THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Robert E. Hood, Circuit Court Judge

Appellate Case No. 2024-000220

Unpublished Opinion No. 52023-UP-369 (Ct. App. filed November 15, 2023)

Harland Jones.....Petitioner,

v.

Karen Robinson .....Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner Harland Jones, certify that they petitioned for rehearing to the Court of Appeals and that the Court of Appeals finally ruled on the petition on January 25, 2024. Counsel sought and received an extension of the time from this Court's to file the petition for writ of certiorari to March 11, 2024.

QUESTIONS PRESENTED

Petitioner Harland Jones ("Mr. Jones") was catastrophically injured when Respondent Karen Robinson smashed into his bicycle with her vehicle. As a result of the collision, Mr. Jones was hospitalized with a head injury, sustained multiple broken bones, and incurred more than $240,000.00 in medical bills. It was undisputed that Respondent was operating her vehicle unlawfully and undisputed that she hit Mr. Jones. Yet rather than resolving the case on the merits, Respondent concocted a narrative of alleged discovery abuse and rules violations that the record on appeal clearly shows to be fictitious and without factual support.

After the initial trial on Mr. Jones' claims ended in a mistrial due to Respondent's inappropriate closing arguments, Respondent proceeded to use the contrived narratives to convince the circuit court to impose the most severe sanctions available against Mr. Jones – dismissal, ultimately foreclosing Mr. Jones' ability to seek redress for the life-altering injuries Respondent caused. The record in this case does not support such extreme sanctions. Accordingly, the Court of Appeals' decision affirming the circuit court's sanction order should be reviewed and reversed by this Court because it departs from this Court's prior rulings governing the standards for reviewing sanctions orders and results in an outcome that is manifestly unjust based on the totality of the circumstances in this case.

This Court should grant Mr. Jones' petition to review the following questions:

1. Did the Court of Appeals Court of Appeals err in relying on the doctrine of law of the case to affirm the circuit court's sanctions order?

2. Did the Court of Appeals erred in finding the circuit court's sanctions order imposed appropriate sanctions based a misapprehension of the record and the arguments on appeal?

3. Did the Court of Appeals err in affirming the circuit court's sanctions order where the sanctions imposed by the circuit court were disproportionate to the alleged wrongful conduct?

STATEMENT OF THE CASE

This case began as routine personal injury litigation arising out of a collision between Mr. Jones' bicycle and Respondent's automobile. Mr. Jones, a relatively unsophisticated plaintiff with very limited education, initiated this action after he suffered substantial injuries when he was hit by Respondent's vehicle on June 7, 2017, as he was riding his bicycle on Old Bluff Road in Columbia, South Carolina. It is undisputed that Respondent was operating her vehicle on the highway unlawfully and hit Mr. Jones at some point after he signaled to turn. Mr. Jones was propelled from his bicycle upon impact resulting in significant injuries, an extended hospital stay, a considerable period of post-hospitalization recovery, medical bills of approximately one quarter of a million dollars, and significant residual health deficiencies.

Mr. Jones filed his Complaint asserting claims of negligence and negligence *per se* against Respondent, which lays out his recollection of events and includes various theories of liability. (R. pp. 74-80) In part, the Complaint alleged "[t]hat, at the time of the subject incident, [Respondent] unlawfully attempted to pass a vehicle immediately in front of her" and "crossed over into [Mr. Jones'] lane of travel" causing him to "strike the front of [Respondent's] vehicle." (R. p. 77, ¶¶ 8-10) In addition to this unlawful passing theory, the Complaint alleged other theories including a

claim for negligence per se. (R. pp. 77-78, ¶ 13) Thus, consistent with general practice and custom in automobile collision cases, Mr. Jones' Complaint advanced several different but related theories of liability. However, very early in this case, Respondent decided to focus almost exclusively on Mr. Jones' unlawful passing theory.

Since the inception of this litigation, Mr. Jones has consistently attested of his own personal knowledge that he displayed the proper hand signal indicating his intention to turn prior to actually doing so. He also recalled being prompted to complete his turn by a woman driving a blue car and that two other vehicles were following behind the blue car. Based on Mr. Jones' recollection of the accident, his counsel presented the unlawful passing theory as a reasonable explanation of why Respondent, who was driving a gray car, ended up colliding with Mr. Jones rather than the blue car in front of which he believed he had turned. Based on this limited information, Mr. Jones' counsel hoped that they could identify and locate witnesses to corroborate Mr. Jones' version of events. That turned out not to be the case.

