THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Please

The Honorable Robert E. Hood, Circuit Court Judge

Appellate Case No. 2020-000581

Harland Jones.....Appellant,

v.

Karen Robinson .....Respondent.

APPELLANT'S PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT

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Pursuant to SCACR 221, Appellant Harland Jones respectfully petitions the Court of Appeals for rehearing of the Court's Unpublished Opinion in this matter No. 52023-UP-369, filed November 15, 2023. In affirming the lower court's order, this Court overextended the doctrine of law of the case, overlooked key arguments challenging the appropriateness of the sanctions imposed against Appellant, and disregarded jurisprudence limiting the use of dismissal as a sanction to only the most severe conduct. These errors warrant rehearing and issuance of a new opinion reversing the lower court's extraordinary and unsupportable sanction of dismissal, modifying the fee award granted to Respondent, and remanding the case for disposition on the merits.

I. THE COURT MISINTERPRETED THE DOCTRINE OF LAW OF THE CASE TO PRECLUDE REVIEW OF THE ADULTERATED NARRATIVE OF DISCOVERY CONDUCT CRAFTED BY RESPONDENT IN THIS CASE.

The Court held that because Appellant did not expressly appeal the interlocutory discovery orders issued in this case, the underlying discovery orders are the law of the case precluding appellate review of the factual underpinnings of the appealed Final Sanctions Order. This conclusion mischaracterizes Appellant's arguments on appeal, inaccurately applies the doctrine of law of the case, and mistakenly narrows the Court's scope of review applicable to the Final Sanctions Order.

The law of the case doctrine is often misused to describe the deference one judge of the same court gives to another. However, the doctrine is narrower and only applies to an order or ruling which finally determines a substantial right. *Shirley's Iron Works, Inc. v. City of Union,* 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (quoting *Weil v. Weil*, 229 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989)). As this Court recognized in *Flexon v. PHC-Jasper, Inc*., 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015),

> [u]nder the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court. In other words, [t]he doctrine of the law of the case prohibits issues [that] have been decided in a prior appeal from being relitigated in the trial court in the same case.

Id. at 572, 776 S.E.2d at 403. Similarly, an unappealed ruling finally determining a substantial right is also subject to the law of the case doctrine. *See Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 119, 754 S.E.2d 486, 490 (2014) (Under the law of the case doctrine, a party is precluded from re-litigating issues decided in a lower court order, when the party voluntarily abandons its appeal of that order.). However, "[d]iscovery 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 affect a substantial right." *Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008). This is consistent with our state Supreme Court's long-standing proposition that preliminary findings contained in interlocutory motion orders are not final and should not be construed as binding on the parties or the Court. *See Lucius v. DuBose*, 114 S.C. 375, 103 S.E. 759 (1920); *Weil*, 299 S.C. at 89, 382 S.E.2d at 474 ("The doctrine of the law of the case is not applicable to a statement by the court which does not constitute a binding adjudication.").

Nonetheless, where "no appeal is taken until final judgment is entered, the court may review any intermediate orders or decrees necessarily affecting the judgment that were not previously appealed." Jean Hoefer Toal et al., Appellate Practice in South Carolina (SCCLE) 8.IV (3d ed. 2016); *accord Lancaster v. Fielder*, 305 S.C. 418, 421, 409 S.E.2d 375, 377 (1991) ("[I]f there is a final judgment, and the party timely files his notice of intent to appeal from that judgment, under section 14-3-330(1) this [c]ourt can review any intermediate order or decree necessarily affecting the judgment not before appealed from."); *Sullivan-Carter v. Carter*, 439 S.C. 406, 887

S.E.2d 146 (Ct. App. 2023) (citing S.C. Code Ann. § 14-3-330(1) and acknowledging that the appellant was not required to immediately appeal an interlocutory order or to specifically list the order in the notice of appeal of the final judgment for it to be subject to review by the appellate court).

The procedure outlined in *Davis v. Parkview Apartments*, 409 S.C. 266, 276-78, 762 S.E.2d 535, 541-42 (2014), is consistent with the general procedures of appellate practice in South Carolina in that it clarified that discovery orders are interlocutory and not appealable until entry of a final contempt judgment. However, nothing in *Davis* explaining the procedure for appealing the merits of a discovery order impacts the procedure for reviewing the propriety of a sanctions order. Specifically, *Davis* centered on the review of the appropriateness of the trial court's final order imposing the sanction of dismissal against the appellants in that case. *Id*. at 273, 762 S.E.2d at 538. In its opinion, the Supreme Court acknowledged its review of a "voluminous" record and completed its own analysis of the appellants' discovery conduct leading up to the sanctions order to determine whether the harsh result of dismissal was warranted. *Id*. at 278-78, 762 S.E.2d at 541-42. Importantly, while the Court declined to review whether the prior discovery orders were rightly or wrongly decided, finding that review of those specific rulings would be disallowed by the law of the case doctrine, it did not curtail its scope of review in determining whether the sanction of dismissal was supported by the facts in the record. *Id*. at 281 n. 15, 762 S.E.2d at 543 n. 15 (noting that it is "the specific discovery findings [that] are unreviewable on appeal").

