THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Maite Murphy, Circuit Court Judge

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S.C. SUPREME COURT

Innovative Waste Management, Inc., Respondent,

v.

Crest Energy Partners GP, LLC, Crest Energy Partners L.P., Dunhill Products GP, LLC, Dunhill Products L.P., Henry Wuertz, and Edward H. Girardeau, Defendants,

Of Whom Crest Energy Partners GP, LLC, Crest Energy Partners L.P., Dunhill Products L.P., Dunhill Products GP, LLC, and Henry Wuertz are the Appellants.

Appellate Case No. 2023-001045

APPELLANTS' BRIEF

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1. Did the Court of Appeals err in holding that Appellants had waived appellate review of the Circuit Court's interlocutory discovery orders?
2. Did the Court of Appeals err in holding that the Circuit Court's was within its discretion to strike Petitioner's Answers and Counterclaims under Rule 37(b), SCRCP, when
    a. the underlying order at issue was patently defective and could not have been violated by Appellants;
    b. the Order striking Appellants' pleadings was not only without support, it was directly contradicted by the record; and
    c. less punitive sanctions were clearly available to cure the discovery abuse alleged.

STATEMENT OF THE CASE

This Appeal concerns a series of three discovery orders issued by the circuit court on June 18, 2019, August 1, 2019, and October 1, 2019. The last Order granted a Motion for Sanctions, Striking the Answers and Counterclaims of all Appellants, pursuant to Ryle 37(b)(2)(C).

The case arises from a series of three petroleum industry trades involving Respondent Innovative Waste Management ("IWM") and Appellant Crest Energy Partners, L.P., formerly known as Dunhill Products, L.P. ("Crest"). The first transaction involved a shipment of petroleum slops from Montreal, Quebec to St. Charles, Louisiana in December 2009. The second and third transactions involved product that IWM had brokered from certain Shell Oil subsidiaries to Crest, in March and April 2010, from facilities in Mobile, Alabama, and St. Rose, Louisiana. IWM claims that Crest owes IWM approximately $1,050,000 from the 2010 transactions. IWM also claims that Girardeau, Bridge, Crest, and Crest principal Henry Wuertz engaged in a fraudulent scheme to steal product, clients, and trade secrets.[1] From these allegations, IWM asserts thirteen separate causes of action. (Appx. 59-87). The Crest Defendants deny IWM's claims outright in their Answers, and their Counterclaims assert that IWM owes Crest over $300,000, after set-off.

IWM originally filed suit in the United States District Court for the District of South Carolina on April 29, 2011. That case proceeded through discovery before it was dismissed for lack of subject matter jurisdiction on May 10, 2012.[2] On May 11, 2012, IWM filed the instant

[1] The Complaint named two Crest entities and two Dunhill entities as defendants, along with the individual defendants. Well before the filing of this case, the Dunhill entities executed name changes to become the Crest entities. (Appx. p. 756). The undersigned represented all of the defendants below until March 2014 when Defendant Bridge, no longer employed by or with any other defendant, obtained new counsel, entered into a settlement with IWM, and was released. Defendant Girardeau remains a defendant below, is now represented by separate counsel, and is not a party to this appeal. The Crest entities and Wuertz are the Appellants, together referred to as the "Crest Defendants" herein. The defendants named below are collectively referred to as "defendants".

[2] Innovative Waste Mgmt., Inc. v. Crest Energy Partners GP, LLC, No. 2:11-CV-1023-RMG, 2012 WL 13005334 (D.S.C. May 10, 2012)

lawsuit in the Dorchester County Court of Common Pleas, based on the same facts previously alleged in federal court.

As discovery began in state court, defense counsel (including the undersigned) failed, through conflict and oversight, to respond in a timely fashion to certain Interrogatories and Request for Production that had been served by IWM's counsel on October 2, 2012. IWM filed its first Motion to Compel in State Court on January 31, 2013. (APPX. 206-209). The parties entered into an agreement on the Motion to Compel which was submitted as a proposed Consent Order. (APPX. 5-7). Thereafter, Defendants filed a Motion for Protective Order (APPX. 279-282), and Plaintiff filed an Amended Motion to Compel (APPX. 283-291), which was heard by The Hon. Edgar W. Dickson on April 1, 2013 (APPX. 111-151). The March 15, 2013 proposed Consent Order was signed by Judge Dickson on April 2, 2013 and filed on April 5, 2013 (APPX. 5-7).

While Judge Dickson's Order from the April 1, 2013 hearing was signed on June 3, 2013, it was not filed, and therefore not effective, until August 22, 2013 (APPX. 8-11). In the meantime, a dispute arose over the interpretation of Judge Dickson's rulings. Defendants filed a second Motion for Protective Order on August 21, 2013 (APPX. 328-330), and IWM Filed a Second Motion to Compel in response (APPX. 395-413). Although Judge Dickson had retained jurisdiction over the discovery issues in this case, those motions were heard by The Hon. Diane S. Goodstein. [3] Judge Goodstein's Order on the discovery motions was filed on October 3, 2013. (APPX. 12-14). Judge Goodstein's Order granting, in part, defendants Motion to Dismiss was filed November 18, 2013. (APPX. 15-19).