During the litigation, the parties became entangled in a dispute about Mr. Jones' alleged failure to disclose possible eyewitnesses to the accident. Although Mr. Jones believed that there were witnesses to support his case, he did not have the names, addresses, or any other contact information for them at the time he made his initial and supplemental responses to Respondent's discovery requests. During his deposition, Mr. Jones testified as to his limited memory of the accident. (R. pp. 1095-234) While Mr. Jones noted that he believed there were two possible witnesses, he was only able to recall the assumed name of one of them; that is, an acquaintance known to him merely as "Alex." Mr. Jones testified that he did not know Alex's real name and could only identify his possible residence as a shack in the woods without reference to any particular address or landmarks. (R. p. 1114-16; 1138-40) Regarding the other potential witness,

Mr. Jones noted that he did not really know her but did recall that his deceased wife had referred to the woman as her cousin. (R. p. 1122) ("when my wife was living at that time, she said it was her cousin."). Despite Mr. Jones' inability to recall and lack of knowledge regarding any meaningful identification of the witnesses, Respondent repeatedly sought to compel the disclosure of the information and ruthlessly pursued sanctions against Mr. Jones for his failure to provide the information – fruitless information that neither Mr. Jones nor his counsel possessed until shortly before trial.

In pursuit of sanctions, Respondent's counsel argued that Mr. Jones and his counsel were intentionally withholding the witness information while relying on the same in court filings. Specifically, Respondent contended that Mr. Jones used the existence of the witnesses to prevail on certain dispositive motions. However, the record demonstrates that is not the case.

Although Mr. Jones moved to dismiss Respondent's counterclaim pursued under the Frivolous Proceedings Act, the basis for the motion was that such a claim was premature and procedurally defective. *See* (R. pp. 110) ("Motion to Dismiss") (noting that "pursuant to the terms of Section 15-36-10(C)(1), relief under the Act must be sought at the conclusion of the trial by way of motion") (emphasis omitted). The Motion to Dismiss expressly noted discovery had not yet revealed the identity of witnesses to corroborate the unlawful passing theory of the case, but that Mr. Jones "expected" it would. Mr. Jones was also clear that he was seeking dismissal of the claim based on the procedural deficiencies in Respondent's pleading and the court granted Mr. Jones' motion ("Benjamin Order") on that basis only. (R. pp. 4-7) It did not rely on or address, in any way, Mr. Jones' arguments regarding the merits of his claim against Respondent.

Likewise, in response to Respondent's Motion for Summary Judgment, (R. pp. 126-27), Mr. Jones relied exclusively on the conflict between his testimony and Respondent's testimony.

(R. pp. 155-57) There was absolutely no mention of what any other witness might say. Indeed, Mr. Jones' memorandum specifically stated that his argument rested entirely on his and Ms. Robinson's differing personal observations recounted in their depositions. (R. p. 157) Moreover, nowhere in the transcript of the hearing on that motion did Mr. Jones' counsel ever even mention, much less rely upon, the potential testimony from any witness other than Mr. Jones. The court denied Respondent's Motion for Summary Judgment, never referencing expected testimony from the unidentified witnesses. (R. p. 505)

In seeking pretrial sanctions for discovery conduct, Respondent's counsel continued to propagate the false narrative that Mr. Jones had repeatedly refused to identify the witnesses which he had earlier indicated he expected to identify. (R. pp. 506-08) Counsel relied upon Mr. Jones' deposition testimony in support of his argument but blatantly distorted the deposition testimony. In describing the events purportedly necessitating the motion to compel, despite having no supporting evidence, Respondent's counsel told the trial court that Mr. Jones unequivocally knew the person that he thought was driving the blue car and strongly implied that he was willfully withholding her name because the witness did not want to get involved. (R. pp. 507-08) ("We also learned in that deposition -- and we heard here today -- that this other car that might have been there was driven by the plaintiff's wife's cousin. The plaintiff knows who that is. In fact, he testified that she came to the house to see him after all of this.") (emphasis added). However, Respondent's argument about failure to identify the witnesses was based on an indisputably false factual predicate. Although Respondent requested the more severe sanction of dismissal, the court declined to impose the harsh sanction and, instead, found that exclusion of the two witnesses would be a more appropriate remedy. (R. p. 510, l. 11-511, l. 7) Respondent went on to memorialize her sensationalized version of the discovery conduct in her proposed draft order on the motion to

compel, which the court entered over Mr. Jones' objections. (R. pp. 190-95, 228, and 230); (R. pp. 10-13)

