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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM DORCHESTER COUNTY

Court of Common Pleas

Hon. Maite D. Murphy, Circuit Court Judge

Case No. 2019-001719

Appellate Case No. 2023-001045

Innovative Waste Management Inc., Respondent,

v.

Crest Energy Partners GP, Crest Energy Partners LP, Dunhill Products LP, Henry Wuertz, Appellants.

RESPONDENT'S BRIEF

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Appellants, Crest Energy Partners GP, LLC, Crest Energy Partners LP, Dunhill Products LP, Henry Wuertz, and Edward H. Girardeau (hereafter "Appellants") are appealing the March 29, 2023 Opinion of the South Carolina Court of Appeals affirming the trial court's October 1, 2019 Order striking Petitioner's Answer and Counterclaims. Appellants make two arguments, 1) that the Appellate Court erred in finding that Appellants waived appellate review of the June 18, 2019 and August 1, 2019 orders and 2) the October 1, 2019 Order was an abuse of discretion.

As to the first argument, the Court of Appeals correctly interpreted and followed in *Davis v. Parkview Apartments* finding that Appellants had waived review of the prior discovery orders. *Davis v. Parkview Apartments* 409 S.C. 266, 280–81, 762 S.E.2d 535 (2014). Nonetheless, the Court of Appeals still examined the June and August orders and found that the circuit court did not abuse its discretion. *Innovative Waste Mgmt. v. Crest Energy Partners GP*, No. 2019-001719, 2023 WL 2671712 at *1, *4 (S.C. Ct. App. Mar. 29, 2023). Accordingly, even if Appellants are correct that appellate review of the prior orders had not been waived under *Parkview,* it does not matter. As for Appellants' second argument, and as set out below, the long history of Appellants' Counsel's discovery abuse is well documented. The Court of Appeals correctly found that the October 1, 2019 was not an abuse of the trial court's discretion.

COUNTER STATEMENT OF THE CASE

Appellants' statement of the case and procedural history is inaccurate. Respondent provides the following history which includes the facts omitted from Appellants' Brief. The underlying case was filed in Dorchester County Court of Common Pleas on May 11, 2012. This case stems from Respondent's allegation that Appellants failed to pay the Respondent for over $1 million dollars of oil that Appellants acquired by fraudulent means from Respondent in April of 2010 (ROA 66-72). In addition, Appellants interfered with the existing and prospective business relationships of the Respondent, all for the purpose of taking Respondent's clients and misappropriating millions of dollars in business from Respondent. *Id.* Respondent's expert Oliver Wood calculated that Appellants' conduct have caused Respondent no less than $12,000,000.00 in economic losses (ROA 570-71). Appellants filed a counterclaim alleging economic damage for an entirely different transaction between Appellants and Respondent that was completed prior to the events set out in the Amended Complaint. Respondent alleged economic losses and punitive damages, and so, the parties' financial records were relevant (ROA 91-93 ¶¶ 38-56).

On October 2, 2012 Respondent served Appellants with Respondent's First Requests for Production and Interrogatories, including requests for Appellants' financial information (ROA 283, 221-34, 253-69). Respondents sought Appellants' banking and tax accounting records and also included requests pertaining to the amount of business (by dollar and volume) that Appellants had done with certain third-party business clients alleged by Respondent to have been taken by Appellants. *Id.* The Appellants did not provide any response to the discovery requests and Respondent filed its first Motion to Compel on January 31, 2013 (ROA 205-08).

Shortly after the Respondent's First Motion to Compel was set for a hearing, Appellants agreed to and signed a Consent Order (ROA 4-6). The Consent Order provided that "the

Defendants shall serve responses, including all responsive documents and to all outstanding discovery requests on or before Wednesday March 20, 2013." *Id.* In addition, Appellants' Counsel agreed to pay Respondent's Counsel's attorney fees related to bringing the Motion to Compel (ROA 481, ¶ 14). This was the first occasion on which Appellants had an opportunity, if it was so inclined, to inform the Court that it would not/could comply with the Plaintiff/Respondent's discovery requests. Instead, the Appellants promised that they would answer the discovery requests. The Appellants failed to comply with the terms of the March 15th Consent Order (ROA 282-90) and instead filed a Motion for a Protective Order (ROA 482, ¶¶17-20) that was inconsistent with the negotiated and agreed upon Consent Order requiring Appellants to provide a response to all outstanding discovery by March 20, 2013 (ROA 398).

Respondent filed an Amended Motion to Compel that was heard on April 1, 2013 by Judge Dickson (ROA 110-150). Judge Dickson ordered Appellants to respond to Respondent's previously served interrogatories and to provide a sworn or certified financial statement indicating income and net worth (ROA 7-10). The Court set a deadline of July 1, 2013 for Appellants to comply with the June 3rd Order. *Id.* Appellants failed to comply with Judge Dickson's June 3, 2013 Order and Respondent's counsel made many attempts to confer with Appellants' counsel regarding numerous deficiencies. (ROA 286-89, 484-85, ¶¶ 23-32). <u>At no time did Appellants indicate that they could not or would not comply with the June 3, 2013 Order</u>.

