proper procedure for being held in contempt and waived their right to challenge the order on appeal.

The Court of Appeals unanimously held that "Appellants have waived appellate review of all discovery orders prior to the October 1, 2019 order granting sanctions, and therefore, the October 1, 2019 order is the only order properly before us on appeal. See *Davis v. Parkview Apartments*, 409 S.C. 266, 280–81, 762 S.E.2d 535, 543 (2014) (finding plaintiffs who were sanctioned for discovery abuse had waived review of the underlying discovery orders 'by providing incomplete responses and causing delay through other tactics' while 'continu[ing] to accept the circuit court's formulation of discovery' instead of preserving their objections to the prior discovery orders by immediately refusing to comply with the prior orders, suffering contempt, and appealing from the contempt finding; accordingly, the prior discovery orders were the law of the case and the only order properly on appeal was the order granting sanctions." *Innovative Waste Mgmt., Inc. v. Crest Energy Partners GP, LLC,* Op. No. 2023-UP-126 at *4 (S.C. Ct. App. filed March 29, 2023).

Petitioners argue that the procedure set out in *Parkview* is evolving and that there is recent precedent that somehow modifies *Parkview*. Respondent can find no evidence of that and the recent cases cited by Petitioners do not address this situation. There does not appear to be any new or evolving law which, as Petitioners suggest, changes the well settled principles set out in *Parkview*. Orders which are not appealed are still the law of the case and therefore are not proper for review before this Court. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). (An unappealed ruling is the law of the case and requires affirmance and reliance.) See Also, *Johnson v. S.C. Nat'l Bank*, 285 S.C. 80, 82, 328 S.E.2d 75, 76 (1985), *Cooper Tire and Rubber Co. v. Perry*, 201 S.E.2d 245 (1973).

It is still clear that if a party complies in any way with an order, they lose the ability to later challenge that order. "An order directing a party to participate in discovery is interlocutory and not directly appealable … Instead of appealing immediately, a non-party has two alternatives. He 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." *Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881, 882 (1986).

The following language from *Parkview* is analogous to the current facts and specifically addresses Petitioners contentions here: "Appellants did not follow that [being held in contempt] route here. Rather, they continued along in the litigation, attempting to divert the implementation of the court's rulings by providing incomplete responses and causing delay through other tactics while they decided whether or not to surrender to the possibility of being held in contempt of court. However, during this time, Appellants continued to accept the circuit court's formulation of discovery. Right or wrong, these decisions form the law of the case, and Appellants are bound by them now." *Parkview* at 281.

The record reflects that Petitioners acted just as the appellant did in *Parkview*. Petitioners made repeated assurances that they would provide the ordered discovery and comply with the August 1, 2019 Order, made partial responses and employed delay tactics. (ROA 684-703) It was only after repeated empty assurances from Appellants and that they were complying with the August 1, 2019 order that Respondent filed their Motion for Sanctions on September 13, 2019. (ROA 672-683) Petitioners filed no response to that motion. (ROA 764-765) On October 1, 2019, the trial court granted Respondent's Motion for Sanctions and struck Appellants' pleadings. (ROA 46-57)

Parkview clearly illustrates that if Appellants fail to appeal the discovery orders, which in a later order for sanctions, make up the grounds for the sanction, the appellate court may only review

whether the trial court has abused its discretion in granting the sanction. Any issues pertaining to the underlying discovery orders have been waived. *Parkview* at 281. Appellants did not request to be held in contempt or appeal any of these prior orders at the time that they were entered. Instead, Petitioners gave half answers, employed delay tactics and provided assurances that it would eventually comply with the orders. As such, the Court of Appeals correctly determined that, under *Parkview*, the prior orders were not subject to this appeal and there is no basis for this Honorable Court to grant Certiorari.

II. The Court of Appeals correctly found that the trial court was within its discretion to strike Petitioner's Answers and Counterclaims under Rule 37(b), SCRCP and Petitioners have raised no basis under Rule 242(b) for the Supreme Court to review the Court of Appeal's Holding.

Petitioners argue that the October 1, 2019 order striking Petitioners answer and counterclaims was an abuse of discretion because 1) the underlying Order was defective; 2) the Order striking Petitioners' pleadings was without support and contradicted by the record; and 3) less punitive sanctions were available to cure the discovery abuse alleged. Each of these arguments was specifically addressed by the Court of Appeals in its March 23, 2023 opinion and each of these arguments was again rejected by the Court of Appeals in denying Petitioners Motion for Rehearing. Moreover, Petitioners argument is a factual argument and does not raise any reason or basis pursuant to Rule 242(b) that would support its request that this Honorable Court grant Certiorari. Nevertheless, Respondent will briefly address each of Petitioners arguments for the third time.

