

THE STATE OF SOUTH CAROLINA  
In the South Carolina Supreme Court

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**Oct 18 2023**

**S.C. SUPREME COURT**

APPEAL FROM DORCHESTER COUNTY

Maite Murphy, Circuit Court Judge

Appellate Case No. 2023-001533

Case No. 2021-CP-18-1486

John Trenton Pendarvis ..... Respondent,

v.

L.C. Knight, in his official capacity as Dorchester County Sheriff; Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division; Hugh E. Weathers, in his official capacity as the South Carolina Commissioner of Agriculture; and John Doe(s),..... Defendants,

Of whom, Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division is..... Appellant.

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**MOTION TO DISMISS AND  
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

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This motion is made pursuant to Rule 201, 240 and 269 of the South Carolina Appellate Court Rules. Respondent John Trenton Pendarvis, moves this Court to dismiss the petition for writ of certiorari filed by Appellant on September 28, 2023, as it is a frivolous appeal of an unappealable interlocutory discovery order, arising from a hearing held almost a full year ago, taken solely for

the purpose of further delay. For the reasons stated below, this Court should dismiss this appeal under Rule 269 SCACR.

### **BACKGROUND**

On September 19, 2019, the Appellant and others entered the Respondent's Dorchester County farm, arrested him, then seized and destroyed his hemp crop. It was the first "enforcement action" taken against a South Carolina farmer growing hemp with a license issued pursuant to South Carolina's Hemp Farming Act. The arrest, seizure and destruction of Respondent's hemp crop led to one criminal prosecution (which was *nolle prossed* by the State on or about August 5, 2022) and three separate civil lawsuits that are all still pending: a declaratory judgment and injunction action in the Marion County Court of Common Pleas (C/A No. 2019-CP-33-0675); a 42 U.S.C. §1983 civil rights lawsuit in Federal District court (C/A No. 2:22-cv-03142-BHH-MHC); and the civil lawsuit under state law claims in Dorchester County Court of Common Pleas, from which this appeal arises.

On February 28, 2023, the trial court issued the Order ("Order") Appellant seeks to appeal, granting the Respondent's *Motion to Compel Discovery from Defendant Keel* and *Motion to Determine the Sufficiency of Defendant Keel's Responses to Plaintiff's Requests for Admission*. In granting the Respondent's motions, finding certain requests for admission deemed admitted, compelling certain discovery responses and awarding \$11,307.36 in attorney's fees and costs as sanctions, the trial court found the Appellant's "discovery in this case has been dilatory, prejudicial, willful, intentional and in bad faith and that his responses have been false, misleading, and incomplete." Order, p.21. The trial court further found that the prejudice to the Respondent from Appellant's discovery conduct was "clear, convincing and substantial. Basic discovery in

this case has now been delayed for over a year.<sup>1</sup> [Respondent] has been forced by [Appellant] to expend substantial time and resources to obtain initial discovery responses that comply with the rules of civil procedure.” Order, p.28.

Appellant filed a motion to alter or amend and/or to reconsider the Order, specifically requesting “oral argument” on March 20, 2023. Respondent filed a response in opposition to that motion, specifically asking the trial court deny the motion “as promptly as possible, in order to avoid further prejudice and delay,” informing the trial court Respondent’s belief that another hearing was unnecessary. The trial court agreed, informing the parties via email dated March 23, 2023, that the trial court would not hold another hearing and would decide the motion on the briefs, allowing the parties the opportunity to supplement their submissions. Appellant asked for, and was allowed time by the trial court, to file a reply to Respondent’s response in opposition, filing that reply on March 28, 2023. The trial court subsequently issued a Form 4 order denying Appellant’s motion on April 5, 2023.

Appellant then sought to appeal the Order to the Court of Appeals, filing an appeal on May 2, 2023. Respondent moved to dismiss that appeal, pursuant to Rule 201, 249 and 269 South Carolina Appellate Court Rules on May 8, 2023. In that motion, Respondent specifically asked the Court of Appeals “to impose such sanctions as the Court finds appropriate given the circumstances of the case and to discourage like conduct in the future.” *May 8, 2023 Motion*, p.1.

After recounting prior similar appellate history and the specific nature of the Order being appealed, Respondent argued, at a minimum, the Court of Appeals should issue a finding that the appeal was being dismissed under Rule 269 SCACR “as frivolous, so as to discourage like conduct

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<sup>1</sup> As of the filing of this motion, Appellant’s conduct has succeeded in delaying this basic discovery for over two years, as the original deadline to respond to the discovery requests at issue was October 15, 2021. Order, p.2.

in the future,” warning that “merely dismissing this appeal as an unappealable interlocutory order will do nothing to discourage parties like the Appellant from wasting the Court’s and opposing parties’ time and resources filing such improper appeals going forward.” *May 8, 2023 Motion*, p.6-7.

Unfortunately, the Court of Appeals did not make such a finding, and here we are again, over two years past the original deadline Appellant is still obstructing and delaying “basic discovery” in this case via this appeal.

### ARGUMENT

Appellant’s petition seeks to appeal an unappealable interlocutory Order which is not immediately appealable and have this Court referee basic trial discovery. Specifically, Appellant is seeking to improperly appeal an Order compelling discovery and sanctioning discovery abuse, to further delay discovery and avoid any penalty for doing so in a manner that intentionally ignores the well-established procedure this Court has found must be followed to appeal such an order.

Rule 201 states “appeal may be taken, as provided by law, from any final judgment, appealable order or decision.” Rule 201(a) SCACR.

An order compelling discovery does not ordinarily involve the merits of this case and may not be appealed. Tucker v. Honda of S.C. Mfg., 354 S.C. 574, 577 (2003), citing Ex Parte Whetstone, 289 S.C. 580 (1986). Discovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statutes, involve the merits of the action or effect a substantial right.<sup>2</sup> Grosshuesch v. Cramer, 377 S.C. 12,

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<sup>2</sup> A “substantial right” is when “such order would discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.” Mid-State Distribs. v. Century Imps., 310 S.C. 330, 334 n.4. (1993). This is not the case with the order Appellant seeks to appeal.