On July 3, 2013, Respondent served Appellants with Supplemental Requests for Production seeking additional financial information. (ROA 400-01, 485 ¶¶ 26-32). Appellants did not respond to the supplemental discovery requests and, in Rule 11 consultation, Appellants' Counsel informed Respondent that he would "follow up on the discovery" and would provide responses by Monday, August 19, 2013 (ROA 485, ¶30); See also Rule 11, SCRCP. Instead, on

Friday, August 16, 2013, Appellants filed another Motion for a Protective Order (ROA 485, ¶31). This was the second instance where Appellants filed a motion for protective order without any effort to confer, after the discovery deadline had passed and after providing assurances to Respondent's counsel that the overdue discovery responses were forthcoming (ROA 395). As noted below, this delay tactic became a pattern in this case.

On August 27, 2013 Respondent filed Plaintiff's Second Motion to Compel (ROA 394-412). A hearing was held before Hon. Diane Goodstein on September 9, 2013. Respondent argued that Appellants had failed to provide complete discovery answers as required by the March 15th and June 3rd Orders and failed to provide any answers to Respondent's July 3rd Supplemental Discovery Requests which included requests for financial information including Appellants' tax records (ROA 398-400, 406-07, 413-77). Respondent also argued that Appellants' failure to comply with the Court's prior orders appeared to be deliberate and willful, set out a history (to that point) of Appellants' discovery abuse and requested that the court grant sanctions pursuant to S.C.R.C.P. 37 including but not limited to striking Appellants' pleadings (ROA 398-400, 406-07).

On September 27, 2013 Judge Goodstein granted Plaintiff's Second Motion to Compel (ROA 11-13). Appellants were ordered to provide responses to the Respondent's initial October 2, 2012 discovery requests by October 9, 2014. *Id.* In addition, the Court ordered the Appellants to respond to the Respondent's supplemental discovery requests, specifically, that "Defendants shall produce the working papers such as W-2's, 1099s, K-1's, etc., used in preparation of Defendants' state and federal tax returns for the period 2008 – 2012. *Id.* The Order noted that "[n]othing set out in this paragraph shall be construed as any limitation upon Respondent's right to seek additional discovery on these issues in the future." *Id.* Judge Goodstein also found that Appellants had failed to comply with the March 15, 2013 and June 3, 2013 Orders: "Appellants

failed to provide discovery responses in accord with this Court's March 15, 2013 and June 3, 2013 Orders and are hereby ordered to pay Respondent's counsel's attorney's fees and costs spent in drafting, preparing and arguing this Motion to Compel. *Id.* Appellants did not inform the court or the Plaintiff that it would not or could not comply with the September 23, 2013 Order.

Petitioner Henry Wuertz was deposed in May of 2014. Portions of his testimony conflicted with the financial information previously provided in discovery (ROA 560-64). In addition to the inconsistencies between the court-ordered production and the testimony, Mr. Wuertz was unable to give answers to basic questions such as: (1) how much net income he had made in any of the last few years, (2) what year he had last filed his taxes, and (3) what Crest's net worth was. *Id.* Mr. Wuertz identified Margavio and Schmidt as Appellants' accountant and identified Wells Fargo as their banking institution.

Given these inconsistencies discovered in Mr. Wuertz's deposition and the failure to provide full discovery responses in accord with Judge Goodstein's September 27, 2013 Order, Respondent issued subpoenas to Margavio and Schmidt seeking Appellants' accounting records and to Wells Fargo seeking Appellants' banking records. (ROA 560) The information was sought for the purpose of verifying income and alleged economic losses related to the matters in controversy and to verify the testimony of Mr. Wuertz. (ROA 560-564) The scope of the requests was 2009 to the present.

On December 5, 2014 Appellants filed a Notice of Motion to Quash and Motion for Protective Order relating to the Margavio and Schmidt and Wells Fargo subpoenas. (ROA 539-540) Appellants again failed to make any attempt to confer with Respondent pursuant to Rule 11 prior to filing their Motion. (ROA 540) Appellants argued that (1) the subpoenas to Margavio and Schmidt and Wells Fargo were procedurally defective, (2) the information sought was protected

by the Right to Financial Privacy Act, (3) and that the financial records sought by Respondent were not likely to lead to the discovery of admissible evidence. (ROA 539); *See* also Rule 11, SCRCP.

Respondent briefed all of these issues (ROA 557-559) and Judge Murphy heard arguments on Appellants' Motion to Quash in chambers on April 6, 2015. In denying Appellants' Motion to Quash and Motion for Protective Order in full, the court noted "[a]t the hearing the issues argued centered around relevancy and scope of the subpoenas at issue." (ROA 36-38). The court ordered "the subpoenas issued to Wells Fargo and Accountants Margavio and Schmidt are relevant; The scope of the subpoenas shall be limited to the years 2009 to the present; and Respondent shall re-issue the subpoenas in accordance with this order." *Id.* Respondent promptly re-issued the subpoenas (ROA 168, 572, 577-89). Appellants did not inform the court or the Respondent that it would not or could not comply with the April 6, 2015 Order.