First, Petitioners argue that the October 1, 2019 Order was unwarranted because June 18 and August 1, 2019 Oders were defective. Petitioners seek, at great length to reform the record and facts on appeal to suit its argument – even going so far as to suggest that both the circuit court's October 1, 2019 Order and the Court of Appeals opinion are factually inaccurate. However, the

record on appeal is clear and it cannot be edited by Petitioners. The Court of Appeals correctly found that "even if the June 18/August 1, 2019 Orders were properly before us on appeal, we find the circuit court did not abuse its discretion or exceed its authority in ordering Appellants to execute authorizations for the release of their own banking and accounting records. See *Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009) ("A trial judge's rulings on discovery matters will not be disturbed by an appellate court absent a clear abuse of discretion.")."

The Court of Appeals also properly found that the banking and accounting documents were within the legal control of Petitioner and that the June 18/August 1, 2019 orders did not improperly overrule another circuit court's order in the same case. See *Sellers v. Nicholls*, 432 S.C. 101, 114, 851 S.E.2d 54, 60 (Ct. App. 2020) ("'[A]n interlocutory order [that] merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered . . . by the court before entering a final order on the merits."(quoting *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013))). *Innovative Waste Mgmt., Inc. v. Crest Energy Partners GP, LLC,* Op. No. 2023-UP-126 at *4 (S.C. Ct. App. filed March 29, 2023). This is a factual determination made by the trial court, was within the trial court's discretion, was given all due consideration by the Court of Appeals and is not a proper subject of a Petition for Certiorari.

Petitioners next contention is that the October 1, 2019 Order was an abuse of discretion because it was not supported by the record. The Court of Appeals stated that "in finding Appellants "engaged in a deliberate pattern of discovery abuse," the circuit court described the many times Appellants missed discovery response deadlines; failed to fully comply with motions to compel; represented to the court they would cooperate in discovery, but then failed to follow through; and failed to pay past monetary sanctions *Innovative Waste Mgmt., Inc. v. Crest Energy Partners GP,*

LLC, Op. No. 2023-UP-126 at *5 (S.C. Ct. App. filed March 29, 2023). The Court of Appeals also noted the trial court's finding that the Petitioners' noncompliance with the June 18/August 1, 2019 orders were a willful tactic "to delay a case on the eve of trial" in gross indifference to IWM's rights. *Innovative Waste Mgmt., Inc. v. Crest Energy Partners GP, LLC,* Op. No. 2023-UP-126 at * 5 (S.C. Ct. App. filed March 29, 2023). Again, this was a finding made by the trial court, was within the trial court's discretion, was given all due consideration by the Court of Appeals and is not a proper subject of a Petition for Certiorari.

Here again, the *Parkview* case is remarkably similar to the facts of this case. In *Parkview*, the Court found that dismissal of the pleadings was not an unduly harsh sanction in light of the plaintiff's willful and repeated failure to comply with various orders of the trial court, which resulted in unnecessary delay and prejudice. *Parkview* at 283. Here the trial court and the Court of Appeals specifically noted the repetitive nature of Petitioners' conduct, that it was willful, and that it was a delay tactic intended to prejudice Respondent. Both the trial court and Court of Appeals followed the well settled law of *Parkview*. Petitioners arguments seek to improperly revise the findings of the circuit court which is not the purpose of the appellate courts. There is no basis for this Court to grant Certiorari and, as such, the Petition should be denied.

CONCLUSION

Both the circuit court and Court of Appeals decisions properly construe and follow *Parkview*. There is nothing new about Petitioners arguments. They are the same arguments rejected by the circuit court and twice by the Court of Appeals. The Court of Appeals correctly found that the trial court's October 1, 2019 Order was the only order properly preserved for appeal and that it was not an abuse of the circuit court's discretion. This was a unanimous decision with no dissent. There is no new law or precedent which has any bearing on the Court of Appeals' interpretation

of *Parkview*. There is no basis pursuant to SCACR 242(b) for this Honorable Court to grant the Petition for Certiorari and, as such, the Petition should be denied.

Respectfully Submitted:

s/ Wm. M. Gruenloh
Attorneys for the Respondent:
Gruenloh Law Firm
Wm. Michael Gruenloh, Esq.,
SC Bar #12418
67 Moultrie Street, 2nd Floor
Charleston, South Carolina 20403
Phone: (843) 577-0027
Email: mike@gruenlohlaw.com

Frederick Jekel, SCBAR# 66491
930 Richland Street, Suite 300
Columbia, SC 29201
(803) 888-7130

For Petitioners:
David B. Marvel
Marvel Et Al., LLC
P.O. Box 22734
Charleston, SC 29413

September 19, 2023
Charleston, South Carolina
(via supctfilings@sccourts.org w/ copy to all counsel)