IWM waited nearly four months, until March 10, 2014, to file a Second Amended Complaint, without seeking further leave of court or seeking to set aside any default. The Second

[3] Judge Goodstein later designated the case complex and assigned it to The Hon. Maite Murphy. (APPX. 30-31).

Amended Complaint mostly restated the original causes of action. (APPX. 59-87). IWM then served certain out-of-state subpoenas on Margavio & Schmidt CPAs in New Orleans, and Wells Fargo Bank, in Houston, seeking detailed financial records of or relating to the Crest Defendants. (APPX. 542-549). Defendants filed a Motion to Quash those subpoenas on December 5, 2014, arguing that these issues had already been resolved by Judge Goodstein. (APPX. 540-541). On April 6, 2015, that motion was heard by The. Hon. Maite Murphy, who denied Defendants' Motion by an Order issued that same day. (APPX. 37-39). The case was subsequently dismissed, Judge Murphy denied IWM's motion to reinstate the case, and then denied IWM's Rule 59 Motion. IWM appealed, which ultimately resulted this Court's opinion in Innovative Waste Mgmt. Inc. v. Crest Energy Partners GP, LLC, 423 S.C. 611, 815 S.E.2d 780 (Ct. App. 2018), aff'd as modified, 425 S.C. 568, 571, 824 S.E.2d 214 (2019). The case was remitted to the trial court on February 27, 2019.

Shortly after the case had been restored in the trial court, IWM served a second subpoena on Margavio & Schmidt. On April 17, 2019, Margavio & Schmidt filed a Motion to Quash that subpoena in Jefferson Parish, Louisiana, which was granted on June 10, 2019. (APPX. 604-605). IWM then filed a Third Motion to Compel in this case, seeking to compel the production of certified financial statements and also seeking to compel the Crest Defendants to execute releases for the Margavio & Schmidt and Wells Fargo documents. (APPX. 571-592).

The Third Motion to Compel was heard by Judge Murphy on June 5, 2019 and granted by Order filed June 18, 2019. (APPX. 41-43). The Crest Defendants filed a Motion to Alter or Amend on June 25, 2019 (APPX. 668-670) which was partially granted in part but mostly denied by Judge Murphy's Order of August 1, 2019 (APPX. 44-46). On August 30, 2019, undersigned counsel transmitted a letter to Judge Murphy detailing the effort and progress that had been made to comply

with her Orders, but also advising the court that the Crest Defendants wished to appeal certain aspects of her rulings, and also requesting that the court issue a finding of contempt so that the Orders would be immediately appealable (APPX. 755-757). In response, IWM filed a Motion for Sanctions. (APPX. 673-684) which was heard on September 23, 2019 (APPX. 177-205). On October 1, 2019, Judge Murphy issued an Order granting IWM's Motion for Sanctions and striking the Answers and Counterclaims of the Crest Defendants. (APPX. 47-58).

Appellants filed Notice of Appeal on October 10, 2019. Following oral argument, the Court of Appeals affirmed by way of an unpublished opinion issued March 29, 2023. Rehearing was denied on June 10, 2013, and this Appeal follows.

STANDARD OF REVIEW

The scope of discovery is generally within the trial court's discretion, and a trial court ruling on discovery matters is reviewed for abuse of that discretion. A trial court's selection of a sanction is likewise usually a matter of discretion. Griffin Grading and Clearing, Inc. v. Tire Service Equipment, 334 S.C. 193, 511 S.E.2d 716 (1999). Appellants bear the burden of establishing that the trial court abused that discretion. Clark v. Ross, 284 S.C. 543, 328 S.E.2d 91 (Ct.App.1985). In determining whether there has been an abuse of discretion all of the facts and circumstances must be evaluated. Edwards v. Ferguson, 254 S.C. 278, 283, 175 S.E.2d 224, 226 (1970).