In the meantime, on April 8, 2015 the parties were ordered to mediate this case. At mediation a settlement was reached in which Appellants agreed to pay a settlement amount within 30 days (ROA 48). The Appellants failed to pay the agreed upon settlement amount and breached the settlement agreement. The case was mistakenly dismissed by the Clerk of Court and Respondent appealed the dismissal. In 2018, the Court of Appeals found the Form 4 order dismissing the case void, and the South Carolina Supreme Court affirmed this holding in February 2019. *Innovative Waste Mgmt. v. Crest Energy Partners GP*, 425 S.C. 568, 824 S.E.2d 214 (2019). Having found the case erroneously dismissed, the Appellate Court remanded the case to the circuit court. *Innovative Waste Mgmt.,* 425 S.C. at 571, 824 S.E.2d at 215.

Given the long delay, the financial information previously sought by Respondent in 2013 needed to be updated. On March 26, 2019, Respondent served an updated subpoena on Margavio

and Schmidt (ROA 572, 577-89). The subpoena requested updated records through the present. *Id.* Appellants' counsel was copied on the correspondence to the Louisiana Clerk of Court and made no objection regarding the subpoena. *Id.* On March 27, 2019, the Respondent wrote to Appellants' Counsel and requested that Appellants provide updated financial statements (ROA 577).

Also, Respondent advised Appellants that Harris County, Texas required an additional consent order to domesticate the Wells Fargo subpoena, attached a proposed consent order, and requested that Appellants sign the consent order so that Respondent could effectuate the Wells Fargo subpoena in accord with the court's Order (ROA 168, 577-79). Respondent also requested that Appellants produce the records themselves to avoid the unnecessary time and expense (ROA 577-89). The time period specified for the Wells Fargo subpoenas was January 2009 through the present. *Id.* Respondent referred Appellants to the Court's prior orders authorizing this discovery and requested an immediate response if Appellants were unwilling to provide the executed consent order for the Wells Fargo subpoena and provide updated financial statements. *Id.* The parties had an April 22, 2019 telephone conference with the court to discuss these discovery requests pursuant to Rule 26(f) (ROA 572-73, 736-39); *See* also Rule 26, SCRCP.

During the April 22nd telephone hearing with Judge Murphy, Respondent's Counsel advised the court of Appellants' failure to provide the updated financial statements and to sign the consent order necessary for the domestication of the Harris County Wells Fargo subpoena (ROA 573). In light of Appellants' refusal to provide the financial statements and to cooperate with the Wells Fargo subpoena and third-party efforts in Louisiana to quash the court-ordered Margavio and Schmidt subpoena, Respondent moved that Appellants be ordered to provide updated sworn financial statements and executed authorizations authorizing the release of their bank and accounting records held by Wells Fargo and Margavio and Schmidt. *Id.* On May 7, 2019

Appellants' counsel offered to provide a financial statement that was being constructed for use in Petitioner Henry Wuertz's criminal trial in which he had been indicted for illegally dumping toxic waste from his fuel refinery into a federally protected bayou in Texas (ROA 590-91). However, Appellants failed to provide that financial statement (ROA 573). The Appellants did not advise the trial court that it could not or would not comply with the Order requiring the production of the financial statements or that it would not cooperate with Plaintiff in obtaining records from Wells Fargo and Margavio and Schmidt.

On May 15, 2019, Respondent filed its Third Motion to Compel requesting an Order requiring Appellants do the following: 1) Produce updated, sworn, certified financial statements for each Defendant, 2) Provide executed authorizations for the production of the Wells Fargo and Margavio and Schmidt records from 2009 through the present date or, in the alternative, produce the records themselves, 3) Pay Plaintiff's attorneys fees and costs related to re-litigating these issues, and 4) For any other relief deemed appropriate (ROA 570-91). No written response to Respondent's Third Motion to Compel was filed by Appellants until after the motion was heard and decided by the court.

On June 5, 2019, a hearing was held on Respondent's Third Motion to Compel. Petitioner represented to the court that he would provide the financial statement being constructed in connection with Henry Wuertz's criminal trial and that he would provide an executed 4506T form to allow Respondent to access the tax transcripts Appellants had filed with the IRS (ROA 162, lines 15-19). On June 18, 2019, the trial court, having received no response in opposition from Appellants, granted Respondent's Third Motion to Compel (ROA 40-42). Judge Murphy ordered Appellants to sign authorizations for the release of their bank and accounting records within 7 days of the Order and to produce sworn certified financial statements within 21 days of the Order. *Id.*

The Court also sanctioned Appellants for their noncompliance with the Court's prior order, finding Appellants had failed to comply with a prior order and required Appellants to pay attorney fees in the amount of One Thousand Nine Hundred and Fifty Dollars ($1,950.00). *Id.*

