THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Maite D. Murphy, Circuit Court Judge

Case No. 2019-001719

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,

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

APPELLANTS' INITIAL REPLY BRIEF

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APPELLANTS' REPLY

Appellants Crest Energy Partners GP, LLC (f/k/a Dunhill Products GP, LLC), Crest Energy Partners LP (f/k/a Dunhill Products, LP), and Henry Wuertz, (hereafter "Appellants") hereby Reply to the Brief of Respondent Innovative Waste Management ("IWM"), in accordance with Rule 207(b)(3), SCACR, and State v. Wakefield, 323 S.C. 189, 473 S.E.2d 831 (Ct.App.1996).

Respondent contends throughout its brief that this Court should not review any of the lower court Orders, other than Judge Murphy's October 1, 2019 Order Granting Sanctions in favor of Respondent and against Appellants, because all prior orders are the "Law of the Case.". This Argument appears based on a fundamental misunderstanding of the Law of the Case doctrine, and standards of appellate review in general.

Appellants Brief addresses all of the lower court orders involving the discovery dispute, which were filed on April 5, 2013, August 22, 2013, October 3, 2013, April 6, 2015, June 18, 2019, August 1, 2019, and October 1, 2019.[1] The operative Notice of Appeal explicitly sought review of the October 1, 2019 Order, which Appellants referenced as being "inclusive of the prior Orders of August 1, 2019, [which were in turn] inclusive of the Orders dated of June 18, 2019 and April 6, 2015. The August 1, 2019, June 18, 2019, and April 6, 2015 Orders referenced therein addressed pretrial discovery. Each of those orders were interlocutory decisions that were not directly appealable. Ex parte Wilson, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005); Lowndes

[1] Respondent's Brief correctly notes that Appellants served a Notice of Appeal as to the August 1, 2019 Order that was never filed with any court. Appellants did so out of abundance of caution, ultimately believing that it was not necessary as the August 1, 2019 Order was interlocutory and not subject to immediate appeal. Further, Appellants' counsel informed the lower court that Appellants did not intend to proceed with that appeal. Rule 205, SCACR, does indicate that mere service of the Notice of Appeal divests the lower court's jurisdiction pending a Motion to Dismiss the Appeal. Arguably, service of that Notice makes the October 1, 2019 Order a nullity. Appellants respectfully request that the Court consider that initial Notice of Appeal withdrawn, so that the issues presented herein may be decided on the merits. Cf. State v. Dingle, 279 S.C. 278, 306 S.E.2d 223 (1983); Crout v. S.C. Nat. Bank, 278 S.C. 120, 293 S.E.2d 422 (1982).

Products, Inc. v. Brower, 262 S.C. 431, 205 S.E.2d 184 (1974); Patterson v. Specter Broadcasting Corp., 287 S.C. 249, 335 S.E.2d 803 (1985).

This Court has appellate jurisdiction to review Judge Murphy's October 1, 2019 Order pursuant to S.C. Code § 14-3-320(1) and 330(2)(c), and therefore has jurisdiction to review any prior interlocutory orders referenced in the Notice of Appeal. Judge Murphy's October 1, 2019 Order, which granted the sanctions sought by Respondent IWM, struck Appellants' Answer, Counterclaims, and Third-Party Claims. That Order was immediately appealable pursuant to S.C. Code § 14-3-330(2)(c). It was also appealable under S.C. Code § 14-3-330(1) because it struck the Appellants Counterclaims and Third-Party claims, "finally determined a substantial matter involving the claim and/or defense", and therefore "involve[ed] the merits". Wilson, 625 S.E.2d at 208 (2005); Baldwin Const. Co., Inc. v. Graham, 357 S.C. 227, 593 S.E.2d 146 (2004); Mid–State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 336, 426 S.E.2d 777, 780 (1993).

An issue that is raised in subsequent proceedings in the same litigation following an appellate decision may be subject to the "Law of the Case". As a practical matter, the doctrine is cited routinely by appellate courts in the process of affirming a lower court decision when an issue that might otherwise be dispositive on remand was not appealed or did not survive appellate review.

While the law of the case doctrine is not easy to define succinctly, it generally precludes a party from challenging, "after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). One aspect of the doctrine that *does* appear easy to state is that an interlocutory order that was not subject to a prior appeal does not become law of the case. See Gunnells v. Raybestos-Manhattan, Inc., 261 S.C. 106, 111, 198 S.E.2d 535, 536

(1973); Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("[o]rdinarily an interlocutory order which merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered and corrected by the court before entering a final order on the merits."); Weil v. Weil, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct.App.1989).

Notably, this case was subject to prior appellate review by this Court and by the Supreme Court. See 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). Respondent filed that appeal after Judge Murphy dismissed the case in 2015; Appellants were certainly not aggrieved by that Order, and therefore had no standing to appeal those orders or any prior, unrelated interlocutory discovery orders. See Cisson v. McWhorter, 255 S.C. 174, 177, 177 S.E.2d 603, 605 (1970); Rule 201(b), SCACR.