30 (2008), citing Hamm v. S.C. Pub. Serv. Comm'n, 312 S.C. 238, 241 (1994); Wallace v. Interamerican Trust Co., 246 S.C. 563, 568-69 (1965).

Since a contempt order is final in nature, an order compelling discovery may be appealed **only** after the trial court holds a party in contempt. Tucker at 577, citing Hooper v. Rockwell, 334 S.C. 281 (1999), emphasis added. Thus, a party may comply with the order and waive any right to challenge it on appeal **or** refuse to comply with the order, be cited for contempt, and appeal. Tucker at 577, citing Ex parte Whetstone, emphasis added.

Despite the above being well-settled law instructing how a discovery order is **not** an immediately appealable order under Rule 201(a) SCACR and what one must do to properly appeal an interlocutory discovery order, Appellant continues to ignore the rules and the law by filing this petition for certiorari.

As Respondent previously noted, in Locklear v. Marlboro Co., et al., the Court of Appeals dismissed a similar improper appeal, finding:

Respondent's motion to dismiss the appeal is granted because the underlying order is not immediately appealable. *See Grosshuesch v. Cramer*, 377 S.C. 12, 20, 659 S.E.2d 112, 122 (2008) (“[T]he fact remains that discovery orders, in general, 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 effect a substantial right.”); *Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994). (“Discovery orders...are interlocutory and are not immediately appealable.”).<sup>3</sup>

The appellant in Locklear petitioned for a rehearing and the Court of Appeals denied that petition. The appellant then petitioned for a writ certiorari to this Court and that petition was

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<sup>3</sup> The language of the Court of Appeal's July 10, 2023 Order granting Respondent's motion to dismiss Appellant's appeal in this case repeats verbatim this same language from the Locklear order, while adding to it the language from the Tucker case instructing the Appellant on the proper procedure to appeal (similar to the language noted in the Order sue sponte dismissing the appeal in Funny).

denied. **Exhibit 1**, p. 15-17, Locklear v. Marlboro Co., et al., Appellate Case No.2018-001510, and Appellate Case No.2019-000064.<sup>4</sup>

As Respondent previously argued, Appellant was well-aware that this Order was unappealable, as the Court of Appeals has previously *sua sponte* dismissed a similar appeal filed by Appellant's former counsel, finding:

This appeal arises out of an order of the circuit court granting the respondent's motion to compel discovery. Because an order compelling discovery may not be appealed, the appeal is dismissed as interlocutory. *See Tucker v. Honda of S.C. Mfg., Inc.*, 354 S.C. 574, 577, 582 S.E.2d 405, 406 (2003) (**noting a party must refuse to comply with a discovery order and be held in contempt before the decision becomes appealable**). The remittitur will be sent pursuant to Rule 221(b) of the South Carolina Appellate Court Rule.

**Exhibit 2**, p.2, Funny v. Waffle House, Inc. and Christopher Heithaus, Appellate Case No.2019-002081.

The appellant in *Funny* then petitioned the Court of Appeals for a rehearing, arguing the Court had "overlooked or misapprehended the precise nature of the orders on appeal," attempting to distinguish that because the orders had in addition to compelling discovery, awarded sanctions, that "a non-contempt monetary sanction is an immediately appealable final order." The Court of Appeals denied that petition for rehearing via order dated July 1, 2020. **Exhibit 2**, p.3-8. The appellant in *Funny* then petitioned this Court for a writ of certiorari and that petition was denied via order dated April 19, 2021. **Exhibit 2**, p.9-17, Funny v. Waffle House, Inc. and Christopher Heithaus, Appellate Case No.2020-001050.

Rule 269 of the South Carolina Appellate Court Rules states:

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<sup>4</sup> Respondent would note that the Appellant in this case was a co-defendant in the *Locklear* case, represented by Appellant's counsel's then-law firm. The *Locklear* case was cited to the trial court in the discovery dispute giving rise to this appeal, in support of Respondent counsel's attorney fee rate, as Appellant was sanctioned for discovery abuse in *Locklear* and required to pay attorney's fees and costs arising from another order compelling discovery.

**Where an appeal, petition, or motion or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules**, the appellate court may upon its own motion or that of a party, after ten (10) days notice, **impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require**. This Rule does not apply to any matters where counsel is required by law to pursue an appeal or petition for writ of certiorari even though the matter may be frivolous.

Rule 269 SCACR, emphasis added.

The above shows that not only should Appellant's appeal be dismissed, but Appellant **knew** his appeal was improper and subject to dismissal by this Court, with similar arguments having been previously unsuccessful in prior appeals (as a party or through counsel), and as such, a Rule 269 SCACR finding and sanction is warranted.

**I. The trial court's Order properly identifies the named party whose conduct is addressed by the Order.**

Appellant argues this case is "exceptional" because of "the language and tone of the Circuit's Court Order," arguing that "immediate review is required because the Order – as drafted – reads as a personal attack on Chief Keel." *Petition*, p.4. In support of this argument, Appellant argues the Order refers to Appellant "as 'KEEL' approximately 175 times, and by doing so, indicates erroneously that Chief Keel personally engaged in discovery abuse." *Petition*, p.4.

In making this argument, Appellant fails to acknowledge to this Court that, "over the course of six filings and ten separate discovery responses in this case, [Appellant] **has self-identified as "Defendant Keel" in some form or fashion approximately 100 times.**" *Respondent's Response*, p.3, fn.1, emphasis added.

The Order correctly identifies the named party against whom the order is directed: Defendant Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division, i.e., "KEEL."

As evidenced by the caption, Appellant has been a named party defendant since the underlying action commenced with the filing of the *Summons and Complaint* on August 23, 2021. Prior to the issuance of the Order being appealed, Appellant never argued he was improperly named or identified, not raising any issue over this identification until **after** this Order was issued, arguing for the first time through the motion to alter or amend and/or reconsider, “the proper Defendant would be the South Carolina Law Enforcement Division.” *Appellant’s Motion*, p.2.