Appellants did not inform the court or the Plaintiff that it would not or could not comply with the June 5, 2019 Order. Instead, Appellants waited 20 days and on June 25, 2019, the due date specified for the production of signed authorizations, Appellants filed an after the fact response in opposition to Respondent's Third Motion to Compel (which had been granted on June 5, 2019) along with a Motion to Amend the Court's Order pursuant to S.C.R.C.P. 59 (ROA 765); *See* also Rule 59, SCRCP. The Court reviewed briefings from the parties and on August 1, 2019 issued an order amending its June 18th Order, still granting in full the relief requested by Respondent but altering its original Order allowing different classes of individuals to sign the requested authorizations (ROA 43-45). The authorizations were to be signed within seven days and financial statements were to be produced within 21 days. *Id.* Appellants did not inform the court or the Plaintiff that it would not or could not comply with this Order. Instead, Appellants' Counsel informed Respondent's Counsel that he did not believe there would be any issue getting all the signed authorizations to Respondent's counsel by August 16, 2019 (ROA 676, 692).

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

On August 28, 2019, after the date for compliance set by the court had passed, Appellants' Counsel e-mailed Respondent's requesting until the end of the day to comply with the Court's

August 1, 2019 Order. Appellants provided nothing further on August 28, 2019 (ROA 676, 684-703). On August 29, 2019, Appellants produced certain documents purported to be the 2016 and 2017 tax returns of Crest Energy Partners, and a financial statement for Henry Wuertz. Appellants' counsel wrote, "[s]tand by, more to come" (ROA 677, 698). On August 30, 2019, Appellants produced a letter from Sean K. Butler, an accountant who represented in the letter to have previously prepared tax returns for Crest Energy Partners, L.P. This document was not a financial statement for any entity and was not responsive to the Court's Order (ROA 677). Appellants' Counsel's e-mail transmitting these documents again stated "[m]ore to come…" (ROA 700).

However, no further discovery materials were produced. Appellants never produced financial statements for the Crest or Dunhill or executed authorizations for the financial records. Also, Appellants did not pay the $1,950.00 in monetary sanctions nor make any filing with the court regarding their inability to do so (ROA 672-83, 176-204). On August 30, 2019, weeks after the deadline set by the court for compliance, counsel for Appellants sent a letter to the court stating he had complied as much as he would with the August 1st Order and requested that the court hold him in Contempt for his client's refusal to comply with the remaining portions of the August 1, 2019 Order (ROA 677-78, 704-06). Petitioner's counsel also wrote that he would be serving a notice of appeal that day. *Id.* This was the first time in the seven-year history of this case that Appellants notified the court that he would not comply with an order, the first mention of any appeal relating to a discovery order and the first mention of being held in contempt.

On September 3, 2019 Respondent received by courier what purported to be a Notice of Appeal signed by counsel for Appellants. However, the Notice of Appeal was not filed (ROA 677-78, 707-19). On September 13, 2019, Respondent filed Plaintiff's Motion for Sanctions Pursuant to S.C.R.C.P. 37 (ROA 672-83). No written response to Plaintiff's Motion for Sanctions was ever

filed by Petitioner (ROA 764-772). A hearing was held on Respondent's Motion for Sanctions on September 23, 2019. Respondent summarized Appellants' noncompliance with the court's Order and provided support of its motion and allegation that such noncompliance was willful. Specifically, Respondent argued that Appellants had failed to provide the court-ordered financial statements for the Crest and Dunhill, failed to provide the court-ordered executed authorizations for the financial records, and failed to pay the $1,950.00 in ordered monetary sanctions (ROA 677). Respondent further argued that it had been unduly prejudiced by Appellants' failure to comply with the August 1st Order given that trial was scheduled to begin on November 3, 2019 (ROA 672-83, 176-204).

Appellants' counsel argued that he had complied with the Order as much as he could, that his clients were unable to pay the monetary sanctions ordered by the Court and requested the Court to issue an order finding Appellants in Contempt so they could appeal the August 1, 2019 discovery Order (ROA 176-204, 707-19). The following exchange occurred between Judge Murphy and Mr. Marvel at the September 23, 2019 hearing:

> THE COURT: Mr. Marvel, let me ask you this question. You are obviously an officer of the Court. So, what you are telling me is that I am going to take what you say as if you are under oath today; do you understand?
>
> MR. MARVEL: Certainly.
>
> THE COURT: All right. Your letter to me is basically to find your client in contempt. For contempt that requires a willful violation of this Court's order. You are under oath telling me that your client has willfully violated this Court's order so that you can appeal; is that correct?
>
> MR. MARVEL: My client has directed me to pursue an appeal.
>
> THE COURT: Because they have failed to comply with this Court's orders. You have multiple orders awarding sanctions and awarding compliance with the discovery process that have not been complied with. This has been going on for seven years. Judge Dixon's order of 2012, I do recall that motions hearing and motions subsequent to that, because circumstances have changed. As stated in that order, the grammar of what was discoverable in 2015, 2016 has changed. Your client has failed to abide by all of these Court orders – refuses to do so. Now you are asking me to hold them in contempt. So, you are telling me that they are in willful violation of these Court's orders. Is that what you are asking me?