The trial court must make an effort to impose reasonable discovery limits. The trial court abuses its discretion by ordering discovery that exceeds that permitted by the rules of procedure. Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Envtl. Control, 387 S.C. 380, 388, 692 S.E.2d 920, 924 (2010). The trial court also will be found to have abused its discretion when a discovery ruling is based on an error of law or a factual conclusion that is without evidentiary support. Fields v. Regional Medical Center Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (2005). If the trial court's conclusion reached was without reasonable factual support and resulted in prejudice to the rights of appellant, it amounts to an error of law and therefore and abuse of discretion. E.g., Dunn v. Dunn, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989); Halverson v. Yawn, 328 S.C. 618 493 S.E.2d 883 (1997); Carlyle v. Tuomey Hosp., 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991); Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

LAW AND ARGUMENT

The Court of Appeals erred in holding that it was unable to review the circuit court's Orders relating to the ongoing discovery issue. The Court of Appeals should have fully reviewed the Orders under the appropriate standards, and held that the lower court's Order striking Appellants' Answers and Counterclaims pursuant to Rule 37(b)(2)(C) was an abuse of discretion. The circuit court failed to address the required factors when fashioning the sanction and the Crest Defendants had not, in fact, violated any proper Order of the circuit court. The prior Order that the Crest Defendants purportedly violated was likewise an abuse of discretion because it was based on errors of law and was an improper collateral review of two prior discovery Orders. As addressed further below, these Orders are unsupported by the record or the law, and therefore the Court of Appeals ruling affirming the trial court must be Reversed, the circuit court's Order granting sanctions must be vacated, and this case remanded for further proceedings.

I. The Court of Appeals Erred in Holding that its Review was Limited to the October 1, 2019 Order, and Failed to Fully Review the Record

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

However, South Carolina appellate courts have historically reviewed interlocutory orders when such orders are presented on appeal as companion issues to orders that are ordinarily immediately appealable. See, e.g., Brown v. Cnty. of Berkeley, 366 S.C. 354, 362, 622 S.E.2d 533, 538 (2005) (citing Morris v. Anderson County, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002); Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 338, 574 S.E.2d 502, 512 (Ct.App.2002)). After the South Carolina Rules of Civil Procedure replaced the Rules of Practice for the Circuit Courts, this Court applied this principal to a discovery order directed at a non-party, explicitly adopting existing procedure under the federal rules for the appeal and review of a discovery order, Ex parte Whetstone, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986). The Court stated the procedure succinctly: one who is aggrieved by a discovery order "may either comply with the discovery order and waive any right to challenge it on appeal, or refuse to comply with the order and appeal after he is held in contempt for his failure to comply. Id. 347 S.E.2d at 881–82.

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

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

The Davis opinion notes three reasons supporting its affirmance of the circuit court, all of which distinguish the facts and proper outcome of this matter. First, the Court noted that the plaintiffs "only appealed the order awarding sanctions, . . . the Dismissal Order." Id., 762 S.E.2d at 542-43. In contrast, the Notice of Appeal in the instant case explicitly sought review of the April 6, 2015, June 18, 2019 and August 1, 2019 discovery orders, as well as the October 1, 2019 order striking Appellants' pleadings.[4] In this case, Appellants never stopped challenging the June 18, 2019 order. Appellants filed a Motion to Alter or Amend, which was denied by the August 1, 2019 Order. At that point, Appellants advised the Court that they intended to seek Appellate review of the discovery orders, and even asked the court to find them in contempt, going so far as

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

citing Davis in the process. Second, the Davis Court found that the plaintiffs had not followed the Whetstone procedure because they "continued on in the litigation" and "continued to accept the circuit court's formulation of discovery." Id. at 543. Finally, the Davis Court found that the discovery rulings at issue in that case were "unreviewable on appeal" because the Appellants "only raise[d] general issues with those orders", making no "specific objections to each item of discovery deemed discoverable by the circuit judge". Id. at n. 15. In the instant appeal, Appellants objected to the propriety of the individual orders and the items deemed discoverable in great detail, covering an expansive portion of their briefs and being fully argued before the Court. Clearly, none of the reasons underlying the Davis Court's decision to affirm the sanctions ordered below apply to this case. The procedure restated in the opinion, on the other hand, was followed by the Appellants, allowing this Honorable Court to review the underlying discovery orders.

The procedure adopted in Whetstone is described in Davis and subsequent cases relatively simply: to obtain review of an interlocutory discovery order, a party must refuse to comply with the lower court's formulation of discovery, and file an appeal from an immediately appealable order resulting from the party's failure to comply. See Richardson v. Halcyon Real Est. Servs., LLP, No. 2019-000671, 2023 WL 2995102, at *2 (S.C. Ct. App. Apr. 19, 2023); Whitfield v. Schimpf, No. 2019-001716, 2022 WL 17174886, at *1 (S.C. Ct. App. Nov. 23, 2022). Est. of King ex rel. King v. Richland Cnty., No. 2008-UP-274, 2008 WL 9841679, at *2 (S.C. Ct. App. May 21, 2008). It has been referred to by this Court as "well settled" precedent. See Montgomery v. Montgomery, Opinion No. 2019-MO-027, Case No. 2018-001233 (S.C. Sup Ct. May 29, 2019). Whether the appealable order finds a party in contempt or issues sanctions is of no consequence, as either result subjects an order to immediate appeal, allowing the appellate court to review companion issues decided in otherwise interlocutory rulings.