This Court's holding that the law of the case doctrine precludes its review of the facts cited in the Final Sanctions Order because Appellant purportedly failed to follow the procedure set forth in *Davis* misses the fundamental point of Appellant's arguments in this appeal. Appellant does not challenge the prior rulings by Judge Couch and Judge Benjamin compelling disclosure of the

potential witnesses, i.e. the "formulation of discovery." Instead, Appellant challenges the factual underpinnings of the Final Sanctions Order, which includes the trial court's review of the facts independent of the factual summaries set forth any prior order. *See* (R. p. 68) (Explaining that the Final Sanctions Order was "based on the totality of the circumstances" and concluding that "Plaintiff continues to violate discovery rules and willfully ignore the prior orders of this court. Plaintiff has acted in bad faith, with willful disobedience of numerous court orders and rulings, and with gross indifference toward the court and counsel highlighted herein."); (R. p. 1002) ("I am going to process through everything and so just give me some time to put all my thoughts together, go back through the order. . . and I can really sit down and go through everything one more time before I make my final decision.")

Appellant cited Respondent's repeated efforts to distort the facts and history of this case to explain how the trial court ended up adopting Respondent's false narrative as justification for its dismissal of Appellant's case. Stated otherwise, even accepting that Appellant was previously ordered to identify the potential witnesses and that Appellant did not appeal those rulings ordering him to make the identifications, the factual basis recited by the trial court in the Final Sanctions Order to support the dismissal still has no support in the record and should be reversed for that reason. The *Davis* decision, which is distinguished from the instant case because Appellant is not attempting to challenge the prior discovery orders, only underscores the principle that the appellate court maintains its ability to make its own review of the record to ensure that the most extreme sanctions are actually supported by the facts in the case.

Although Respondent has convinced the Court that the law of the case doctrine somehow limits full review of this appeal, the doctrine is not intended to hamstring the appellate court's ability to review the full bases for the rulings set forth in final orders and does not limit the scope

of review on matters properly before the appellate court. *See also Weil v. Weil,* 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989) (Ordinarily an interlocutory order which 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 and corrected by the court before entering a final order on the merits.) (citations omitted). In reviewing an order imposing sanctions, the appellate court must confirm that the conclusion reached by the trial court was reasonably supported by the facts and was not prejudicial to the rights of the appellant. *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997); *In re Beard*, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004) ("In an action in equity tried by a judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. Following its own determination of facts, the appellate court applies an abuse of discretion standard in reviewing the decision to award sanctions and the specific sanctions awarded.") (citations omitted). That necessarily requires review of facts that might have been relayed to the court issuing the intermediate discovery orders but does not require the court to review the merits of those intermediate orders.

Here, Appellant sought review of the Final Sanctions Order in accordance with the appropriate procedure and sought to apply the well-established standard of review. Under South Carolina statutory and case law, the factual findings of prior discovery orders issued in the case do not constitute law of the case and are reviewable to the extent required to determine the appeal of a final order. The fact that Judge Hood seemingly adopted some of the factual findings from prior discovery rulings as his own additionally supports the need for close scrutiny of the factual bases of the discovery orders. Appellant did not need to directly appeal each and every discovery order made in the course of the litigation. All that was necessary to preserve review of the factual

findings upon which the Final Sanction Order rested was to clearly articulate the issues in his brief. Appellant did so and those matters should be addressed by the court.

II. THE COURT OVERLOOKED KEY PORTIONS OF THE RECORD AND APPELLANT'S ARGUMENTS IN FINDING THAT THE SANCTION OF DISMISSAL WAS APPROPRIATE IN THIS CASE.

The Court held that the Final Sanctions Order was founded on a sufficient factual basis. In so holding, the Court first found inconsequential the trial court's determination of frivolity as related to Appellant's unlawful passing theory of liability on the trial court's dismissal of the case because the trial court declined to issue sanctions under Rule 11, SCRCP. This conclusion overlooks that the substantial foundation for the Final Sanctions Order rested on the trial court's belief that Appellant continuously propagated the unlawful passing theory throughout the litigation while failing to identify the witnesses that were thought to be able to corroborate it.