Prior to trial, Respondent filed a motion seeking "an [o]rder sanctioning Plaintiff and Plaintiff's counsel for violations of ADR Rule 6 [because] Plaintiff failed to participate in mediation as required by Rule 6." (R. p. 161) The gravamen of Respondent's motion was that Gus Anastopoulo, an associate attorney with the firm representing Mr. Jones, participated in the mediation prior to filing a formal notice of appearance with the court. (R. p. 167) Respondent did not object at the mediation conference after realizing that Mr. Jones' lead counsel, Lane Jefferies, was not in attendance, nor did she request the mediator suspend or continue the mediation for the purposes of securing Mr. Jefferies' or any other more senior attorney's attendance. (R. p. 188-89). The mediation ended in an impasse after Mr. Anastopoulo made a reasonable opening demand on behalf of Mr. Jones of roughly double the medical bills incurred as a result of the collision and Respondent refused to offer any money to settle Mr. Jones' claim. (R. pp. 896-98) To add insult to injury, despite clear evidence disclosed in discovery of her negligence *per se,* Respondent demanded that Mr. Jones pay her more than $40,000.00 – nearly five times the repair estimate for the damage to her car. Yet, Respondent maintained that it was Mr. Anastopoulo's unfamiliarity with the case that caused the case not the settle.

The trial in this matter began on August 13, 2018, before the Honorable Casey Manning. Despite having already secured the sanction of exclusion of Mr. Jones' witnesses, Respondent further argued during pretrial motions that she was also entitled to monetary sanctions against Mr. Jones for alleged discovery abuse, but Judge Manning deferred his ruling on the motion to the end of the trial. (R. pp. 558-70) At the close of all evidence, Judge Manning heard each parties' directed verdict motions. Mr. Jones moved for a directed verdict on the issue of negligence *per se* against

Respondent for failing to wear her required eyeglasses, which Judge Manning granted and agreed to note on the verdict form. (R. pp. 800-02). Respondent renewed her prior motion for directed verdict, which the court denied. (R. pp. 803-04) The court also considered and denied Mr. Jones' motion to include punitive damages on the verdict form. (R. p. 804). No other motions or issues were raised before closing arguments. Ultimately, the trial ended in a mistrial which was precipitated by Respondent's counsel's improper remarks to the jury during closing arguments. (R. pp. 851-58) The jury was excused and the record closed without Respondent raising any complaint about a mediation violation or renewing her request for monetary sanctions. Additionally, Respondent never pursued any post-trial motions seeking a ruling from Judge Manning on the issue of sanctions.

About a month and a half after the mistrial, Respondent's motion for sanctions was set for a hearing before Judge Robert Hood. Despite having previously failed to raise any alleged mediation violation before Judge Manning at trial in seeking the imposition of monetary sanctions against Mr. Jones and his counsel, Respondent's counsel substantially relied on the argument in an effort to obtain an order for the most severe sanctions available under the court rules. Counsel portrayed Mr. Anastopoulo's attendance at mediation as an obstacle to resolution, when he readily admitted to Judge Hood that the case was unlikely to settle in any event due to the difference in the parties' opening demands. (R. p. 888, ll. 17-19) ("So while the case wouldn't have gotten settled, I don't think if we're talking those numbers, there was no effort made").