MR. MARVEL: First of all, the record is clear –

THE COURT: The record is clear, sir. Just answer my question. Yes or no, are you asking me to find your client in contempt for being in willful violation of this Court's orders? Is that what you are asking me to do?

MR. MARVEL: I am asking for the Court to find us in contempt, not because we believe that we have violated any prior order, but to the extent that Mr. Gruenloh is requesting that my clients sign the authorizations that Mr. Gruenloh has provided us, to my knowledge, is the only thing that we have not done in compliance with that order.

THE COURT: Well –

MR. MARVEL: Your Honor –

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

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

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

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

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

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

THE COURT: Sir, wanting to do something and then backing it up is a whole different ballgame from just appearing in court and saying, "I will do it one of these days." You are wanting to do it and not providing responses as to why you can't do it or your inability to do it is a whole different ballgame, sir. So, this constant manipulation of the process really is, quite frankly, not reasonably optimistic that you will ever comply with this Court's orders (ROA 197-200).

The Court granted Respondent's Motion for Sanctions on October 1, 2019 and stated: "Defendants have engaged in a deliberate pattern of discovery abuse and willfully failed to follow this Court's August 1, 2019 Order. For these reasons, as set out in detail below, the Court grants

Respondent's Motion for Sanctions pursuant to Rule 37 of the South Carolina Rules of Civil Procedure and hereby strikes all pleadings of the Wuertz Appellants" (ROA 46-47).

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

1. Appellants have waived appellate review of all discovery orders prior to the October 1, 2019 order granting sanctions;
2. Even if the June 18 and August 1 orders were preserved for appeal, neither is an abuse of discretion and both are supported by the record.
3. The October 1st 2019 Order was not an abuse of discretion and is supported by the record.

Innovative, 2023 WL 2671712 at *1, *5. These findings thoroughly address Appellants' current arguments to this Court.

Appellants filed a motion for rehearing on May 8, 2023 which was denied by the Court of Appeals on June 5, 2023. The Petition for Certiorari was filed on August 1, 2023 addressing the exact same points that were argued in the appeal and in the motion for rehearing. On May 1, 2024 this Court granted certiorari and on June 12, 2024 Appellant served its Brief upon Respondents.

LAW AND ARGUMENTS

I. The Court of Appeals properly interpreted this Court's holding in *Davis v. Parkview* correctly finding that the only order preserved for appeal by Appellants was the October 1, 2019 order.

The Court of Appeals properly held that "Appellants have waived appellate review of all discovery orders prior to the October 1, 2019 order granting sanctions, and therefore, the October 1, 2019 order is the only order properly before us on appeal. *Innovative*, 2023 WL 2671712 at *4; *See* also *Parkview, 409 S.C. at 280-81* (finding plaintiffs who were sanctioned for discovery abuse

had waived review of the underlying discovery orders "by providing incomplete responses and causing delay through other tactics while continu[ing] to accept the circuit court's formulation of discovery' instead of preserving their objections to the prior discovery orders by immediately refusing to comply with the prior orders, suffering contempt, and appealing from the contempt finding; accordingly, the prior discovery orders were the law of the case and the only order properly on appeal was the order granting sanctions.").

Petitioner's first argument is that the Court of Appeals erred in finding that only the October 1, 2019 Order of the circuit court was properly preserved for appeal. Specifically, Appellant argues that the June 18, 2019 and August 1, 2019 orders which preceded the October 1, 2019 order were interlocutory orders, that he followed the procedure set out in *Ex parte Whetstone* and so the orders are preserved for appeal. *Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881, 882 (1986).

However, as the record clearly reflects, Appellants did not follow the procedure laid out in *Whetstone.* Appellants had two choices when the June 18th and August 1st orders were entered: (1) refuse to comply, request contempt and challenge the orders on appeal, or (2) comply with the order and waive their right to appeal the orders later. The Court of Appeals took note of the following facts:

> On June 18, 2019, and then again, on August 1, 2019, the circuit court ordered Appellants to produce authorizations for the release of the banking and accounting records, as well as monetary sanctions in the amount of $1,950.00. The circuit court noted Appellants did not produce the authorizations, pay $1,950.00, or "advise [IWM] or the Court of its inability to pay the award of attorney's fees at any point prior to [the hearing on the motion for sanctions]. The court found that, "from a review of the totality of the record," Appellants' "conduct is in bad faith, is willfully disobedient to the orders of the Court, and demonstrates a gross indifference to [Appellant's] rights seeking to delay a case on the eve of trial." The circuit court noted that, instead of timely asserting that Appellants did not believe updated records from the bank and accountant were discoverable, Appellants chose "to make false representations to opposing counsel" and "feign compliance with the order of the Court." *Innovative*, 2023 WL 2671712 at *3.