Here, the circuit court issued discovery orders adverse to Appellants, which Appellants believed to be procedurally defective, factually incorrect, beyond the scope of discovery, and outside of the discretion of that court. Appellants refused to comply with certain aspects of those orders, advised the court that they intended to seek appellate review. This is precisely what the procedure outlined in Whetstone and Davis requires, yet Appellants suffered an excessive sanction as a result. This Court is now left to correct the errors of law and fact in both lower courts, and to clarify the procedure for seeking appellate review of trial court discovery orders. If no pre-trial circuit court discovery order is *ever* subject to appellate review, the abuse of discretion standard becomes unfettered discretion of the state trial courts. For both practical and policy reasons, that cannot become South Carolina law.

II. The Record Does Not Support Any of the 2019 Discovery Orders and Drastic Rule 37(b)2)(C) Sanctions Were Improper

The record simply does not reflect a history of discovery abuse by Appellants that would warrant the drastic sanctions ordered by Judge Murphy. The discovery disputes began with IWM's first discovery requests, served on October 2, 2012. (APPX. 210-244). The discovery was certainly comprehensive, covering a swath of general matters but also including pointed inquiries to matters that had arisen in the federal court case. Each set of interrogatories included at least seventy and perhaps over one hundred fifty separate inquiries, depending on how one defines a subpart. Therefore, they were patently improper and objectionable under Rule 33 (b)(9), SCRCP. This fact was recognized by both Judge Dickson and the Court of Appeals.

The interrogatories also included financial discovery that would have been extensive for supplemental proceedings and was far beyond the scope of pre-trial discovery. From the bench, Judge Dickson distilled certain requests to their relevant parts, recognizing the burden of the

requests, limiting the volume of what he perceived to be relevant, and ultimately ordering production that was far less onerous than originally served. (APPX. 145-147, (p. 35, line 15-p. 36, line 5, p. 36, line 11-p. 37, line 2)). Judge Dickson also found IMW's requests for discovery of financial information beyond the scope of allowable pre-trial discovery, directing the defendants to provide only "some kind of valid credible statement of [their] worth". (APPX. 8-11, 136-138, (p.27, line 21-p. 30, line 15); APPX. 147 p. 37, lines 2-13)). Defendants not only complied with that order, they did so far in advance of the date they were required to.

IWM filed its First Amended Complaint on July 1, 2013, and served Supplemental Requests for Production for all defendants. (APPX. 331-394).[5] Defendants also believed that the Supplemental Requests were improper because they were within the scope of Judge Dickson's ruling, and in violation of Rule 43(l), SCRCP, and therefore filed a second Motion for Protective Order. IWM filed its Second Motion to Compel one week later. (APPX. 395-413). These motions were ultimately heard by Judge Goodstein during two lengthy and contentious hearings on September 6 and 9, 2013.[6] Judge Goodstein ultimately ordered the defendants to respond to the original and supplemental requests relating to the eighteen companies identified as relating to the corporate usurpation claims, and to pay $2,000 in attorney's fees. (APPX. 12-14; 735, 736). However, Judge Goodstein ruled that defendants were not required to produce documents that were not previously in existence, and again limited IWM's financial discovery requests by refusing to require the defendants to execute releases. (APPX. 13). Given that there was no practical means of obtaining relief from that ruling, defendants proceeded to devote every resource available to

[5] Defendants responded to IWM's First Amended Complaint with a Motion to Dismiss, which was granted by Judge Goodstein. (APPX. 15-19).

[6] During the time that this case was previously on appeal, the court reporter for these hearings retired. The current dispute arose more than five years after the hearings, and SC Court Administration stated that it was unable to produce transcripts pursuant to Rule 607(i), SCACR.

attempt to comply with her Order. At exorbitant expense and substantial personal difficulty for all involved, the undersigned, defendants undertook a review of a warehouse full of petroleum trade files from over a decade, culling and producing over 35,000 pages of Crest's otherwise confidential financial and technical documents, served all formal responses required by Judge Goodstein, and promptly paid the monetary sanction.

On November 18, 2014, IWM served out of state subpoenas on Wells Fargo Bank and Margavio & Schmidt CPAs. Those subpoenas directed those entities to produce expansive and detailed financial records relating to the Crest Defendants' transactions and tax records (APPX. 542-556). The third-party, out-of-state subpoenas failed to comply with Rule 45, SCRCP on their face, and sought additional financial discovery from third parties that had at this point been addressed and limited by both Judge Dickson and Judge Goodstein. Therefore, Defendants filed a Motion to Quash. (APPX. 540-541). This Motion was heard and denied by Judge Murphy on April 6, 2015.[7] The Order from that hearing stated that the information sought was relevant, and ordered "[t]he scope of the subpoenas shall be limited to the years 2009 to the present; *and Plaintiff shall re-issue the subpoenas in accordance with this Order.*" (APPX. 37-39) (emphasis added). Thus, in a point that was entirely overlooked in Judge Murphy's 2019 rulings, and by the Court of Appeals, **the April 6, 2015 Order did not compel the Appellants to do anything.**

