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SC Court of Appeals

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, 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.

APPELLANTS' FINAL BRIEF

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2) Did the trial court otherwise err as a matter of law in its Order to Compel?

3) Did the trial court abuse its discretion in finding that the Appellants failed to comply with an enforceable discovery order authorizing sanctions under Rule 37, SCRCP?

4) Did the trial court abuse its discretion in striking Appellants' pleadings as a sanction under Rule 37(b)(2)(C)?

STATEMENT OF THE CASE

The dispute underlying this case arose from a serious 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.

At the time of these transactions, former Defendant Rodney Bridge and current Defendant Edward Girardeau were employees of IWM. Each voluntarily left their employment with IWM to become employees of Crest in late April 2010.

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] The Crest Defendants deny IWM's claims outright, and further aver that IWM owes Crest over $300,000 from the transactions, after set-off. From these allegations, IWM's Second Amended Complaint asserts ten separate causes of action against the Crest Defendants. IWM asserts three additional claims against Crest, but not against Wuertz Individually (ROA 58-86).

[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. 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".

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. On May 11, 2012, IWM filed the instant lawsuit in the Dorchester County Court of Common Pleas, based on the same facts previously alleged in federal court.

As discovery began to proceed 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. (ROA 205-208). The parties discussed and ultimately entered into an initial consent agreement on the Motion to Compel which was submitted as a proposed Consent Order. (ROA 4-6). Thereafter, Defendants filed a Motion for Protective Order (ROA 278-281), and Plaintiff filed an Amended Motion to Compel (ROA 282-290), which was heard by The Hon. Edgar W. Dickson on April 1, 2013 (ROA 110-150). The March 15, 2013 proposed Consent Order was signed by Judge Dickson on April 2 and filed on April 5, 2013 (ROA 4-6). Judge Dickson's Order from the April 1, 2013 hearing was signed on June 3 and filed on August 22, 2013 (ROA 7-10).

Unfortunately, the parties disagreed about the outcome of the April 1, 2013 hearing. Defendants filed a second Motion for Protective Order on August 21, 2013 (ROA 327-329). IWM Filed a Second Motion to Compel in response (ROA 394-412). Although Judge Dickson had previously indicated he was retaining jurisdiction over the discovery issues in this case, those motions were ultimately heard by The Hon. Diane S. Goodstein. Judge Goodstein's Order on the discovery motions was filed on October 3, 2013 (ROA 11-13). Judge Goodstein's Order granting, in part, defendants Motion to Dismiss was filed November 18, 2013 (ROA 14-18).

Judge Goodstein designated the case complex and assigned it to The Hon Maite Murphy on March 10, 2014. (ROA 30-31). IWM filed a Second Amended Complaint that same date, mostly restating the original causes of action. (ROA 58-86). As discovery continued, IWM 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. (ROA 541-548). Defendants sought a third Protective Order by way of a Motion to Quash filed on December 5, 2014 (ROA 539-540). That motion was heard by Judge Murphy on April 6, 2015 and denied by an Order issued that same day (ROA 36-38).

For reasons unrelated to this Appeal, the case was dismissed by the Clerk of Court, 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.

Soon thereafter, IWM served a second subpoena on Margavio & Schmidt in New Orleans. On April 17, 2019, Margavio & Schmidt filed a Motion to Quash that subpoena in Jefferson Parish, Louisiana, which was granted on June 10, 2019 (ROA 603-604). On May 15, 2019, IWM 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. (ROA 570-591).

The Third Motion to Compel was heard by Judge Murphy on June 5, 2019 and granted by Order filed June 18, 2019 (ROA 40-42). The Crest Defendants filed a Motion to Alter or Amend

on June 25, 2019 (ROA 667-669) which was partially granted in part but mostly denied by Judge Murphy's Order of August 1, 2019 (ROA 43-45).

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, advising the court that Crest wished to appeal her most recent Orders, and requesting that the court issue a finding of contempt so that the Orders would be immediately appealable (ROA 754-756). In response, IWM filed a Motion for Sanctions. (ROA 672-683) which was heard on September 23, 2019 (ROA 176-204).