Rather than challenging the rulings when they were made, Appellants chose to accept the rulings, did not follow the procedure set out in *Whetstone* and *Parkview* and waived their right to challenge the orders on appeal. The following language from *Parkview* is analogous to the current facts and specifically addresses Appellants contentions here: "Appellants did not follow that [being held in contempt] route here. Rather, they continued along in the litigation, attempting to divert the implementation of the court's rulings by providing incomplete responses and causing delay through other tactics while they decided whether or not to surrender to the possibility of being held in contempt of court. However, during this time, Appellants continued to accept the circuit court's formulation of discovery. Right or wrong, these decisions form the law of the case, and Appellants are bound by them now." *Parkview,* 726 S.E.2d at 281.

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

Parkview clearly illustrates that if Appellants fail to appeal the discovery orders, which in a later order for sanctions, make up the grounds for the sanction, the appellate court may only review whether the trial court has abused its discretion in granting the sanction. Any issues pertaining to the underlying discovery orders have been waived. *Parkview,* 726 S.E.2d at 281. Appellants did not request to be held in contempt or appeal any of these prior orders at the time that they were entered. Instead, Appellants gave half answers, employed delay tactics and provided assurances

that it would eventually comply with the orders. As such, the Court of Appeals correctly determined that, under *Parkview*, the prior orders were not subject to this appeal. *Innovative*, 2023 WL 2671712 at *4.

Appellant states in its brief: "Here the Circuit Court issued discovery orders adverse to Appellants believed to be procedurally defective … and outside the discretion of that court. Appellants refused to comply with certain aspects of those orders, [sic] advised the court that they intended to seek appellate review." Appellants' Br. 15. To be clear, there is no record of Appellants' Counsel notifying the court or counsel that he and/or his client would not be complying with these two orders upon entry of the orders and that his client should, therefore, be held in contempt. It did not occur. Instead, Appellants feigned compliance, delayed production and engaged in general delay tactics.

Accordingly, Respondents' conduct bears no relation to that of the moving party in *Whetstone*. There was no finding in *Whetstone* that the moving party had deliberately gamed the court and/or the other party on the eve of trial in order to seek some advantage. Here, the trial court found that Appellants misconduct was willful and for the purpose of delay. That key finding made by the trial court and upheld by the Court of Appeals differentiates Appellants' conduct from the moving partying in *Whetstone.* Instead, Appellants conduct was almost identical *t*o the conduct in *Parkview*.

Appellants argue that the procedure set out in *Whetstone*/*Parkview* is evolving and that there is recent precedent that somehow modifies those holdings. Respondent can find no evidence of that and the recent cases cited by Appellants are not on point. There does not appear to be any new or evolving law which, as Appellants suggest, changes the well settled principles set out in *Whetstone* and *Parkview*. Orders which are not appealed are still the law of the case and therefore

are not proper for review before this Court. *Shirley's Iron Works. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). (An unappealed ruling is the law of the case and requires affirmance and reliance.); *See* also, *Johnson v. S.C. Nat'l Bank*, 285 S.C. 80, 82, 328 S.E.2d 75, 76 (1985); *Cooper Tire & Rubber Co. v. Perry*, 201 S.E.2d 245 (1973).

It is still clear that if a party complies (or feigns compliance) with an order, they lose the ability to later challenge that order. "An order directing a party to participate in discovery is interlocutory and not directly appealable … Instead of appealing immediately, a non-party has two alternatives. He may either comply with the discovery order and waive any right to challenge it on appeal or refuse to comply with the order and appeal after he is held in contempt for his failure to comply." *Ex parte Whetstone,* 289 S.C. at 580.

II. The Court of Appeals Reviewed the June 18th and August 1st Orders Irrespective of the Fact that they were not Preserved for Appeal and Found there was no Abuse of Discretion.

The majority of Appellants' brief is spent challenging the validity of the June 12, and August 1 orders but, as noted above, the Court of Appeals already reviewed both of these prior orders notwithstanding it's finding that Appellants had waived appellate review of the orders. The Court of Appeals correctly found that "[r]egardless, even if the June 18/August 1, 2019 orders were properly before us on appeal, we find the circuit court did not abuse its discretion or exceed its authority in ordering Appellants to execute authorizations for the release of their own banking and accounting records." *Innovative*, 2023 WL 2671712 at *4; *See* also *Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009) ("A trial judge's rulings on discovery matters will not be disturbed by an appellate court absent a clear abuse of discretion.").

The Court of Appeals properly found that the banking and accounting documents were within the legal control of Petitioner and that the June 18/August 1, 2019 orders did not improperly

overrule another circuit court's order in the same case: “Further, although the banking and accounting documents were in the custody of the bank and accountant, they were Appellants' documents, and, therefore, within the legal control of Appellants.” *Innovative*, 2023 WL 2671712 at *4; S*ee* also Rule 34(a), SCRCP ("Any party may serve on any other party a request (1) to produce . . . any designated documents, or electronically stored information . . . within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served . . . ."); *See* also *Barnette v. Adams Bros. Logging.,* 355 S.C. 588, 595, 586 S.E.2d 572, 576 (2003) (affirming an order granting sanctions for a party's failure to comply with a discovery order compelling execution of an authorization for the release of social security records); Wright and Miller, § 2210 Possession, Custody, or Control, 8B Fed. Prac. & Proc. Civ. § 2210 (3d ed.2022) (gathering cases discussing the issue of compelling authorizations for release of documents within a party's "control").