Respondent's counsel also continued to make unsubstantiated allegations of perceived discovery abuses and unsupported allegations of false representations to the court by Mr. Jones' counsel. Such misstatements to the court are particularly egregious in that Respondent's counsel's own statements in filings and before the court were often less than candid. (R. p. 914, ll. 5-20)

(incorrectly arguing that "motion was denied because Mr. Jefferies alleged at that hearing, which was held immediately before the motion to compel hearing, that they had witnesses that would support their case. Because they alleged they had witnesses to support their cases, even though they had not yet been identified, Judge Couch denied our motion. So that was the reasoning behind it.") (emphasis added). Not only was this statement irrelevant, it was simply untrue. As previously explained, Mr. Jones' counsel's arguments and the court's ruling on summary judgment were based on the conflicting versions of the accident provided by Mr. Jones and Respondent, not upon alleged evidence of unidentified witnesses. Further, throughout this appeal, Respondent's counsel has made many other arguments to the court that had no reasonable factual basis throughout this litigation. In fact, Respondent's counsel's penchant for embellishment infected the prior orders on which Respondent relied to weave a fictitious and unsupported tale of Mr. Jones' and his counsel's disregard for the rules of court and, therefore, tainted Judge Hood's orders on appeal.

Judge Hood adopted Ms. Robinson's factual and legal arguments, dismissed the Complaint with prejudice, and ordered Mr. Jones's counsel to pay all of Respondent's attorney's fees and costs. *See* (R. pp. 23-45) ("Initial Sanctions Order"). Furthermore, the Final Sanctions Order cites a litany of factually inaccurate details about the case, taken from Respondent's counsel's representations to the court, in support of the imposed sanctions. Among other things, Judge Hood found that Mr. Jones repeatedly violated court orders and discovery rules by not identifying witnesses of which he was aware while also relying extensively on the existence of those witnesses to avoid summary judgment and advance his case. (R. pp. 50-52) Judge Hood also concluded that Mr. Anastopoulo's participation in mediation violated Rule 6, SCRADR, based on a "totality of the circumstances." (R. p. 56) He accepted Respondent's counsel's arguments about mediation without any evidence in support of the same and dismissed Mr. Jones' case with prejudice, while

allowing Respondent to proceed with her property damage counterclaim. (R. p. 57) He also ordered Mr. Jones' counsel to pay Respondent $29,788.24 in attorneys' fees.

Mr. Jones filed his Notice of Appeal on April 2, 2020. The Court of Appeals held oral argument on April 5, 2023, and issued its decision on November 15, 2023. This petition followed.

STANDARD OF REVIEW

An order imposing sanctions is reviewed on appeal for an abuse of discretion. *Ex parte Gregory,* 378 S.C. 430, 437-38, 663 S.E.2d 46, 50 (2008). However, "[t]he decision to impose sanctions is one in equity, and thus the appellate court reviews the circuit court's factual findings de novo. If the appellate court agrees with the factual findings, then it reviews the circuit court's decision to impose sanctions and the [terms] of sanctions for an abuse of discretion." *Pee Dee Health Care, P.A. v. Estate of Thompson,* 424 S.C. 520, 538 n.11, 818 S.E.2d 758, 768 n.11 (2018) (internal citation omitted). "An abuse of discretion occurs either when a court is controlled by some error of law, or where the order is based upon findings of fact lacking evidentiary support." *Patel v. Patel,* 359 S.C. 515, 529, 599 S.E.2d 114, 121 (2004). Additionally, failure to consider appropriate factors for the imposition of sanctions amounts to an abuse of discretion. *See Samples v. Mitchell,* 329 S.C. 105, 110, 495 S.E.2d 213, 216 (Ct. App. 1997).

ARGUMENT

I. The Court of Appeals Erred in Relying on the Law of the Case Doctrine to Affirm the Circuit Court's Sanctions Order.

In affirming the circuit court's Final Sanctions Order, the Court of Appeals held that the doctrine of the law of the case precluded its review of the factual underpinnings of the circuit court's decision to award sanctions against Mr. Jones and his counsel. Specifically, the Court of Appeals held that because Mr. Jones did not directly appeal the interlocutory discovery rulings

requiring him to respond to or supplement his responses to certain discovery requests and did not follow the procedure described in *Davis v. Parkview Apartments*, 409 S.C. 266, 276-78, 762 S.E.2d 535, 541-42 (2014), for appealing those discovery rulings, that "the findings of the underlying discovery orders are the law of the case." *Jones v. Robinson*, Op. No. 23-UP-369, *13 (Ct. App. Filed Nov. 15, 2023). This conclusion not only mischaracterizes Mr. Jones' arguments on appeal but, more critically, inaccurately applies the doctrine of law of the case and mistakenly narrows the appellate court's scope of review applicable to sanctions orders.