It has long been recognized that a government entity may be sued by filing suit against a state officer in his or her “official capacity.” See *Ex Parte Young*, 209 U.S. 123 (1908). Further, South Carolina law “is clear that an attorney or insurance company’s misconduct is imputable to the client.” *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 609 (2009).

Whether or not “Chief Keel personally engaged in discovery abuse” is irrelevant in the eyes of the law. He is the properly named party under the law and any discovery misconduct found and sanctioned by the Court is imputable upon Appellant as that properly named party under the law.

Appellant’s argument ignores that well-settled law, as well as Appellants own repeated “self-identification” throughout this matter.

At the October 31, 2022 hearing that resulted in the Order, Appellant’s former counsel appeared on the record, identifying as:

THE COURT: Response, Mr. Lindemann?

MR. LINDEMANN: Yes, Your Honor. May it please the Court. Andrew Lindemann **for Chief Mark Keel in his official capacity.**

**Exhibit 3**, *Transcript of October 31, 2022 hearing excerpts*, p.47, 1.5-8, emphasis added.

Appellant’s former counsel went on to argue during the October 31<sup>st</sup> hearing that “the only party in this case is **Chief Keel in his official capacity,**” that he was “retained through the

Insurance Reserve Fund to represent **Chief Keel**,” and that “I do not have possession, nor does **Chief Keel**” of requested discovery. **Exhibit 3**, *Transcript of October 31, 2022 hearing excerpts*, p.55, 1.15-16; p.57, 1.9-10 and 1.15-16, emphasis added.

Just two weeks prior to that hearing, when seeking a continuance, Appellant filed a motion self-identifying as “the Defendant Mark Keel”:

YOU WILL PLEASE TAKE NOTICE that counsel for the Defendant Mark Keel hereby moves before the Chief Administrative Judge of the First Judicial Circuit at the Dorchester County Courthouse, St. George, South Carolina, for an Order, pursuant to Rule 40(i), SCRCPC, and Rule 601(a), SCACR, continuing this case past the October 31, 2022 term of court.

The Defendant Mark Keel seeks the continuance due to scheduling conflicts during the week of October 31, 2022. Specifically, the undersigned counsel for Defendant Keel has a date

*October 18, 2022 Notice of Motion and Motion for Continuance, C/A No.2021-CP-18-1486.*

In Appellant’s written responses to discovery submitted to Respondent, Appellant self-identified as “Defendant Keel,” **including** the discovery responses which the trial court found sanctionable. One such example is Appellant’s last-minute attempt to address the noticed deficient responses to RFA#1 and RFA#2, submitted via an email at 12:42 p.m. the day of the hearing:

1. Admit that SLED sought judicial approval to destroy Plaintiff's hemp crop.

**RESPONSE #1:**

Denied as stated. Further answering, on September 19, 2019, Special Agent John Neale with the South Carolina Law Enforcement Division (SLED) obtained an arrest warrant for the Plaintiff for Unlawful Cultivation of Hemp. Special Agent John Neale met with Dorchester County Magistrate Judge Ryan Templeton who issued the arrest warrant.

**SUPPLEMENTAL RESPONSE #1:**

Denied as stated. Further answering, the Defendant Keel admits that Adam Whitsett, General Counsel for the State Law Enforcement Division, contacted the law clerk of Judge Diane Goodstein on September 11, 2019, to request a meeting with Judge Goodstein to discuss a proposed order entitled "Hemp/Marijuana Seizure Order and

2. Admit that judicial approval of SLED's action was denied.

**RESPONSE #2:**

The Defendant Keel objects to this request in that the reference to "SLED's action" is vague and ambiguous. The Plaintiff does not specify the "action" to which he is referring. To the extent a response is required, the Defendant Keel denies the request as stated.

**SUPPLEMENTAL RESPONSE #2:**

Denied as stated. Further answering, the law clerk for Judge Diane Goodstein informed Adam Whitsett that Judge Goodstein was not willing to sign the proposed order entitled "Hemp/Marijuana Seizure Order and Order of Destruction." Judge Diane Goodstein did not hear or adjudicate the merits of the "SLED's action."

BY: s/ Andrew F. Lindemann  
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Counsel for Defendant Mark Keel

October 31, 2022

October 31, 2022 Defendant Keel's Supplemental Responses to Plaintiff's Requests for Admission, see Order, p.23-24.

Additionally, in two separate emails raising objections with the proposed order submitted by the Respondent, Appellant failed to raise any concern that the proposed order properly identified Appellant as the named party, continuing to identify in those objections as "Defendant Keel":

Forgive me, but I failed to mention two additional points. Certainly, the Defendant Keel objects to the imposition of a per diem penalty. The order cites no authority for

**Exhibit 6.**

Appellant is the properly named party to this action and the Order sanctioning the discovery conduct in this case accurately and appropriately identifies the named party whose conduct is addressed in the Order. The record reflects that Appellant has had no problem with being so identified in numerous filings, proceedings, discovery responses and communications with the Court. It is only when the Court sanctions Appellant's misconduct, that Appellant objects to being identified as the law provides.

However, South Carolina law "is clear that an attorney or insurance company's misconduct is imputable to the client." Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 609

(2009). The purpose of that law is simple: parties are responsible for their conduct during litigation, including discovery misconduct. The very heartburn the Order is apparently causing the Appellant is the heartburn the law is meant to inflict. The named party is responsible for what is done in his/her name.

To grant Appellant's petition would not only ignore that purpose of the law, but it would serve to interject the appellate courts into everyday discovery disputes and be contrary to well-established case law governing discovery and appellate procedure.