In its Initial Sanctions Order, the trial court included an analysis under Rule 11 that equated frivolousness with Appellant's counsel's assessment of the probability of success of the case. *See* (R. p. 33, n. 13) (If a claim being made has, at best, a 10% chance of success it is the undersigned's opinion this claim cannot possibly meet the requirements of Rule 11(a)—that to the best of [the attorney's] knowledge, information and belief there is good ground to support it. This simply is not the good ground standard applied to a Complaint filed in a case—that there is a 10% chance of success and a 90% chance of failure.). Although the trial court removed this conclusion from its decision in the Final Sanctions Order, the trial court's viewpoint on frivolity permeates the Final Sanctions Order. Additionally, while the trial court notes that it elected a remedy set forth under Rule 37, SCRCP and Rule 10, SCADR, the trial court explicitly noted that it was imposing the selected sanction, at least in part, due to its conclusion that Appellant violated Rule 11. *See* (R. p. 68) (This Court agrees that, based on the totality of the circumstances, sanctions pursuant to Rule 37 for violations of SCADR Rules, SCRCP Rule 11 and SCRCP Discovery Rules are warranted.

. . . Pursuant to SCRCP 37(b)(2)(C) and SCADR Rule 10(b), the only proper remedy is to strike the Complaint with prejudice.).

The Court also misconstrued Appellant's arguments regarding the trial court's conclusions about Appellant's discovery responses. While part of Appellant's argument included a discussion of his inability to initially respond to discovery, Appellant also noted that he did respond to written discovery on November 7, 2018, which was prior to his deposition, that he expected to name no witnesses to corroborate his unlawful passing theory of the case. This response was confirmed by his deposition testimony where he was unable to recall any useful identifying information about the potential witnesses. (R. pp. 209, 218, and 225). As noted in Appellant's briefing, the trial court's conclusions, and now this Court's conclusions, were based on the Respondent's embellished narrative that Appellant asserted a frivolous lawsuit, actively concealed the identities of potential witnesses, failed to participate in mediation in good faith, and repeatedly misled the court. This Court's decision to forego its own review of the factual record simply allows Respondent to perpetuate those falsehoods and does not provide Appellant with any meaningful review of the lower court's decision.

Moreover, the Court disregarded Appellant's theory of negligence per se, on which he prevailed at the directed verdict stage, in evaluating whether Respondent was prejudiced by the discovery and mediation conduct. The full record on appeal reveals that it was largely Respondent's choice to focus nearly exclusively on Appellant's unlawful passing theory when there were other viable theories on which Appellant could have, and actually did, prevail. Accordingly, in addition to the fact that the witnesses were excluded from presenting trial testimony, Respondent suffered no prejudice because Appellant had alternative, and ultimately successful, theories of liability.

The Court also held that the sanctions issued by the trial court were further justified by the manner in which Appellant's counsel handled mediation. Although Appellant necessarily conceded that Gus Anastapoulo had not made a formal appearance on the docket in the case before appearing at mediation, the Court wholly disregarded evidence in the record indicating that Mr. Anastapoulo was a long-time member of Appellant's litigation team. (R. pp. 896-98) Additionally, the Court mischaracterized Mr. Anastapoulo's opening demand as excessive when it was roughly twice the amount of Appellant's medical bills and expenses resulting from the accident – an amount that is well within the range of reasonableness for demands in personal injury cases, ignored the impact of Respondent's refusal to offer any amount when she was well aware of her exposure to liability for negligence per se, and the offensiveness of Respondent's demand that Appellant pay her nearly five times the amount of the property damage she incurred when she hit Appellant. Furthermore, the mediation rules allow for a deviation in the attendance requirements when there is consent among the parties and the mediator. Certainly, Respondent was free to object to Mr. Anastapoulo's presence at mediation in lieu of Mr. Jefferies. However, Respondent elected to proceed, thereby consenting by acquiescence and waiving any objection. When viewed in totality with Respondent's mediation conduct, Appellant's noncompliance with the mediation rules in this litigation fails to rise to the level of egregiousness warranting the brutal sanctions handed down by the trial court.

III. THE COURT'S AFFIRMANCE OF THE HARSHEST SANCTION OF DISMISSAL IN THE CIRCUMSTANCES PRESENTED IN THIS CASE OVERLOOKED OUR STATE COURT'S HISTORICAL EXERCISE OF RESTRAINT IN RESERVING THE SEVEREST SANCTIONS FOR THE MOST EXTREME CONDUCT AND PREFERENCE DISPOSING OF CASES ON THE MERITS.