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. (ROA 46-57). 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 lower court's Order striking the pleadings pursuant to Rule 37(b)(2)(C) was an abuse of discretion because the lower court failed to address the required factors when fashioning the sanction and because the Crest Defendants had not, in fact, violated any proper Order of the 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 decision of the trial court must be Reversed.

I. THE APPLICABLE RULES OF CIVIL PROCEDURE

The Court is called upon to review several discovery orders under the South Carolina Rules of Civil Procedure. When interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes. Ex parte Wilson, 367 S.C. 7, 15, 625 S.E.2d 205, 209 (2005). If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary, and the stated meaning should be enforced. Id.

Rule 26, SCRCP controls the scope of discovery. Generally, a party may seek discovery on any non-privileged matter which is relevant to the case, so long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Rule 26 (b), SCRCP.

Rule 33, SCRCP provides that "any party may serve upon any other party written interrogatories to be answered by the party served . . . who shall furnish such information as is available to the party." Rule 33 (b) provides a set of standard interrogatories that may be served in any case. While a party in most cases may also serve general interrogatories, "the total number of general interrogatories to any one party shall not exceed fifty questions including subparts, except by leave of court upon good cause shown." Rule 33 (b)(9), SCRCP.

Rule 34, SCRCP allows a party to:

> serve on any other party a request (1) to produce . . . any designated documents, or electronically stored information . . . or to inspect and copy, test, or sample any tangible things which constitute or contain matters 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

Rule 34 (a), SCRCP. When a party seeks documents or inspection from a non-party, the discovering party may serve a subpoena on the non-party under Rule 45, SCRCP to "produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified". Rule 45 (1)(c).

The trial court is required to limit the use of use of discovery methods where:

> 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; or (iii) the discovery is unreasonably burdensome or expensive taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

Rule 26 (a), SCRCP.

To enforce this limitation, a party (or other responding party) may seek a Protective Order from the Court pursuant to Rule 26 (c). If the moving party establishes good cause for a Protective Order, the court may issue "any order which justice requires", and specifically may order:

> 1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than selected by the party seeking discovery; (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by

> order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Rule 26 (c), SCRCP. In addition to these remedies, a non-party served with a subpoena under Rule 45 may move to quash the subpoena under Rule 45 (c)(3).

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 or attorney to pay costs and fees caused by the failure. Rule 37(b), SCRCP.

II. IWM'S INITIAL DISCOVERY REQUESTS VIOLATED THE CIVIL RULES

IWM's first discovery requests in the state court action, served on October 2, 2012, consisted of four sets of Interrogatories and Requests to Produce. (ROA 209-243). One set was directed to the entity defendants collectively, the other three to defendants Wuertz, Bridge, and Girardeau individually. 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. Rule 33 (b)(9), SCRCP.

IWMs discovery included two specific lines of inquiry pertinent to this Appeal. The first relates to IWM's claim that Bridge and Girardeau usurped certain corporate opportunities when they left their employment with IWM to become employees of Crest. On this issue, IWM's First Interrogatories to Wuertz, Bridge, and Girardeau directed each of them to:

> State whether you had any business dealings with the following companies prior to April 2010 and, if so, please describe such business and indicate the names, addresses and telephone numbers of any persons who you dealt with at such businesses:
>
> a. Gulf Stream Tanker Chartering
> b. Shell Oil
> c. Amspec L.L.C.
> d. Sunoco
> e. Dow
> f. Alberrnarle
> g. Exxon
> h. United Solutions Inc.
> i. Colonial Pipeline
> j. Texas Molecular
> k. Cross Oil
> l. Esso/Imperial Oil

m. Conoco Phillips
n. CVR Energy Coffeeville Resources
o. Century ORO Signal Oil and Chemical Co.
p. Eastman Chemical
q. Lion Oil, and
r. Macquarie Energy Trading.

(ROA 237-38, 247-48, 255-57) The next interrogatory requested those items of information for the same eighteen companies "since April 2010" (ROA 237-38, 247-48, 255-57).

IWM propounded a corresponding interrogatory to Crest to:

> State whether you currently conduct any business or have an existing business relationship with the [same list of eighteen] companies and. if so, please describe such business or business relationship; indicate the month and year that such relationship began; state the names, addresses and telephone numbers of the persons at such company with whom you conduct business and state the amount of income that such business has generated for you or any other Defendant in this litigation since April 2010.