## **II. There is no hyperbolic language contained in the trial court's Oder.**

Appellant calls "troubling" that the Order contains "incendiary language" that the trial court refused to change from a requested proposed order, that "allowed Respondent's counsel to lodge a personal attack against Chief Keel with the imprimatur of the judiciary," claiming such "hyperbolic language" has been criticized by this Court. *Petition*, p.5-6.<sup>5</sup>

As an initial matter, Appellant does not identify any such "incendiary language." Instead, Appellant cites via footnote to a January 5, 2023 oral argument before this Court with the description "discussing the problems associated with judges signing proposed orders 'riddled with hyperbolic, false statements.'" *Petition*, p.6, fn.2, citing to Freddie E. Owens, et al. v. Bryan P. Stirling, et al., Appellate Case No.:2022-001280.

A review of the oral argument in *Owens* shows the comments referred to by Appellant are not applicable to this case, as it was a discussion about proposed orders being signed containing findings that are **not** supported by the record that concerned this Court:

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<sup>5</sup> Not only did the trial court edit the proposed order (as noted in emails, the original proposed order was 32-pages versus the 30-page Order issued by the Court), but the trial court specifically responded to Appellant's objections **before** ever issuing the Order that: "this Court does not just signed proposed orders without careful review to ensure they are accordance with what the Court's ruling is." See **Exhibit 6**.

JUSTICE KITTREDGE: Let me stop you there, and just tell you there's a – in my judgment, sir, a problem that we see in cases that don't reach this magnitude. In nonjury matters, there's a request, as happened here, for orders to be drafted by each side. I don't know for a fact, but I gather, from the order signed by the judge, the judge signed the order submitted by your side. And in that regard, what we see, unfortunately, has surfaced in this case. For example, the trial judge found that the State presented no evidence – quote – “no evidence” that these methods of execution were painless, or cause immediate death. **That's just an absolute false statement, and the order is riddled with those hyperbolic, false statements, as if they presented nothing.** It might have been legitimate to say differing opinions were issued – I found this more credible, for this particular reason. But how does that impact the standard of review, when we've got an obviously flawed order that was signed, **that doesn't match the record?**

**Exhibit 7, Transcript of January 5, 2023 oral argument in Owens v. Stirling excerpt, Appellate Case 2022-001280, p.51, 1.4-24, emphasis added.**

Appellant makes absolutely no attempt in the petition to identify any such “hyperbolic, false statements” in the Order, because there are none. In his motion to alter or amend and/or reconsider, Appellant claimed that “the evidence in the record” did not support such as “harsh finding” as the Order's finding that Appellant's “conduct regarding discovery in this case has been dilatory, prejudicial, willful, intentional and in bad faith and that his responses have been false, misleading, and incomplete.” *Appellant's motion*, p.3, Section 2.

In making that argument, Appellant ignored that the Order specifically addressed in detail within Sections II and III, why it reached such a “harsh finding.” Including, but not limited to:

- 1) the trial court's findings regarding the evidence of Appellant's responses to RFA#1 and RFA#2 being evidence of the “false, misleading, and incomplete” nature of Appellant's discovery responses from page 21-24 of the Order;
- 2) the trial court's findings regarding Appellant's “willful, intentional and in bad faith” discovery conduct from page 24 of the Order (emphasis added):

KEEL failed to offer the Court any reason or excuse why these supplemental responses had not been provided when noticed, but instead had been provided at the last minute before the hearing. In absence of even an attempt to explain this behavior, the Court is left to conclude the delay was **willful, intentional and in bad faith**; and,

- 3) the Court's findings that the record shows Appellant's failure to respond "fully and adequately" to the Plaintiff's discovery responses as evidenced by "numerous communications KEEL neither identified nor produced" from page 25-26 of the Order.

Not only does this Order go into great detail about the support in the record for its findings, but as the Order finds, the record supports that "the prejudice to the Plaintiff from KEEL's conduct is clear, convincing and substantial." Order, p.28.

In other words, this Order is **not** the type that this Court lamented during oral argument in *Owens*, as this Order points to specific evidence in the record supporting its findings that Appellant's discovery conduct in this case has been dilatory, prejudicial, willful, intentional, in bad faith, false, misleading and incomplete. To the extent Appellant's consider such findings "harsh," those findings could have easily been avoided by **not** engaging in such discovery conduct.

### **III. The trial court's finding compelling the production of personnel files did not abuse discretion and is not immediately appealable.**

Appellant attempts to obtain special treatment outside the well-established procedure for properly appealing unappealable interlocutory discovery orders by arguing that because the trial court compelled the production of employee files without protection the trial court's refusal to provide those protections is immediately appealable. *Petition*, p.6-8, Section II.

Appellant supports this argument by stating their counsel requested such protection at the October 31, 2023 hearing. In making this argument, Appellant fails to inform this Court that Appellant actually attempted to improperly shift the burden of seeking such protection to the Respondent at the hearing:

**[Appellant] argued that it was the [Respondent's] burden to obtain a confidentiality order to receive this discovery.** The plain language of the rule defeats that argument: "Upon motion by a party or person from who discovery is sought, and for good cause shown, the court in which the action is pending...may make any order which justice requires to protect a party or person from annoyance,

embarrassment, oppression, or undue burden by expense...” Rule 26(c) SCRCPP, emphasis added.

The burden is on [Appellant] to request such protection via motion. That burden requires “a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.” General Dynamics Corp. v. Selb Manufacturing Corp., 481 F.2d 1204, 1212 (8<sup>th</sup> Cir. 1973) (citing Wright Miller, *Federal Practice and Procedure: Civil*, §2035 at 264-65).

**[Appellant] has filed no such motion and his arguments are not persuasive as they did not rise above stereotyped and conclusory statements.**

Order, p.14-15, emphasis in original.

Appellant also fails to inform this Court that any concern about personal identifying information was addressed by Respondent specifically notifying both Appellant and the trial court that:

[Respondent] has no objection to simple redaction of Social Security numbers, dates of birth, names of minor children or financial account information. But there is no reason for the Court to amend or alter its order to provide protection that [Appellant] never properly requested or sought pursuant to the rules and there is certainly no justification for designating entire personnel files “confidential,” especially given the Burton v. York County Sheriff’s Dep’t holding that such files are subject to production under FOIA. *Order*, p.16.