In finding that the sanctions imposed by the trial court in this case were not disproportionate to the conduct sought to be redressed, the Court overlooked well-established

precedent limiting the most severe sanctions to the most severe conduct. Specifically, this Court has consistently held that "sanctions must be reasonable, and ... not go beyond the necessities of the situation to foreclose a decision on the merits of a case." *The Balloon Plantation, Inc. vs. Head Balloons, Inc., et al.*, 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990) (reversing the trial court's dismissal of a claim for a party's failure to comply with a discovery order and noting that "[t]he sanction should be a rifle shot, not a shotgun blast"). In essence, Appellant suffered the death knell of sanctions for his counsel's failure to disclose possible witnesses to the accident, who might have been relevant to only one of several theories of liability in the case. Appellant's counsel was also ordered to pay excessive fees and costs, including costs for the entire trial of the case, for a rather pedestrian violation of mediation rules. This holding is inconsistent with our courts' prior application of the law regarding sanctions.

In its decision, the Court also heavily relies on *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 719 (Ct. App. 1999). However, the circumstances underlying *Griffin Grading & Clearing* are distinguishable from the instant case in several important ways. Of first importance is the fact that the appellant in that case was first given advanced and express notice that its answer would be stricken if it continued to stonewall discovery in the case. *Id.* at 199, 511 S.E.2d at 719. Additionally, the discovery at issue was integral to the case and the appellant interposed no defense to its discovery conduct. *Id*. at 200, 511 S.E.2d at 719. Finally, the appellant in *Griffin Grading & Clearing* was a sophisticated corporate entity and the court noted the lack of evidence demonstrating counsel acted without the appellant's knowledge.

In contrast, the circumstances here involve a non-sophisticated individual who was critically and permanently injured when Respondent hit him with her vehicle while he was riding

his bike. Although there was a dispute regarding how the accident occurred, there was no dispute that Respondent acted with negligence per se – one theory of liability on which Appellant actually prevailed. Unlike the discovery at issue in *Griffin Grading & Clearing*, because Appellant had a separate and independently viable theory of liability, the discovery conduct in this case had no meaningful impact on the outcome of the litigation and was not prejudicial to Respondent. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("whatever doesn't make any difference, doesn't matter"). However, the dismissal of Appellant's case after he prevailed on one issue of liability at trial, and after two different judges held the evidence of Appellant's testimony alone versus Respondent's testimony created a jury issue as to liability in multiple separate rulings, is greatly prejudicial and irregular. Furthermore, contrarily to the role of the appellant in *Griffin Grading & Clearing*, the record in this case underscores Appellant's ignorance of acts taken by counsel on his behalf. While the acts of an attorney are directly attributable to and binding on the client, *Griffin Grading & Clearing*, 334 S.C. at 200, 511 S.E.2d at 719, it is highly unusual for our courts to saddle innocent litigants with the alleged sins of their counsel. To do so here and deprive Appellant of his day in court, where there is no indication that Appellant was aware of or took part in the discovery disputes and clearly had at meritorious claim for negligence per se, is unduly harsh, manifestly unjust, and highly prejudicial.

The cases cited by the court in support of its harshness finding are equally distinguishable from the matter at hand. *See Rogers v. Rogers*, 432 S.C. 168, 851 S.E.2d 447, 452, 455 (Ct. App. 2020) (upholding the family court's limitations of wife's testimony and presentation of evidence as a sanction for her failure to comply with orders requiring disclosure of certain financial information after wife received advanced notice that the sanctions would be imposed and evidence that wife, *inter alia*, actively concealed integral information about the case, attempted to move