The Court of Appeals also addressed Appellants’ contention that the prior orders were somehow inconsistent with prior orders of the court: “Finally, due to the evolving discovery posture of the case, we find the June 18/August 1, 2019 orders did not improperly overrule another circuit court's order in the same case.” *Innovative*, 2023 WL 2671712 at *4; *See* also *Sellers v. Nicholls*, 432 S.C. 101, 114, 851 S.E.2d 54, 60 (Ct. App. 2020) ("'[A]n interlocutory order [that] merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered . . . by the court before entering a final order on the merits."(quoting *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013)).

The Court of Appeals thorough review and confirmation of the prior orders directly addressed the arguments made by Appellant regarding the alleged deficiencies in such orders.

Accordingly, even if Appellants are correct that appellate review of the prior orders had not been waived under *Parkview,* it does not matter. The prior orders are supported by the record, are not an abuse of discretion and the trial court's discretion in this matter should not be disturbed.

III. The Court of Appeals Correctly Found that the Trial Court was within its Discretion to Strike Petitioner's Answers and Counterclaims under Rule 37(b), SCRCP.

Appellants argue that the October 1, 2019 order striking Appellants answer and counterclaims was an abuse of discretion because it was not supported by the record and less punitive sanctions were available to cure the discovery abuse alleged. Appellants argument is a largely a factual argument seeking to reform the record (specifically the nature of Appellants' counsel's conduct immediately following the entry of the October 1, 2019 order). Nevertheless, Respondent will briefly address Appellants' argument.

Pursuant to Rule 37, S.C.R.C.P., when a party fails to respond to discovery requests or obey an order to provide or permit discovery, the court may "make such orders in regard to the failure as are just." Rule 37(b)(2), S.C.R.C.P. "Rule 37 expressly grants the trial court power to order judgment by default for either violation of a court order, or upon motion, for a party's failure to respond to certain discovery requests." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E. 2d 679, 682 (Ct. App. 1997) (citing Rule 37(b)(2)(C) & (d)). The decision to award sanctions is entrusted to the discretion of the trial court. *QZO v. Moyer*, 358 S.C. 246, 255, 594 S.E.2d 541, 546 (2004).

This Court, has addressed the issue of discovery sanctions numerous times, including the appropriateness of a trial court's decision to strike the pleadings of a party. When determining the proper sanction, the Court considers three factors, the precise nature of the discovery sought, the discovery posture of the case, the degree of the prejudice and the willfulness of the parties 'conduct.

See *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (1997). If the court finds the conduct offends these factors, a sanction is justified. In this case, "[w]here the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience, or gross indifference to its rights to justify the sanction." *Griffin Grading and Clearing, v. Tire Service Equipment Mfg. Co.,*334 S.C. 193, 198-199, 511 S.E.2d 716, 718 -719 (S.C. App.1999) (citing *Baughman v. AT&T Co.*, 306 S.C.101, 410 S.E.2d 537 (1991)).

The Nature of the Discovery Sought

In evaluating the first factor, the underlying discovery orders demonstrate that Respondents sought the financial discovery at issue through numerous discovery requests and subpoenas and that the information sought was relevant, not privileged, and discoverable. The record reflects that the trial court found Appellants' accounting records and banking records to be relevant and necessary to the claims of economic damage and there are ample examples in the record of Respondent's arguments and the trial court's orders to that effect. (ROA 11-13, 556-65, 151-175, 40-42,570-91); *See* also Order Grant Mot. to Compel Sept. 27, 2013; Order Den. Mot. to Quash Apr. 5, 2015; Hr'g Tr. June 5, 2019; Order Grant Mot. to Compel June 18, 2019; Mot. to Compel 1 May 15, 2019.

The Discovery Posture of the Case and Prejudice

At the time of the filing of the Motion for Sanctions, this case had been in the South Carolina State Courts for seven years. The trial court found that, prior to the Motion for Sanctions, three separate motions to compel filed by Respondent had been granted and Appellants' objections and motions to quash had been denied. (ROA 11-13, 556-65, 36-38); *See* also Order June 3, 2013; Order Sept. 27, 2013; Order Den. Mot. To Quash Apr. 6, 2015; Order June 12, 2019. At the time of the hearing for the Motions for Sanctions, the date certain trial was 56 days away and pretrial

motions due in 26 days. This financial discovery was central to Respondent's claims of economic damage and should have been produced long before the Court needed to address the Motion for Sanctions.