*See* Plaintiff’s Response in Opposition to Defendant Keel’s Motion to Alter or Amend Order and/or Motion to Reconsider, p.9-10.

The Order itself specifically addressed Appellant’s arguments on this issue:

[Appellant’s] argument that it is appropriate to ask for protection because the agents/employees are “non-parties” ignores the reason they are “non-parties” is because the South Carolina Tort Claims Act dictates the Plaintiff name only [Appellant] and not the individual SLED agents/employees. South Carolina courts recognize that being a non-party is not grounds for protection. “The rules do not differentiate between information that is private or intimate and to which no privacy interests attach... Thus, the rules often allow extensive intrusion into the affairs of both litigants and third parties.” Hamm v. S.C. Public Serv. Commission, 312 S.C. 238, 439 S.E.2d 852, 853-854 (1994).

All discovery is intrusive. All parties and witnesses in every case would prefer to have court orders in place protecting their information. But to do so would gut a fundamental constitutional right in South Carolina:

Because South Carolina has a long history of maintaining open court proceedings, this Rule is intended to establish the guidelines for governing the filing under seal of settlements and other documents. Article I, §9, of the South Carolina Constitution provides that all courts of this state shall be public, and this Rule is intended to ensure that the Constitutional provision is fulfilled.

Rule 41.1(a) SCRCP.

Order, p.15.

In *Ex parte Whetstone*, the South Carolina Supreme Court made clear that the proper procedure for appealing unappealable interlocutory discovery orders is no different for non-parties:

We now hold that an order directing a nonparty to submit to discovery is not immediately 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, at 580.

Despite Respondent having previously pointed out the problems with Appellant's reliance on *Doe v. Howe*, 362 S.C. 212 (2004) and *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1 (2006), Appellant continues to argue those cases to this Court, ignoring the substantive difference between comparing compelling the production of basic discovery (personnel files), with a court refusing to protect the identify of a sexual assault victim (*Howe*) and unsealing sealed court records (*Ex parte Capital*). Set aside the audacity of such comparisons based on the subject matter alone, Appellant's reliance on those cases overlooks a basic fact that led to allowing appeals in those cases: revealing certain information was the sole subject of the action being appealed.

In *Howe*, Doe had filed a motion to keep his identity anonymous in pretrial phases of a legal malpractice case arising from prior claims that had come from allegations of sexual abuse. That was the whole point of the motion and the order that was being appealed. Howe at 217.

In *Ex parte Capital*, the entire proceeding before the Family Court that was being appealed, was the husband's Employer's motion to unseal previously sealed divorce proceedings to obtain financial information to use against the husband in a separate civil action. In essence, the order unsealing that action ended any further proceedings in family court, and the *Ex parte Capital* court found the motion was appealable. Ex parte Capital at 7-8.

In both those cases, the matters had reached "the end of the road" and the release of the information was imminent **and potentially out of the appellant's control**.

That is not this case.

Appellant has not lost a motion wherein they made a record showing good cause to protect highly sensitive and personal information. Further, **no information would be publicized prior to the Appellant following the well-established proper procedure for appealing an interlocutory discovery order**. There is no third party who can produce the compelled personnel files.

If Appellant does not comply with the Order, proceeds to be found in contempt, then appeals that contempt order, no one will have been prejudiced by production of the personnel files, because the personnel files will have not been produced.

To paraphrase a line from *Ex parte Capital*, **the cat only leaves the bag if the Appellant complies with the trial court's Order**. The alleged prejudice/harm does not exist if Appellant follows proper appellate procedure **and is successful**.

What Appellant seeks is a free roll of the dice to keep delaying and obstructing discovery, with no cost for doing so. As the trial court noted, the discovery process "is not a children's game, but a serious effort on the part of adult human beings to administer justice." Order, p.26, quoting Griffin v. Capital Cash, 310 S.C. 288 (Ct. App. 1992). Accordingly, appellate procedure and case law protects appealing discovery orders from becoming such a game. It is a serious effort with real

consequences for frivolous appeals that cannot meet the abuse of discretion standard. If Appellant cannot accept those rules, it is time to stop playing such games.

**IV. The trial court’s finding that two requests for admission be deemed admitted is not immediately appealable.**

Appellant characterizes the trial court’s deeming two requests for admission “admitted,” as playing “a fact-finding role.” In doing so, Appellant ignores the specific findings the trial court expressly set out in the Order for deeming the requests admitted: the responses failed to comply with the plain language of Rule 36 SCRPC. *See* Section II(d) Order, p.18-21.

Appellant’s original responses dated October 15, 2021 are set out in the Order:

- 1) *Admit that SLED sought judicial approval to destroy the Plaintiff’s hemp crop.*  
Denied as stated. Further answering, on September 19, 2019, Special Agent John Neale with the South Carolina Law Enforcement Division (SLED) obtained an arrest warrant for the Plaintiff for Unlawful Cultivation of Hemp. Special Agent John Neale met with Dorchester County Magistrate Judge Ryan Templeton who issued the arrest warrant.
- 2) *Admit that judicial approval of SLED’s action was denied.*  
The Defendant Keel objects to this request in that the reference to “SLED’s action” is vague and ambiguous. The Plaintiff does not specify the “action” to which he is referring. To the extent a response is required, the Defendant Keel denies the request as stated above.

Order, p.18.