(ROA 265-66).

IWM's discovery also sought comprehensive information on financial matters of Bridge, Girardeau, and Wuertz unrelated to the facts alleged in the Complaint. This inquiry included the directive for Bridge, Girardeau, and Wuertz to:

> Set forth any and all real and personal property owned, whether individually, collectively, or otherwise owned including with other third-parties. including but not limited to the following;
> a. Any and All domestic or offshore bank accounts. including. checking. savings, money market, or otherwise, in the name of Defendants. including without limitation balances, names of accounts, location of accounts, holder of accounts, etc.;
> b. Any and all certificated of deposits, stock certificates in any publicly held or closely held corporation, as well as any bonds owned by Defendants. membership interest in any and all limited liability companies, partnership interest in any and all partnerships. and any and all interest in any other form of business entity. including joint ventures, whiter domestic or offshore. detailing without limitations and with particularity

percentage of ownership, amount of revenue generated for each entity;

c. Any and all titles to vehicles, mobile homes, or water craft owned by Defendants, detailing a description of each item including year, model, serial number, vehicle identification number, present value and the amount of any lien thereon;
d. Any and all deeds, Mortgages, Notes, Contracts of Sale, and Settlement or closing Statements relating to any real estate transactions involving Defendants;
e. Any and all real property, including without limitation (county. state.jurisdiction), whether domestic or offshore;
f. Any and all life insurance policies owned by Defendants, along with any information pertaining to any loans outstanding on any of said policies;
g. Any and all items of jewelry or art owned by Defendants, including a description of each item and its most appraised evaluation;
h. Any and all lease of realty or personally in favor of Defendants;
i. Any and all books. recorded, documents. or writings concerning the financial status of defendants not herein before specified, including any and all interest in any form of trust, and
j. Any and all tax receipts, tax returned tax supplemental forms, and any and all other documents, forms or letters filed with the United States Internal Revenue Service, and any other State Tax authority within the last five years.

(ROA 240-42, 251-52, 260-62).

All of IWM's First Requests for Production included a request to "[p]roduce all documents referred to by Defendant in answering Plaintiff's First Set of Interrogatories." (ROA 209-214, p. 3). Defendants interpreted this request to require production of documents that were identified in their responses to IWM's Interrogatories. IWM's counsel took the position that this request required the production of any document in the defendants' possession, custody, or control that referenced the subject matter of the response (ROA 144-45(p.35, line 20-p. 36, line 1)).

III. THE DISCOVERY MOTIONS BEFORE JUDGE DICKSON

This case was filed after the parties had been through a year of litigation 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 defense counsel was under the impression that the confirmation and supplementation of prior discovery would adequately prepare the parties for a state court trial. Unfortunately, counsel for the defendants (including the undersigned) was unable to respond to IWM's October 2, 2012 discovery in a timely fashion.[2] IWM filed a Motion to Compel, which was scheduled for a teleconference with Judge Dickson on March 15, 2013.

The parties were able to work out an agreement allowing defendants additional time to respond to the discovery and continuing that teleconference until April 1, 2013. That agreement was documented in a March 15, 2013 proposed Consent Order that was ultimately executed by Judge Dickson on April 2, 2013 and filed on April 5, 2013 (ROA 4-6).

With that agreement in place, the defendants began in earnest to prepare responses, but quickly determined that they would be unable to respond to the breadth and scope of discovery as served. IWM's discovery patently violated Rule 33 (b)(9), SCRCP, and was far beyond the scope of what would be expected in this case. The interrogatories also included financial discovery that would have been extensive for supplemental proceedings and was far beyond the scope of pre-trial discovery. With the discovery hearing and status conference already scheduled before Judge Dickson on April 1, 2013, defendants filed a Motion for Protective Order to bring these issues