Appellants are unsure whether Respondent believes that each of the discovery orders prior to October 1, 2019 are barred by the law of the case, or only the orders pre-dating Respondent's prior appeal. Either way, they are not barred from review because they are interlocutory discovery orders, not matters that "should [or could] have been" raised during the first appeal. Shirley's Iron Works, 743 S.E.2d at 785. If anyone is barred from re-arguing the outcome of those motions because they are the law of the case, it is the Respondent. Respondent never appealed Judge Goodstein's dismissal of a fair portion of their claims, in response to Appellants' Motion to Dismiss. Respondent also failed to raise any of the discovery issues during its prior appeal through this Court.

Respondent's Brief does not acknowledge or meaningfully address the fact that Appellants prevailed on their first and second Motions for Protective Order. Appellants have never challenged

Judge Dickson's Orders. Rather, Appellants complied with them in full, because they substantially reduced the discovery burden that Respondent intended to impose on them. Appellants do believe that Judge Goodstein erred by requiring the production of some 35,000 pages of documents and paying $2,000 in attorneys' fees, and Appellants raised that issue before Judge Goodstein. However, it is undeniable that Judge Goodstein also curtailed the financial production demanded by Respondents. Again, Appellants complied with Judge Goodstein's order.

More importantly, Appellants never directly challenged Judge Murphy's April 6, 2015 Order, because the April 6, 2015 ruling did not Order appellants to do anything**.** As more fully stated in the Appellant's Brief, Respondents were the only party that violated Judge Murphy's April 6, 2015 Order.

To the point where Judge Murphy erroneously dismissed the case in 2015, the following salient facts are both unchallenged and this simple:

1) Appellants challenged the initial financial discovery served by Respondent by filing a Motion for Protective Order;
2) Judge Dickson limited the financial discovery served by Respondent in his August 22, 2013 Order;
3) Appellants complied with the financial discovery requirements contained in the August 22, 2013 Order;
4) Respondent served additional financial discovery after filing its Amended Complaint;
5) Appellants challenged the Amended Complaint by filing a Motion to Dismiss and challenged the additional discovery by filing a Second Motion for Protective Order;
6) Judge Goodstein limited the financial discovery served by Respondent in her October 3, 2013 Order;

7) Appellants complied with the financial discovery requirements stated in the October 3, 2013 Order; and

8) Respondent did not serve **ANY** additional discovery on Appellants after 2013.

Following Remand from the Supreme Court, the record established the additional unchallenged, incontestable facts:

9) Respondent served a subpoena on Margavio & Schmidt, CPAs, a Louisiana Corporation;

10) Appellants did not contest Respondent's subpoena served upon Margavio & Schmidt;

11) Margavio & Schmidt filed a Motion to Quash Respondent's subpoena in Jefferson Parish, Louisiana;

12) Respondent failed to contest the Motion to Quash filed by Margavio & Schmidt;

13) The Jefferson Parish Court granted Margavio & Schmidt's Motion to Quash; and

14) After Respondent's subpoena to Margavio & Schmidt had been quashed, and without serving any additional discovery requests, Respondent demanded that Appellants execute "releases" directing Margavio & Schmidt and Wells Fargo, N.A. to respond to Respondent's Subpoena;

Appellants do not repeat these facts simply to rehash the arguments presented in their Initial Brief, but only to point out the egregiousness of the lower Court's error. Even if Rule 34, SCRCP allowed the Respondent to serve Appellants with a request to execute a release, respondents never served such a request. Even if Respondents had that authority, and had served such a request, and assuming the lower court had the authority to Order the Appellants to execute releases, the lower

court refused to provide Appellants with a copy of the releases they were directed to execute, even after Appellants explicitly requested that the court do so. Yet, without having been served with a Rule 34 request, and without having been directed by the lower court to actually complete any specific act, and without any evidence in the record that Appellants had violated any prior Order of the Court, Appellants were sanctioned under Rule 37, SCRCP.

Appellants' Answers, Counterclaims, and Third-Party claims were stricken. That ruling is an abuse of discretion which should not be allowed to stand.

RESPECTFULLY SUBMITTED:

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October 23, 2020
Amended November 9, 2020
Charleston, South Carolina

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Crest Energy Partners, GP, LLC, Dunhill Products GP, LLC, Henry Wuertz, Innovative Waste Management, Inc., Crest Energy Partners LP, Dunhill Products LP, Edward H. Girardeau, C. Russ Lloyd, Defendants, Of Whom,

Crest Energy Partners GP, LLC, Crest Energy Partners LP, Dunhill Products, LP, and Henry Wuertz, are the Appellants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of November, 2020 I served Respondent's counsel with an Amended Appellants' Initial Reply Brief, per the Court's correspondence, by mailing a copy by U.S. Mail, postage prepaid, to the following address:

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November 9, 2019

Via E-Filing
Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Innovative Waste Mgmt. v. Crest Energy Partners, *et al.*
Case No. 2019-001719

Dear Ms. Kitchings,

I hope all is well with you. In response to the Court's correspondence of October 28. 2020, of I hereby submit an Amended version of Appellant's Initial Reply Brief. The version of the brief that was transmitted by U.S. Mail included a Certificate of Service, which I am also filing herewith. I have also included a Certificate of Service confirming that I have served respondent's counsel with a copy of the Amended Reply Brief as well.

Thank you, as always, for your assistance with this matter. If you have any questions, comments, or concerns, please do not hesitate to contact me at any time. With best regards, I remain

Sincerely,

David B. Marvel

/DBM
Cc: Wm. Michael Gruenloh