The trial court explained Appellant’s response to RFA#1 was deficient and improper under Rule 36 because it did not “**fairly meet the substance of the requested admission or specify so much of it as true as required by the rule.**” Order, p.18-19, emphasis added. The trial court explained in detail how Appellant’s response to RFA#1 failed to comply with the plain language of Rule 36 SCRPC:

The response evades admitting or denying whether judicial approval was sought for the destruction of the Plaintiff’s hemp crop. The request did not ask [Appellant] whether judicial approval had been sought to arrest the Plaintiff. It specifically asked [Appellant] to admit whether judicial approval has been sought **to destroy**

**his hemp crop.** Admitting that SLED sought approval to **arrest** the Plaintiff is a blatant attempt to avoid admitting or denying whether SLED attempted to comply with the August 8, 2019 opinion they received from the South Carolina Attorney General.

Rule 37(a)(3) SCRPC specifically allows this Court to treat an evasive or incomplete answer as a failure to answer. Any denial of a request for admission “must specifically address the substance of the requested admission” and “may not sidestep the request or be evasive.” S. Baicker-McKee, *et al.* Federal Civil Rules Handbook at 871 (2009) (citations omitted).

Order, p.19, emphasis in original.

Similarly, the trial court explained in detail how Appellant’s response to RFA#2 was also deficient pursuant to the plain language of Rule 36 SCRPC:

As to RFA#2, the Court does not find that the term “action” as used in the request was vague or ambiguous. Since there were only two requests, the “action” being referred to was readily identifiable.

If [Appellant] could not...legitimately make that connection, he had a duty “to obtain clarification prior to objecting on this point.” [Curtis v. Time Warner Entm’t v. Advance/Newhouse P’ship, 2013 U.S. Dist. LEXIS 68115, \*3 (D.S.C. May 14, 2013)]. Even if the request had been vague or ambiguous, the Plaintiff promptly clarified any legitimate confusion [Appellate] could claim and [Appellant] failed to cure his deficient responses in light of that unnecessary clarification.

Order, p.19.

At the conclusion of this quoted text regarding Appellant’s RFA#2 response, the trial court included footnote no.5, which specifically stated:

The Court notes [Appellant’s] supplemental amended responses to these requests served on the [Respondent] **less than 2.5 hours before the hearing** on October 31, 2022. Those responses do not cure the deficiencies and **the Court finds them untimely.** *See* discussion below.

Order, p.19, fn.5, emphasis added.

The last-minute October 31, 2022 supplemental responses the trial court specifically found were untimely prove the flaw with Appellant’s argument. The trial court did not deem the requests admitted because it was “determining the truth of disputed facts prior to trial.” Rather, as explicitly

explained in the Order, the requests were deemed admitted because Appellant failed to comply with the plain language of Rule 36 SCRCF:

**If [Appellant] sought such judicial authorization and the judge denied it, both requests should be admitted** and those two relevant material facts would no longer be in controversy...

...Conversely, **if [Appellant] did not seek such judicial authorization, or he did and it was approved, then those requests should be denied.**

**What is not appropriate under the rule, is refusing to admit the specific request by denying “as stated,” then admitting things for which no admission was sought in the actual request.** A responding party must respond to the request submitted. It is improper and does not comply with the rules for a responding party to respond to a request they want to admit. If a responding party has things they want admitted, they can submit their own requests for admission.

“The answering party that objects to a request for admissions does so at its own peril.” Poole at 499 (noting the language of the rule “states, in detail, the requirements for denials, objections, partial admissions, and qualified answers” and that failure to adhere to the plain language of the rule requires that the fact in question be admitted, citing to Asea, Inc. v. S. Pac. Transp. Co., 669 F.2d 1242, 1245 (9<sup>th</sup> Cir. 1981)).

**I FIND that [Appellant’s] RFA#1 and RFA#2 responses fail to comply with Rule 36 and are, hereby, deemed ADMITTED. “Failure to adhere to the plain language of [Rule 36] requires that the fact in question be admitted.” Want v. Bulldog Fed. Credit Union, 2021 U.S. Dist. LEXIS 118096, 18 (D.Md. 2021) (citing to Poole at 499, noting Poole’s cite to Asea, Inc. v. S. Pac. Transp. Co., 669 F.2d 1242, 1245 (9<sup>th</sup> Cir. 1981). *See also* Rule 36 SCRCF.**

Order, p.20, emphasis added.

The trial court later explained how even the Appellant’s untimely supplemented responses to RFA#1 and RFA#2 failed to comply with Rule 36, specifically finding “[Appellant’s] supplemental responses to RFA#1 and RFA#2 insufficient.” Order, p.25.

Appellant’s argument ignores all of the above, focusing solely on a footnote the trial court placed in the section deeming RFA#1 and RFA#2 admitted that “as discussed below, the record shows both requests should have been admitted.” Return, p.3, citing to Order, p.20, fn.6. As shown

by the placement in a footnote, that comment was made for the discussion of sanctions **after** (below) the finding that the request be deemed admitted – was **not** controlling on the issue of finding the requests deemed admitted.

The trial court specifically pointed out those were two separate issues when addressing Appellant’s reliance on *Sessions v. Withers*, 327 S.C. 409 (Ct. App. 1997):

[Appellant] argues that this Court can only award attorney’s fees as sanctions regarding his requests for admission responses if the [Respondent] filed and proved they should be admitted by winning a motion for summary judgment or proving the matter at trial, citing to *Sessions v. Withers*, 327 S.C. 409 (Ct. App. 1997) and Rule 37(c) SCRPC.

The Court disagrees that a requesting party can only “prove the truth of the matter” through a motion for summary judgment or at trial, finding no such requirement in Rule 37(c) or in *Sessions*. The [Respondent] created an extensive record which the Court finds proves RFA#1 and RFA#2 should have been admitted.

**Even if [Appellant’s] interpretations of Rule 37(c) and *Sessions* were correct, that would not prohibit an award of attorney’s fees and costs, as [Appellant’s] responses did not comply with Rule 36(a), which states “the provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to this motion.” The plain language of Rule 36(a) and Rule 37(a)(4) allows an award of attorney’s fees and costs in this matter.**

I FIND the [Respondent] is entitled to an award of attorney’s fees and costs under Rule 36(a), Rule 37(a)(4) and Rule 37(c) SCRPC.