On March 26, 2019, following the first appeal in this case, IWM issued a second subpoena to Margavio & Schmidt. That subpoena directed that firm to produce "[a]ny and all documents, including but not limited to tax returns. working papers, and P&L statements" of the Appellants. (APPX. 584-86). Appellants did not contest the subpoenas. However, Margavio & Schmidt filed

[7] This hearing took place in chambers in Orangeburg County. For reasons not readily apparent today, there is no record of the parties' argument.

a Motion to Quash that subpoena in Jefferson Parish, Louisiana, IWM failed to respond, and it was granted on June 10, 2019. (APPX. 605-06).

In the meantime, IWM's counsel also informally requested that the defendants supplement their prior discovery and execute "authorizations" that would allow IWM to obtain defendants' financial data from third parties. On May 7, 2019, undersigned counsel transmitted a letter to IWM's counsel, stating that 1) Wuertz was willing to provide the requested financial statement, 2) the Crest entities were no longer in business and therefore had nothing to produce, and 3) that none of the Crest Defendants were willing to execute blanket financial releases. (APPX. 592-93). In response, IWM filed its Third Motion to Compel, which was heard on June 5, 2019 (APPX. 152-176; 571-592). In advance of the hearing, counsel transmitted correspondence to the trial court, advising of the progress that had been made following an April status conference. (APPX. 741-42). **Notably, when IWM filed its Third Motion to Compel, there was no Order or pending discovery requiring a response from the Crest Defendants.**

During the June 5 hearing, IWM's counsel misrepresented the record to the court in several aspects, misstating the content of Judge Dickson's ruling and the basis for IWM's Second Motion to Compel, stating that the Crest Defendants had been sanctioned twice previously for discovery violations, stating that Wuertz had been unwilling to produce current financial statements, and stating that the undersigned's letter to the court the morning of the hearing contradicted the prior correspondence (APPX. 155-156 (p. 4, lines 11-13; p. 5, lines 10-20)). IWM's counsel also made the remarkable admission that IWM was simply unwilling to follow the Uniform Interstate Discovery Act to obtain the information it was seeking from Margavio & Schmidt, stating "we don't want to have to play any more games. We don't want to have to go fight in Louisiana or Texas. What we want is for them to sign authorizations that allow us to get their records." (APPX.

158, lines 13-24). Appellants' Counsel even signed a Consent Order for IWM to serve the Wells Fargo Subpoena in Texas according to proper procedure, and provided it to IWM's counsel, who then provided it to the court, on the record. (APPX. 173-175 (p. 22, line 3-p. 23, line 9; p.24, lines 7-12)).[8]

The trial court granted IWM's Third Motion to Compel on June 18, 2019, requiring the Crest Defendants to execute "authorizations, appended as Exhibits", within seven days of the order, but there were no exhibits attached to the Order. The Order also directed the Crest Defendants to provide current certified financial statements, and to pay $1,950 in costs and fees. (APPX. 41-43). The Crest Defendants filed a timely Motion to Alter or Amend which, among other things, pointed out that the court's Order was defective in that it referred to exhibits that were not attached. (APPX. 668-670). On August 1, 2019, the court issued a Form 4 Order allowing the entities to produce financial statements executed by "an accounting professional", but otherwise denying the Crest Defendants' Motion. (APPX. 44-46).

As the Record establishes, the Crest Defendants did, in fact, produce to IWM all available documents that it had agreed to provide, which should have satisfied its requests for information, and which were supplementary to previous discovery responses. Defendant Wuertz did, in fact,

[8] The court was made aware through oral argument on June 5, 2019, through counsel's letter of June 5, 2019, and through counsel's letter to IWM's counsel of May 7, 2019, that Wuertz was willing to provide a certified financial statement, that Crest had no financial statement to provide, and that the defendants did not intend to object to the subpoenas to Wells Fargo and Margavio & Schmidt if they were issued and served in the jurisdictions where they should have been issued and served. Counsel's letter to the Court references IRS Forms 4605-T that were transmitted to the IRS. At the time, counsel was aware that the Crest Entities were no longer conducting business, but unaware that they had not filed tax returns for several years. The record does not reflect that the IRS ever responded to the request. On information and belief, if there was any defect in the request, it would have been returned to the taxpayer's address on the taxpayer's most recent return as of the date of the request, which is vacant. In any event, IWM declined the offer for that information.

produce a Reviewed Financial Statement. Crest did, in fact, produce a CPA letter attesting to the entities' status, income, and assets. On August 19, 2019, the Crest Entities filed its 2016 and 2017 tax returns, and those were provided to IWM's counsel on August 29, 2019. (APPX. 753-54). All of these efforts were detailed in correspondence to Judge Murphy on August 30, 2019 (APPX. 754-56). That letter also stated:

> With all due respect to Your Honor's ruling, my remaining clients will be serving Notice of Appeal of your August 1, 2019 Order, inclusive of the Court's Orders of June 18, 2019 and April 6, 2015. I am writing to request that you issue an Order of Contempt to the extent you feel the production recited above violates your Order, in accordance with Davis v. Parkview Apartments, 409 S.C. 266, 762 S.E.2d 535 (2014) and the precedent cited therein.
>
> In my experience, and as noted in Metts v. Mims, 384 S.C. 491, 682 S.E.2d 813 (2009), a party requesting a contempt order for purposes of appeal typically avoids sanctions under Rule 37, SCRCP, and I therefore respectfully request that the Court issue a Form 4 so stating. If you would like for me to prepare a formal proposed order, I would be happy to do so.

(APPX. 754).

IWM responded to the Crest Entities' efforts by filing a Motion for Sanctions on September 13, 2019, which was heard on September 23, 2019. (APPX. 177-205, 673-684). During the hearing, IWM's counsel described the only outstanding issue as "they have not produced is the one thing this Court has ordered them to produce; that is, the signed authorizations"[9] (APPX. 188

[9] During that hearing, the following exchange occurred on the record:

MR. MARVEL: I want to make sure I understand [the court] correctly. The financial statements that you ordered us to produce that he was just referring to -- those have been produced. I just want to be clear on that, to make Mr. Gruenloh clear on that. We have produced a statement from the accountant as to Mr. Wuertz. We produced a statement from the same accountant as to entities that says that they are not in business. I believe that we have, not substantially, but I believe we have absolutely complied.
THE COURT: Counsel, any response to that?

(p. 12, line 12-14)). More accurately described, IWM argued that the Crest Defendants had not executed the non-existent authorizations that the lower court failed to attach to its prior Order, despite that being one of many salient points of the Motion to Alter or Amend.[10]

On October 1, 2019, the court granted IWM's Motion for Sanctions (APPX. 47-58). The Court's Order precisely tracked each misleading reference and false statement in the Plaintiff's Motion, was unsupported by the record, held that the Defendants engaged in a pattern of discovery abuse in bad faith and had willfully failed to comply with the court's June 18 and August 1, 2019 Orders.[11] The court sanctioned the Crest Defendants by striking their Answers and Counterclaims, thereby leaving them in default on IWM's claims and leaving Crest without a remedy for the now seven-figure loss that it suffered from the 2009 transaction with IWM.

MR. GRUENLOH: They have provided financial statements, Your Honor. We think it's more of the same. They have provided what they want us to see. That is the reason why we asked for the authorizations. That is why Judge Goodstein back in 2013 ordered them to comply with that request.
(APPX. 203-204 (p. 27, line 20-p. 28, line 11)).

[10] Admittedly, the Crest Defendants also did not pay the monetary sanction, viewing it as an outcome derived issue that should ultimately be overturned. No objection was raised to the amount, but the financial disclosures directly before the court should have provided sufficient evidence to the court on the Crest Defendants' ability to pay that sanction See Estate of Watson v. Babb, No. 2007-UP-329 at *3 (Ct. App. June 25, 2007)

[11] C.f. Davis v. Parkview Apartments, 409 S.C. 266, 296, 762 S.E.2d 535, 551 (2014) (Pleicones, J., Concurring) ("the trial judge's specifications of deficiencies in their compliance with the Discovery Order are simply too vague, and rely too heavily on mere references to memoranda prepared by respondents' counsel, to support the finding of contempt.").

III. The Court of Appeals Erred by Disregarding or Not Addressing the Deficiencies in the Underlying Discovery Orders

The Court of Appeals Opinion held that Rule 34, SCRCP provides an avenue for a party to request, and for a circuit court to compel, the execution of financial authorizations by an adverse party. Notably, the two cases relied upon by the Court in reaching that conclusion addresses altogether different situations where the party compelled to execute such authorizations placed the subject of those authorizations at issue. E.g., Barnette v. Adams Bros. Logging, Inc., 586 S.E.2d 572 (S.C. 2003). Appellants do not contest the concept that the wealth of a defendant is relevant to the assessment of punitive damages, but it would seem to be incorrect statement of law to say that the documents sought by Respondent must be produced simply "[b]ecause IWM asked for punitive damages". In fact, Respondent repeatedly represented to the lower court that the documents were sought solely for the purpose of assessing collectability, which is not a proper purpose of pre-trial discovery. Appellants assert that the Court's ruling is in error, and appears to miss several points argued below and in brief.

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

documents that were never formally requested, then strike a party's pleadings when that party has indicated an intent to seek appellate review of that order.