The law of the case doctrine applies to an order or ruling which finally determines a substantial right. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (citations omitted). "The doctrine does not, however, generally apply to 'an interlocutory order which merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case.'" *S.C. Pub. Interest Found v. Wilson*, 437 S.C. 334, 340, 878 S.E.2d 891, 894 (2022) (quoting *Shirley's Iron Works, Inc.*, 403 S.C. at 573, 743 S.E.2d at 785). This Court has also maintained a 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); *accord Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 474 (Ct. App. 1989) ("The doctrine of the law of the case is not applicable to a statement by the court which does not constitute a binding adjudication."). So, while an unappealed interlocutory ruling may become law of the case under certain circumstances, preliminary findings contained in interlocutory orders are not necessarily similarly treated.

Nothing in the *Davis* decision impacts the procedure for reviewing the propriety of a sanctions order and it does not preclude Mr. Jones from seeking full appellate review of whether

the circuit court abused its discretion in awarding sanctions against Mr. Jones where the underlying facts in the record do not support them. *Davis* centered on this Court's review of the appropriateness of a trial court's final order imposing the sanction of dismissal against a group of defendants for willfully failing to comply with a series of discovery orders. *See Davis,* 409 S.C. at 273, 762 S.E.2d at 538. Unlike the cursory review conducted by the Court of Appeals in the instant case, the *Davis* Court undertook a full review of the "voluminous" record on appeal and completed its own analysis of the discovery conduct at issue 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").[1]

By holding that the law of the case doctrine limited its review of the facts relied upon by the circuit court in issuing the Final Sanctions Order, the Court of Appeals missed the fundamental point of Mr. Jones' arguments on appeal. It is true that Mr. Jones did not challenge the prior discovery rulings compelling disclosure of the potential witnesses, i.e. the "formulation of discovery." Rather, in the instant appeal, Mr. Jones is challenging the factual underpinnings of the Final Sanctions Order, which includes the entire factual background of the discovery conduct in

[1] *Davis* is distinguishable on other grounds from Mr. Jones' appeal. Most notably, the conduct at issue in *Davis* was far more egregious than the alleged conduct for which Mr. Jones is being penalized. Additionally, the defendants in *Davis* were given the opportunity to purge the dismissal sanction. *Davis*, 409 S.C. at 281 n. 16, 762 S.E.2d at 543 n. 16. Mr. Jones was not given any such opportunity.

the case and the circuit court's independent review of the facts cited as justification for the sanctions imposed by the Final Sanctions 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.").

In the appeal, Mr. Jones cited Respondent's repeated efforts to distort the facts and history of this case to explain how the circuit court ended up adopting Respondent's false narrative as justification for its dismissal of Mr. Jones' case. Stated otherwise, even accepting that Mr. Jones was previously ordered to identify the potential witnesses and that Mr. Jones did not appeal those rulings ordering him to make the identifications, the factual bases 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 distinguishable from the instant case because Mr. Jones is not attempting to challenge the outcomes of 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 of the case.

Although Respondent was able to convince the Court of Appeals that the law of the case doctrine somehow limits full review of this appeal, case law establishes that the doctrine is not intended to constrain an appellate court's ability to review the full bases for the rulings set forth in sanctions orders and does not limit the scope of review on matters properly before the appellate

court. *See Weil,* 299 S.C. at 89, 382 S.E.2d at 473 ("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 under the abuse of discretion standard, 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. *See Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989). That necessarily requires review of facts that might have been relayed to the court issuing intermediate discovery orders but does not require the court to review the merits of those intermediate orders.

Here, Mr. Jones 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 law, the preliminary factual findings of discovery orders issued in the case do not constitute law of the case and are reviewable to the extent required to determine the propriety of a final order. The fact that Judge Hood 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 those orders. Despite the Court of Appeals' finding to the contrary, Mr. Jones did not need to force contempt proceedings and directly appeal each and every discovery order made in the course of the litigation to avoid being hamstrung by the doctrine of the law of the case in this appeal. All that was necessary to preserve review of the factual grounds upon which the Final Sanction Order rested was to clearly articulate the issues in his brief. Mr. Jones did so and those matters should have been carefully reviewed and addressed on appeal. The Court of Appeals declined to conduct the required factual review and, instead, dispensed with matter by incorrectly applying the law of the case doctrine. This Court should take this opportunity to correct these errors.