Order, p.29, emphasis added.

The plain-language of Rule 36 would be meaningless if Appellant’s argument was correct:

The party who has requested the admissions **may move to determine the sufficiency of the answers** or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. **If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted** or that an amended answer be served. The court may, in lieu of these orders, **determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial.** The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Rule 36(a) SCRPC, emphasis added.

Appellant's argument also ignores that the Rules of Civil Procedure specifically provide that in dealing with failures to make or cooperate in discovery, trial courts "in which the action is pending may make such orders in regard to the failure as are just, and among others the following: an Order that the matters regarding which the order was made **or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.**" Rule 37(b)(2)(A) SCRCF, emphasis added.

In short, Appellant mischaracterizes the findings by which the trial court deemed the two requests for admission "admitted," and ignores the specific findings of the trial court's Order, as well as the plain language of Rules 36 & 37 SCRCF, essentially arguing that this Court should involve itself in determining the sufficiency of request for admission responses.

**V. The trial court's finding sanctioning Appellant for discovery abuse and awarding attorney's fees and costs is not immediately appealable.**

Appellant argues that because the trial court's Order required the monetary sanctions to be paid "within thirty days of the filing of this order," that entitles their appeal to special treatment. The argument claims that requiring payment within a certain time eliminates Appellant's right to appeal the sanction after final judgment. *Petition*, p.9-10.

This argument is based upon what Appellant has previously described as the "unfair (and arguably unconstitutional) choice of paying the sanctions and forfeiting its appeal rights...or otherwise being held in contempt of court – which is a fundamentally unfair choice." *Return*, p.8. For that reason, Appellant argues orders directing that a specific sum of monetary sanctions be paid by a date certain should be subject to immediate appeal.

This is not the law. Nor should it be. At no point does Appellant even attempt to explain how the current process would ultimately be unfair. If Appellant has valid grounds to appeal the trial court's order and finding of monetary sanctions, then, if Appellant has the courage of its

convictions, they may refuse to comply with the Order, be found in contempt and appeal **that** Order. If successful, **how would the Appellant be prejudiced?** Appellant would have paid no monetary sanctions and there would no longer be any finding of contempt against the Appellant.

Instead, Appellant asks this Court to change the rules, allowing Appellant (and other parties who have similarly engaged in dilatory, prejudicial discovery misconduct) to continue to engage in the same conduct that led to the sanctions, at little to no cost, essentially transforming this Court into the referee of every trial discovery dispute, should the sanctioned party so desire.

The “award of attorney’s fees and costs under Rule 37(b)(2) **is interlocutory and not immediately appealable.**” Richardson v. Halcyon Real Estate Servs., 2023 S.C. App. LEXIS 43, 5-6 (Ct. App. April 19, 2023), emphasis added. In doing so, the Court of Appeals cited to several decisions where:

...federal courts have determined that orders imposing attorney’s fees and costs on a party under Rule 37(b) of the Federal Rules of Civil Procedure are interlocutory and not immediately appealable. *See, e.g., David v. Hooker, Ltd.*, 560 F.2d 412, 416 n.6 (9<sup>th</sup> Cir. 1977) (“Normally, the imposition of the [Federal Rules of Civil Procedure] Rule 37(b)(2) sanction of attorney’s fees and expenses upon a non-complying party is considered to be interlocutory.”); E. Maico Distribs. Inc. v. Maico-Fahrzeugfabrik, G.m.b.H., 658 F.2d 944, 947 (3d Cir. 1981) (“Sanctions for violation of discovery orders are usually considered interlocutory and not immediately appealable.”); *see also* 15B Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.23 (2d ed. 1992) (“Sanctions imposed for violation of discovery orders might seem plausible candidates for appeal on the theory that the sanction is severable from the continuing proceedings. The opportunities for appeal, however, have generally been limited to sanctions that conclude the proceeding or that involve nonparties.”).

Richardson at 6, n.3.

An award of attorney’s fees and costs as a discovery sanction “**neither involves the merits of the case nor affects a substantial right and is therefore not immediately appealable.**”

Richardson at 6, emphasis added. “Allowing a party to immediately appeal an interlocutory order

imposing sanctions under Rule 37(b) for deposition misconduct **would further delay the process and drive up costs.**” Richardson at 7, emphasis added.

Appellant tries to distinguish *Richardson* by arguing “in that case, the appellant had already paid the time-imposed sanction. The Court was, therefore, not called upon to decide the issues raised by [Appellant] in the case at bar, i.e., whether a sanctions award that includes a time limitation for payment that makes the sanction payable prior to final judgment should be deemed immediately appealable. Logically, if a sanctions award *is required to be paid before appeal rights attach*, as we have here, that sanctions award violates a party’s right to appeal thereby implicating safeguards and issues of due process and fundamental fairness.” *Petition*, p.10, emphasis in original.

This argument is the same type of hair-splitting-attempt-to-distinguish-and-receive-special-appellate-consideration that the law firm appellant argued in *Richardson* and that the Court of Appeals refused to accept. *See* Case No. 20019-000671, Final Reply Brief of Appellant, section I. There is no material distinction between the monetary sanctions in *Richardson* and the present case. The order being appealed in *Richardson* imposed the monetary sanction for attorney’s fees and costs with a similar time deadline: within fifteen (15) days of the filing of the order in *Richardson*. *See* Case No. 20019-000671, Record on Appeal, Vol.I, R.16.

The fact the monetary sanction had been paid in *Richardson* was not even considered by the Court of Appeals, despite the issue of “mootness” due to payment being briefed by both parties. *See* Case No. 20019-000671, Final Reply Brief of Appellant, section I and Final Brief of Respondent, Section IV(d).

Put simply, Appellant’s attempts to distinguish their appeal from *Richardson* are distinctions of no consequence. To properly appeal the Order, Appellant was required to follow

the well-established procedure that has existed in this state for over four decades: refuse to comply, be found in contempt, appeal the contempt order. It is not hard or complicated.