money from accounts relevant to the dispute, and manufactured a medical emergency to avoid the final hearing); *Davis v. Parkview Apartments*, 409 S.C. at 276-78, 762 S.E.2d at 541-42 (upholding a dismissal sanction against sophisticated parties after providing advanced warning of the sanction for further noncompliance with orders compelling discovery on a central and dispositive issue in the case, including the failure to timely disclose an expert witness); *McNair v. Fairfield County*, 379 S.C. 462, 467, 665 S.E.2d 830, 832–33 (Ct. App. 2008) (upholding the trial court's dismissal of the county's condemnation action where the trial court warned the county that it would impose the dismissal sanction if the county continued to disregard the court's orders); *QZO, Inc. v. Moyer*, 358 S.C. 246, 257, 594 S.E.2d 541, 547 (Ct. App. 2004) (affirming the trial court's decision to strike the appellant's answer and hold him in default where the appellant was a sophisticated businessman who violated a TRO by failing to produce a computer within the time set in the court's order and reformatting it to erase information the day before he turned it over); *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 594–96, 586 S.E.2d 572, 575–76 (2003) (upholding the dismissal of one plaintiff's complaint, where that specific plaintiff actively participated in violating the court's orders to comply with discovery after the court expressly warned that it would dismiss the case as a sanction for further noncompliance, but reversing the trial court's imposition of such harsh sanctions against the other plaintiffs where there was no indication that they participated in the noncompliance); *Halverson v. Yawn*, 328 S.C. 618, 493 S.E.2d 883 (Ct. App. 1997) (affirming the dismissal of the appellant's complaint where the record on appeal lacked sufficient information for the court to assess the propriety of the sanction and, thereby, necessitating such result due to appellant's failure to demonstrate any abuse of discretion).

However, in noting decisions where our courts have reversed dismissal sanctions in unique situations, this Court cited *Baughman v. Am. Tel. & Tel. Co.*, 298 S.C. 127, 378 S.E.2d 599 (1989),

which is instructive to this appeal. *Baughman* concerned a mass tort claim by 271 plaintiffs for injuries arising from air and water pollution by a factory. Eight of the plaintiffs appealed the trial court's dismissal of their complaints for failure to comply with discovery orders even after entry of sanctions disallowing undisclosed facts at trial. *Id.* at 130, 298 S.E.2d at 601. In reversing the dismissal sanctions, the South Carolina Supreme Court noted that the defendant had conducted in-depth depositions of the plaintiffs regarding their claims and, therefore, was not prejudiced by the plaintiffs' failure to respond to interrogatories. *Id*. Rather than levying the ultimate penalty, the Supreme Court determined that a fine was sufficient and reinstated plaintiffs' claims with a warning that further noncompliance would result in dismissal. *Id.*

The Supreme Court's treatment of the *Baughman* case is more analogous to the circumstances in this appeal. The record before the court contains no evidence that Appellant undertook any intentional or willful actions to prevent Respondent from obtaining the information she sought through written discovery. Despite the grave injuries caused by Respondent crashing her car into his bike, including compromised cognitive functioning, Appellant sat through a lengthy deposition and responded to the best of his ability to questions about the potential witnesses at the center of this discovery dispute. Further, at trial, Appellant was unabashedly candid regarding his recollection of interactions with the potential witnesses, even when his candor worked against him. Because Respondent was subject to liability under Appellant's alternative theory of negligence per se and Appellant had already suffered the sanction of barring the potential witnesses, Respondent suffered no prejudice. Accordingly, this case does not fit the circumstances under which our courts would typically find dismissal an appropriate sanction. Instead, the trial court's sanctions are significantly more severe than necessary to address the conduct at issue and directly contrary to our courts' preference to resolve cases on the merits.

In regard to the Court's affirmance of the fee award, the Court held that [t]he items listed on the expense sheet relate not to the entirety of the fees and costs, but specifically to the violation of the discovery orders and mediation abuses. However, this is erroneous. As set forth in Respondent's amended affidavit and expense sheet, more than half of the amount of the fee award consists of the time to prepare for and participate in trial. Moreover, the trial court specifically noted that it was awarding Respondent the "entirety of [her] attorney fees and costs incurred to date," not merely the portion attributable to the conduct at issue (R. p. 68).

The assessment of fees and costs as a sanction should be limited to reasonable expenses incurred because of the offending conduct. *See* Rule 11(a), SCRCP (allowing an appropriate sanction, which may include "an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee"); Rule 37(b), SCRCP (authorizing reasonable expenses, including attorney's fees, caused by the failure); Rule 10(b), SCRADR (limiting monetary recovery to the payment of attorney's fees, neutral's fees, and expenses incurred by persons attending the conference). The fees awarded, and affirmed by this Court, go well beyond the amounts attributable to the aggrieved discovery and mediation conduct. Accordingly, the monetary sanctions are excessive and should be reduced, if they stand at all.

CONCLUSION

For the reasons set forth herein, this Court should reconsider its decision, reverse the trial court's order dismissing Appellant's case as a sanction for discovery and mediation conduct, and reduce the monetary award granted to Respondent as additional sanctions.

Respectfully submitted,

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Date: December 15, 2023

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PROOF OF SERVICE

I hereby certify that I have this date served Appellant's Petition for Rehearing and Memorandum in Support on all counsel of record by sending a copy of the same via electronic mail, addressed as follows:

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