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

Third, the lower courts failed to address or recognize the fact that **IWM bears the responsibility for its own failure to obtain the records it allegedly sought via the authorizations**. The scope of discovery set forth in the civil rules contemplates that a party seeking discovery will use the allowable tools judiciously. See Rule 26, SCRCP (the "use of discovery methods . . . shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought".). A state court subpoena may only be served "at any place within the State." Rule 45 (b)(2), SCRCP. Cf. Pennoyer v. Neff,

95 U.S. 714 (1877). Accordingly, for IWM to properly compel the production of documents from an entity in another state, it must do so under that state's laws. To facilitate matters such as this, both South Carolina and Louisiana have enacted the Uniform Interstate Depositions and Discovery Act. La. Rev. Stat. § 13:3825; S.C. Code Ann. § 15-47-100 ("UIDDA").

The UIDDA requires the courts of South Carolina to defer to the provisions of the Louisiana Act, and thereby respect the right of the Louisiana courts to assert and control such procedural jurisdiction over Louisiana citizens within state boundaries. S.C. Code Ann. § 15-47-160 ("In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it."). The only procedure by which IWM could obtain discovery directly from Margavio & Schmidt was through compliance with Louisiana's UIDDA. Apparently, IWM refused to do so and, when challenged on the issue in Louisiana by a non-party outside of the lower court's jurisdiction, IWM waived its commensurate right to appear and argue or correct the problem. Once a Louisiana state court ruled that IWM was not entitled to discovery from Margavio & Schmidt, the lower court in this case was without jurisdiction to address the issue by way of requiring the Crest Defendants to execute releases for IWM to obtain the documents outside of the proper intrastate procedure.

While Texas has not enacted the UIDDA, it has enacted its own procedural rules reaching the same result. See Tex. Civ. Prac. & Rem. Code § 20.002; Union Carbide Corp. v. Martin, 349 S.W.3d 137, 141 (Tex. App. 2011). IWM did not even try to comply with Texas law with regard to the Wells Fargo subpoena, despite being ordered by Judge Murphy in 2015 to reissue its subpoena in compliance with her limitations. IWM went so far as to argue in its Third Motion to Compel that "third parties in foreign jurisdictions should not be permitted to use procedural means to prevent document productions ordered by this Court" (APPX. 58).

IWM simply ignored the circuit court's 2015 Order that directed it to issue subpoenas to the entities in question. Then, when IWM issued subpoenas in 2019 to the entities in question, it failed to appear and argue under the Uniform Interstate Depositions and Discovery Act that it was entitled to the documents. If IWM had followed through on either of these discovery methods, in all likelihood it would not have needed to request signed authorizations from Appellants to obtain the information it sought. Having failed to follow the proper procedure for out-of-state discovery on all counts, IWM has no remedy against an adverse party in a South Carolina court. See, e.g., Lerner v. Newmark & Co. Real Estate, Inc., 178 A.D.3d 418, 421 (N.Y. App. 2019) (the UIDDA "provides a mechanism for disclosure in New York for use in an action that is pending in another state..., not the other way around"); Catalina Mktg. Corp. v. Hudyman, 212 A.3d 997, 1000 (N.J. App. 2019) ("[A]n application to the court for a protective order or to enforce, quash, or modify a subpoena ... must comply with the rules or statutes of th[e discovery] state and be submitted to the court ... in which discovery is to be conducted") (*citations omitted*); Yelp, Inc. v. Hadeed Carpet Cleaning, Inc., 770 S.E.2d 440, 444 (2015) (*collecting cases*) ("enforcement of a subpoena seeking out-of-state discovery is generally governed by the courts and the law of the state in which the witness resides or where the documents are located.").

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

documents, Appellants should not have been subject to sanctions under Rule 37, and certainly not the extremely harsh sanction of striking Appellants' pleadings. Accordingly, the Court of Appeals should have reversed, holding that the Circuit Court's Ruling and Order was a failure to even exercise discretion.

IV. The Court of Appeals Incorrectly Found that the October 1, 2019 Order Striking Appellants' Pleadings was Within the Circuit Court's Discretion

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

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

"When the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is harsh medicine that should not be administered lightly." Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct.App.1999). A sanction that results in a default or dismissal is a severe punishment that should be imposed only if there is some showing of bad faith, willful disobedience, or gross indifference to the rights of the adverse party. Id. at 198–99, 511 S.E.2d at 719 "[T]he sanction imposed should

be reasonable, and the [c]ourt should not go beyond the necessities of the situation to foreclose a decision on the merits of a case." Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct.App.1990).

Discovery is enforced under Rule 37, SCRCP. If a party fails to answer an interrogatory or fails to respond to a Rule 34 request that inspection will be permitted, "the discovering party may move for an order compelling an answer or . . . inspection in accordance with the request." Rule 37(a)(2). Likewise, if the party served with a request under Rule 34 objects, fails to respond to any part of the request, or fails to permit inspection, "the party submitting the request may move for an order under Rule 37(a). Rule 34 (b), SCRCP. The court may issue an order compelling discovery or "may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26 (c)." Id.