II. The Court of Appeals erred in finding the circuit court's sanctions order imposed appropriate sanctions based a misapprehension of the record and the arguments on appeal.

The Court of Appeals held that the sanctions imposed by the circuit court were appropriate because the Final Sanctions Order had a sufficient factual basis. However, in so holding, the Court of Appeals further ignored integral facts in the record and misconstrued Mr. Jones' arguments on appeal. The Court of Appeals first found "inconsequential" the trial court's determination of frivolity as related to Mr. Jones' unlawful passing theory of liability because the circuit court declined to issue sanctions under Rule 11, SCRCP. This conclusion overlooks that the substantial foundation for the Final Sanctions Order rested on the circuit court's belief that Mr. Jones continuously advanced the unlawful passing theory throughout the litigation while willfully failing to identify the witnesses that were thought to be able to corroborate it. In fact, the entirety of Respondent's arguments to the circuit court and the alleged factual basis for the discovery violations that led to the sanctions on appeal revolved around the identification of witnesses related to Mr. Jones' unlawful passing theory.

In its Initial Sanctions Order, the trial court included an analysis under Rule 11 that equated frivolousness with Mr. Jones' 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 circuit court court removed this conclusion from its decision in the Final Sanctions Order, the circuit court's viewpoint on frivolity permeates the Final Sanctions Order. (R. pp. 50-54; 60-62; 65-68) Additionally, while the circuit court notes

that it elected a remedy set forth under Rule 37, SCRCP and Rule 10, SCADR, the circuit court explicitly noted that it was imposing the selected sanction, at least in part, due to its conclusion that Mr. Jones 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."). To say that the circuit court's determination of frivolity is inconsequential to the resolution of the appeal when it is a substantial part of the lower court's rationale for imposing the sanctions overlooks the integral role of the frivolity analysis in the Final Sanctions Order and the necessity to review the record to determine whether the circuit court's analysis constituted abuse of discretion due to being unsubstantiated by the record.

The Court of Appeals also misconstrued Mr. Jones' arguments regarding the circuit court's conclusions about his discovery responses and whether those responses constituted discovery violations. While Mr. Jones' arguments did include a discussion of his inability to fully respond to discovery, he also noted very early on in discovery that he did not expect to name any witnesses to corroborate his unlawful passing theory of the case. In response to written discovery on November 7, 2018, which was prior to his deposition, Mr. Jones succinctly responded "none" when asked to state the "full name, address, and contract information" for witnesses who believed that Respondent "attempted to unlawfully pass a vehicle immediately in front of her" at the time of the collision. (R. p. 225) This response was confirmed by Mr. Jones' 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 briefing before the Court of Appeals, the circuit court's conclusions and the Court of Appeals' conclusions, were based on the Respondent's embellished narrative that

Mr. Jones asserted a frivolous lawsuit, actively concealed the identities of potential witnesses, failed to participate in mediation in good faith, and repeatedly misled the court. The Court of Appeals' decision to forego its own review of the factual record in favor of disposing of arguments on appeal as inconsequential or immaterial simply allows Respondent to perpetuate those falsehoods and does not provide Mr. Jones with any meaningful review of the circuit court's decision.

Moreover, the Court disregarded Mr. Jones' theory of negligence *per se*, on which he prevailed at the directed verdict stage of trial, 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 Mr. Jones' unlawful passing theory when there were other viable theories on which Mr. Jones 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 Mr. Jones had alternative, and ultimately successful, theories of liability.

Additionally, the Court of Appeals held that the sanctions issued by the trial court were further justified by the manner in which Mr. Jones' counsel handled mediation. Although Mr. Jones necessarily conceded that Gus Anastapoulo had not made a formal appearance on the docket in the case before appearing at mediation, the Court of Appeals wholly disregarded evidence in the record indicating that Mr. Anastapoulo was a long-time member of Mr. Jones' litigation team. (R. pp. 896-98) Additionally, the Court of Appeals mischaracterized Mr. Anastapoulo's mediation conduct and opening demand as unreasonable and excessive when it was roughly twice the amount of Mr. Jones' 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 Mr. Jones pay her nearly five times the amount of the property damage she incurred when she is the one who hit him with her vehicle. 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. The Court of Appeals did not begin to address the issue of waiver in its decision. When viewed in totality with Respondent's mediation conduct, Mr. Jones' noncompliance with the mediation rules in this litigation fails to rise to the level of egregiousness warranting the brutal sanctions handed down by the circuit court.