Nor would there be any prejudice to a party following that procedure **should they engage in a meritorious appeal and be successful**. It is the last part of that sentence that Appellant is trying to avoid. Respondent submits that part is exactly why the well-established appellate procedure exists: to regulate frivolous appeals.

**VI. The continued attempt by Appellant to pursue this improper frivolous appeal is a continuation of the discovery misconduct being appealed and should be sanctioned pursuant to Rule 269 SCACR.**

Having ignored the well-established appellate procedure in order to avoid the prejudice that comes from pursuing frivolous appeals, Respondent respectfully requests this motion be granted under Rule 269 SCACR.

Even though the imposition of sanctions is usually left to the sound discretion of the trial judge, whatever sanction the judge imposes “should serve to protect the rights of discovery provided by the Rules.” Overly lenient sanctions are to be avoided where they result in inadequate protection of discovery. Samples v. Mitchell, 329 S.C. 105, 114 (Ct. App. 1999), internal citations omitted.

The selection of a sanction for discovery violations is within the trial court’s discretion. This court will not interfere with that decision unless the trial court abused its discretion. An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court **was without reasonable factual support** and resulted in prejudice to the rights of the appellant, thereby amounting to an error of law. Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 198 (Ct. App. 1999), internal citations omitted, emphasis added.

In addressing Appellant's discovery conduct, the trial court specifically found that Appellant's discovery conduct "in this case has been dilatory, prejudicial, willful, intentional and in bad faith and that his responses have been false, misleading, and incomplete," making those findings "in light of the specific relief sought by the [Respondent] in his motions and the thorough and extensive record of [Appellant's] discovery conduct evident in the motions, supplemental memorandum and accompanying exhibits of record before the Court." Order, p.21.

The trial court did not abuse its discretion in any of the above rulings, imposed sanctions allowed by the plain language of the rules, crafted to adequately protect the rights of discovery as established by the rules and did so based upon a "thorough and extensive record" of Appellant's discovery conduct.

Appellant wants to further delay and obstruct discovery in this matter by being allowed to proceed with the improper appeal of an unappealable interlocutory discovery order, while being subject to little consequence for such further delay and obstruction, because the Appellant knows a proper appeal of these discovery issues cannot overcome the abuse of discretion standard.

**In short, Appellant wants special treatment to appeal outside the rules because the Appellant knows the trial court did not abuse discretion and any appeal will be unsuccessful.**

This improper appeal has already frustrated the Respondent's attempts to move this matter forward. On the Monday following the expiration of the deadline to comply on Friday (when Appellant filed the appeal at 4:07 p.m.), Respondent attempted to file his motion/petition for Rule to Show Cause. That attempt was frustrated in part because "Due to this case being on Appeal – the motion needs to be filed for a hearing AFTER the case is no longer on appeal status." **Exhibit 4**, p.3. After several phone calls with the Dorchester County Clerk of Court, explaining that Respondent needed the motion/petition filed and would be notifying the assigned judge that the

hearing would have to await resolution of this improper appeal, Respondent's filing was finally accepted by the Dorchester County Clerk of Court the next morning, Tuesday, May 9, 2023 at 8:30 a.m. **Exhibit 4**, p.4.

Respondent subsequently notified the trial court, Appellant and all opposing counsels of the petition/motion filing and stating:

As mentioned in the petition and affidavit, [Appellant] appealed the Order this past Friday, right before the thirty (30) day deadline for compliance would have run. However, for reasons outlined in attachment five (5) to the affidavit, [Respondent] believes the appeal to be an improper appeal of an unappealable interlocutory discovery order and we expect the appeal to be dismissed.

As such, we have filed the petition in the hopes that upon such dismissal, we may relay that occurrence to your Honor, and the Clerk of Court, and have a hearing set as soon as possible.

We will notify the Court, and the Clerk's office as soon as that happens.

**Exhibit 5**, p.2.

Rule 269 of the South Carolina Appellate Court Rules states:

**Where an appeal, petition, or motion or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules**, the appellate court may upon its own motion or that of a party, after ten (10) days notice, **impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require**. This Rule does not apply to any matters where counsel is required by law to pursue an appeal or petition for writ of certiorari even though the matter may be frivolous.

Rule 269 SCACR, emphasis added.

There is no question that Appellant's appeal is not in compliance with the Rules. Appellant's entire argument is that the rules should **not** apply to this appeal.

Appellant wants a free roll of the appellate dice, with the only consequence being the capped attorney's fees and appellate costs. To allow Appellant to engage in this improper appeal with no sanction or finding under Rule 269 SCACR, would be allowing the type of overly lenient

sanctions *Samples* says are to be avoided where they result in the inadequate protection of discovery. Samples at 114.

In a case in which the Order being appealed found Appellant to have engaged in conduct that was dilatory, prejudicial, willful, intentional, false, misleading, incomplete and in bad faith, resulting in clear, convincing and substantial evidence that the Respondent was prejudiced by having to unnecessarily expend substantial time and resources, an improper and frivolous appeal itself warrants sanctions. Appellant's continued attempt to appeal in an improper manner that this Court has previously refused to accept, shows that sanctions are necessary to stop such improper abuse of the appellate rules.

At a minimum, Respondent would respectfully request the Court make a specific finding that the appeal is being dismissed under Rule 269 SCACR as frivolous, so as to discourage like conduct in the future. As evidenced by this petition in light of the Court of Appeals already dismissing this appeal based on well-established case law and procedure, merely dismissing this appeal as an unappealable interlocutory order will do nothing to discourage parties like the Appellant from wasting the Court's and opposing parties' time and resources filing such improper appeals going forward.

### **CONCLUSION**

Respondent respectfully requests that the Court dismiss the appeal, find the appeal to have been frivolous pursuant to Rule 269 and impose such sanctions as the Court deems proper given the circumstances of this case and to discourage like conduct in the future.

Respectfully Submitted,

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