If a party fails to obey an order compelling discovery, the court "may make such orders in regard to the failure as are just", including issuing:

> (A) 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;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

Rule 37(b)(2), SCRCP. The court is also empowered to make a finding of contempt under Rule 37(b)(2)(D) or order the party to pay costs and fees caused by the failure. Rule 37(b), SCRCP.

Given the wide range of sanctions that are available under the Rule, a trial court must make a determination that no other sanction will suffice before striking a party's pleadings.

The record establishes that Judge Murphy's 2019 Orders erroneously found that Appellants had engaged in a pattern of discovery abuse. Each time a discovery dispute arose in this case prior to the first appeal, that dispute was first raised by the defendants through the only means they had available, a Rule 26 (c) Motion for Protective Order. A Motion to Compel under Rule 37(a) has but one positive outcome for the movant: "an order compelling an answer . . . in accordance with the request." Otherwise, the court has "denie[d] the motion in whole or in part" and may issue a Protective Order "pursuant to Rule 26(c)." Rule 37, SCRCP. A motion for a Protective Order under Rule 26(c), however, has a broad range of positive outcomes for the movant. Appellants, in fact, prevailed each time they filed a Motion for Protective Order, as the discovery sought by IWM was drastically curtailed in each instance. While Appellants did not receive any affirmative relief on their 2015 Motion to Quash, Judge Murphy's Order on that motion required no action by Appellants, and therefore Appellants could not have violated that Order. As for Judge Murphy's June 18, 2019 Order, there was no basis for the court to issue a Rule 37(b) sanction, as there was no valid order for Appellants to obey. Thus, the October 1, 2019 Order granting sanctions was an abuse of the trial court's discretion.

Further, the findings of fact cited in the circuit court's Order are nothing more than a recitation of IWM's argument, which was without support in the record when IWM's counsel said it, without support in the record when signed by the court, and without support in the Record on Appeal.[12] The Order cites these statements, and no others of material consequence, in support of

[12] The Briefs and the Petition for Rehearing in the Court of Appeals outline the false statements of fact in detail, and for purposes of brevity they are not restated verabatim here., One particularly egregious example, however, is the lower court's recitation of the September 23, 2019 hearing that

the finding that the Crest Defendants had engaged in willful, bad faith, dilatory conduct in disobeying the Court's discovery orders. The circuit court failed to undertake any effort to weigh any other factor in ruling that Appellants' pleadings should be stricken, and failed to assess whether any lessor sanction was available to cure any perceived disobedience by the Appellants. This is clearly an abuse of the circuit court's discretion, and this Court must reverse the Court of Appeals, vacate the circuit court's 2019 Orders, and remand this case for further proceedings.

is entirely contrary to the record, in that defense counsel never argued or stated that defendants had "substantially complied with the court's order", that "he could not file the threatened appeal . . . without being held in contempt", or that "he had been ordered by his client to appeal any order issued by the Court." (APPX. 53, p. 7 (emphasis in original); APPX. 170-171 (p. 19, line 8-p. 20, line 3; p. 20, lines 11-13; p. 28, lines 2-4)). Judge Murphy's Order actually tracks the argument of IWM's counsel, who stated "I expect that Mr. Marvel will get up and say, "I gave him all the tax returns. That is substantial compliance" and "[t]here is no doubt that whatever order issues from this Court, it is going to be appealed by Mr. Marvel" (APPX. 161 (p. 10, lines 13-14; p. 11, lines 4-6)). The simple fact that the orders attribute these statements to Appellant's counsel establishes that the circuit court failed to exercise **any** discretion when issuing its sanction.

CONCLUSION

This appeal asks this Honorable Court to do nothing more than allow for the appellate review of circuit court discovery orders to allow for fairness, efficient pre-trial procedure, and the enforcement of the Rules of Civil Procedure as they are written. This case was filed after the parties had litigated the substantive issues in federal court, exchanged thousands of documents, taken depositions of all parties and several others, and were presumably ready for trial. The essential issues were joined in the federal case, and the defendants below were certainly justified in believing that the prior course of discovery would serve the parties to be ready for the state court trial. Now, after fourteen years and the production of over 35,000 pages of discovery responses, Appellants had their defenses and counterclaims stricken without basis.

The Circuit Court abused its discretion when it granted IWM's Third Motion to Compel, and it compounded that error and further abused its discretion by striking the pleadings of the as a sanction. These discovery issues are properly presented for review by this Court. For all of the Reasons stated herein, and to be argued hereafter, Appellants respectfully request that this Honorable Court REVERSE the ruling of the Court of Appeals, VACATE the circuit court's Orders of June 18, 2019, August 1, 2019, and October 1, 2019, and REMAND this case for further proceedings, including trial.

RESPECTFULLY SUBMITTED:

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