As noted above, the Court of Appeals may not simply disregard its obligation to review whether a sanction order is factually supported. *See Father v. S.C. Dep't of Soc. Servs.*, 353 S.C. 254, 261, 578 S.E.2d 11, 14 (2003) (noting the appellate court's role in determining whether it "agrees with the trial court's findings of fact" and its obligation to "review[] the decision to award sanctions, as well as the terms of those sanctions, under an abuse of discretion standard."). Because the Court of Appeals did not apply the appropriate standard of review and did not undertake its own review of the factual record in this appeal to determine whether the sanctions imposed were appropriate in this case, this Court should grant Mr. Jones' petition to provide full appellate relief.

III. The Court of Appeals err in affirming the circuit court's sanctions order where the sanctions imposed by the circuit court were disproportionate to the alleged wrongful conduct.

In finding that the sanctions imposed by the circuit court in this case were proportionate to the conduct sought to be redressed, the Court of Appeals overlooked well-established precedent

limiting the most severe sanctions to the most severe conduct. Specifically, South Carolina courts have 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"); *accord Barnette v. Adams Brothers Logging, Inc.*, 355 S.C. 588, 592-3, 586 S.E.2d 572, 5745 (2003) (explaining that the enforcement of discovery rules are "designed to promote decisions on the merits after a full and fair hearing" and cautioning against the sanctions of witness exclusion and case dismissal except in the most severe cases). In essence, Mr. Jones 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. Mr. Jones' 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 of Appeals 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 a bicycle. Although there was a dispute regarding how the accident occurred, there was no dispute that Respondent acted with negligence per se – a theory of liability on which Mr. Jones actually prevailed prior to Respondent triggering a mistrial. Unlike the discovery at issue in *Griffin Grading & Clearing*, because Mr. Jones 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 Mr. Jones' case after he prevailed on one issue of liability at trial, and after two different judges held the evidence of Mr. Jones' 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 Mr. Jones' 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 Mr. Jones of his day in court, where there is no indication that Mr. Jones 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 of Appeals 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, the Court of Appeals did cite *Baughman v. Am. Tel. & Tel. Co*., 298 S.C. 127, 378 S.E.2d 599 (1989), which is instructive to this petition. *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, this 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 Court determined that a fine was sufficient and reinstated plaintiffs' claims with a warning that further noncompliance would result in dismissal. *Id.*

The *Baughman* case is more analogous to the circumstances in this appeal. The record in this appeal contains no evidence that Mr. Jones 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 bicycle, including compromised cognitive functioning, Mr. Jones 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, Mr. Jones 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 Mr. Jones' alternative theory of negligence *per se* and Mr. Jones 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 circuit 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 of Appeals' 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." *Jones v. Robinson*, Op. No. 23-UP-369, p. 20. 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 circuit 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 the Court of Appeals, 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.

The circuit court abused its discretion in handing down excessively harsh sanctions against Mr. Jones and his counsel. The Court of Appeals did not conduct an appropriate review of Mr. Jones' appeal in accordance with the standard of review. Accordingly, this Court should grant this petition to fully review whether the terms of the sanctions imposed in this case are warranted based on a totality of the circumstances.

CONCLUSION

It is manifest that the circuit court's sanctions order is founded on unsupported and clearly erroneous factual conclusions. These conclusions were based, at least in part, on the circuit court's belief that Mr. Jones asserted a frivolous lawsuit, concealed the identities of potential witnesses, did not participate in mediation in good faith, and repeatedly lied to the court. Unfortunately, aside from Respondent's false narrative of the facts and history of this case, there simply is no basis in the record to support those conclusions and to warrant the type of sanctions imposed by the circuit court against Mr. Jones and his counsel. Established precedent requires a review of the record to ensure that sanctions are justified. Not only did that review not happen here, but the Court of Appeals constricted the standard of review to be applied in future cases. Accordingly, this Court should grant certiorari to correct this misstatement of law, to afford Mr. Jones the appropriate appellate review of this case, and to reverse the dismissal of Mr. Jones' case.

Respectfully submitted,

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