The discovery rules exist to ensure full and fair disclosure, removing either party from trial by surprise. *Samples,* 329 S.C. at 113. (Citing, *State Highway Dep't v. Booker*, 260 S.C. 245, 252, 195 S.E.2d 615, 619 (1973)" Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed. Unless the party who has failed to submit to discovery can show lack of prejudice, reversal is required."). *Samples, 329 S.C. 113-14.* Appellants continued to frustrate discovery into a key claim of the case, a claim the trial court's unappealed orders state was relevant and discoverable, up and through the eve of trial. With the date certain trial pending Respondent was left without the time to properly explore the discovery sought and prejudice could be presumed by the trial court.

Willfulness of the Conduct

The trial court found that Appellants 'conduct was willful as required in *Samples*, for the grant of a sanction but, furthermore found that Appellants 'were willfully disobedient and their conduct constituted bad faith pursuant to *Griffin.* In the Order granting sanctions the Court makes the finding that prior to the Motion for Sanctions, the Courts had granted three separate motions to compel and denied a motion to quash. (ROA 11-13, 36-38, 46-57); *See* also Order June 3, 2013; Order Sept. 27, 2013; Order Den. Mot. To Quash Apr. 6, 2015; Order June 12, 2019; Order Oct. 1, 2019. The trial court found that monetary sanctions were awarded in response to these orders yet, the monetary sanctions did not change the behavior of Appellants (ROA 54). The trial court found that Appellants made representations to the court and Respondent which they never intended

to honor and demonstrated through their repeated assurances that compliance was forthcoming, only to later file motions for protective orders, a notice of appeal purporting to appeal unappealable discovery orders and finally requested a finding of contempt on the eve of trial (ROA 54-55, ¶1); Am. Mot. to Compel March 23, 2013; Mot. to Compel Ex. E Aug. 27, 2013; Mem. in Response to Mot. to Quash April 6, 2015.

The court evaluated and found that Appellants continual promises to provide discovery, to request more time to comply, to delay, only to then file protective orders or force motions to compel was willful and was a delay tactic (ROA 49-51). The Court inquired at the hearing and made the finding that Appellants 'counsel served a notice of appeal, which was never filed, as a tactic of delay (ROA 52).The Court found that Appellant did not comply with representations it made during the April 22, 2019 conference (a conference specifically held to resolve the discovery issues) relating to the Respondents 'request for accounting and bank records and that the actions made in contradiction of the representations made during the April 22, 2019 conference were taken to delay and disrupt preparation for trial. (ROA 54). As such, the trial court properly determined that the actions of Appellants were willfully disobedient and undertaken in bad faith. (ROA 55).

Similarly in *Parkview,* there were repeated discovery abuses which resulted in a finding of contempt and also the striking of the Appellants pleadings and an entry of default. *Parkview*, 409 S.C. at 295. The Court in *Parkview* stated that when a discovery order is issued, the party seeking to challenge the order has two options, comply and waive any right to challenge it or refuse to comply with the order, be held in contempt, and appeal the contempt. *Id*. at 281. In *Parkview* the Court of Appeals found that the sanctioned party acted willfully and in bad faith when they, "continued along in the litigation, attempting to divert the implementation of the court's rulings by

providing incomplete responses and causing delay through other tactics while they decided whether or not to surrender to the possibility of being held in contempt of court." *Id.*

Appellants 'Counsel's numerous representations that they would comply with the Orders set out above, coupled with their subsequent refusal to comply after deadlines (and extensions to deadlines) have formed a pattern. The Appellants attempted to avoid contempt and dance around the orders of the Court for the purpose of delay and, as in *Parkview*, the Court properly exercised its discretion in striking Appellants 'pleadings. The trial court's October 1, 2019 order properly evaluated the factors set forth in *Samples* and *Griffin*, finding willful disobedience to the orders of the court, bad faith in their actions related to the discovery process, and a prejudicial effect on the Respondent.

The Court of Appeals stated that "in finding Appellants "engaged in a deliberate pattern of discovery abuse," the circuit court described the many times Appellants missed discovery response deadlines; failed to fully comply with motions to compel; represented to the court they would cooperate in discovery, but then failed to follow through; and failed to pay past monetary sanctions *Innovative,* 2023 WL 2671712 at *3.

The Court of Appeals also noted the trial court's finding that the Appellants' noncompliance with the June 18/August 1, 2019 orders were a willful tactic "to delay a case on the eve of trial" in gross indifference to IWM's rights. *Id.* This was a finding made by the trial court, was within the trial court's discretion, and was properly undisturbed by the Court of Appeals.

CONCLUSION

Both the circuit court and Court of Appeals decisions properly construe and follow *Parkview* and *Whetstone*. There is nothing new about Appellants' arguments. They are the same

arguments rejected by the circuit court and twice by the Court of Appeals. The Court of Appeals unanimously and correctly found that the trial court's October 1, 2019 Order was the only order properly preserved for appeal and that it was not an abuse of the circuit court's discretion. Nevertheless, the Court of Appeals still reviewed the prior orders underlying the October 1, 2019 order and found them to be within the discretion of the trial court. Respectfully, the Honorable Court should affirm the Court of Appeals and remand this matter back to the circuit court.

Respectfully Submitted by Attorneys for the Respondent:

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