[2] The primary obstacle to responding to the discovery developed when Bridge and Girardeau resigned from their positions with Crest in September 2012. Counsel was effectively unable to consider responding before the clients determined their preferences and then worked out matters relating to the common/joint defense, potential conflicts, and the defense undertaking. (ROA 110-150 p.12, line 20-p.13, line 6, p. 19, line 12-p.20, line 8). The correspondence in the record and the record also reflects that the undersigned's former firm was completing construction of and opening an office at the time the requests were served. (ROA 110-150, p. 19, lines 6-16). In addition to these issues and the usual vagaries of practice, the undersigned was also heavily involved in the Episcopal Church case, Protestant Episcopal Church in the Diocese of S.C. v. Episcopal Church, 421 S.C. 211, 214, 806 S.E.2d 82, 84 (2017), which was filed on January 4, 2013, completing discovery in Stuart v. Springs Indus., Inc., 957 F. Supp. 2d 644 (D.S.C. 2013), aff'd, 572 F. App'x 191 (4th Cir. 2014), and representing the relator in a sealed False Claims Act matter that required substantial travel.

before the court (ROA 278-281). IWM responded to that Motion with its own Amended Motion to Compel (ROA 282-290).

During the April 1, 2013 hearing, counsel debated the issues in the case and Judge Dickson reviewed the discovery in detail. Judge Dickson recognized that IWM's discovery requests were broad in form and scope, and that they were objectionable in number, but ultimately found that additional interrogatories were warranted given the complexities of the case (ROA 141-, line 19-p. 142, line 4). 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 (ROA 144-146, (p. 35, line 15-p. 36, line 5, p. 36, line 11-p. 37, line 2)). As to the requests for discovery of financial information specifically, Judge Dickson found them to be beyond the scope of allowable pre-trial discovery and directed the defendants to provide only "some kind of valid credible statement of [their] worth" (ROA 136-138, (p.27, line 21-p. 30, line 15; ROA 146 p. 37, lines 2-13)). These rulings were encapsulated in the Order signed by Judge Dickson on June 3, 2013 and filed on August 22, 2013 (ROA 7-10).

Defendants not only complied with Judge Dickson's order, they did so far in advance of the date by which they were required to. After the April 1, 2013 hearing, Defendants directed significant resources to IWM's written discovery, in fact providing complete written responses to all by May 1, 2013, sixty days ahead of what Judge Dickson ultimately ordered. On May 3, 2013, IWM's counsel raised several questions about the May 1, 2013 responses (ROA 718-20). Defense counsel responded to those concerns in detail on May 15, 2013 (ROA 721-23). The discovery responses and all of the correspondence among counsel relating to them were provided to Judge Dickson for the Court's review in advance of a telephonic status conference that was scheduled

for May 15, 2013 (ROA 645-647, ROA 643, 651). The Court continued that teleconference, which was ultimately canceled along with a separate hearing that had been set for May 24, 2013 before Judge Goodstein. During this process, IWMs counsel presented Judge Goodstein with several unrelated consent orders, and otherwise all counsel represented to the chambers of both judges that the issues on IWM's discovery were resolved.

It was only on June 3, 2013, after that series of events and resolution, that Judge Dickson signed the Order from the April 1, 2013 hearing. That Order explicitly limited IWM's financial discovery as follows:

> 3. In lieu of detailed responses to Plaintiff's Interrogatories and Requests for Production which seek information related to the income and wealth of the Defendants, each Defendant shall provide a sworn or certified financial statement indicating its/his net worth.

The Order also allowed Defendants a full ninety days from the hearing date to serve the responses that were directed by the Court (ROA 7-10).

IV. THE MOTIONS BEFORE JUDGE GOODSTEIN

IWM filed its First Amended Complaint on July 1, 2013, pursuant to one of the Consent Orders submitted to Judge Goodstein. On July 3, 2013, IWM served Supplemental Requests for Production for all defendants (ROA 330-393). At this point, Judge Dickson's Order on the First Motion for Protective Order and Motion to Compel had been signed, but not yet been entered into the record.

Defendants responded to IWM's First Amended Complaint with a Motion to Dismiss. 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. IWM's counsel also began to raise issues with the discovery responses that had been made pursuant to Judge Dickson's Order, which had been addressed and resolved through the May 3 and May 15, 2013

correspondence, subsequent discussion, and accord when the May hearings were canceled and all motions closed without further input from the court.

The Supplemental Requests directed the defendants to:

> 1. Produce an accounting of the income derived by you or any defendant in his lawsuit from the use of the notebooks referred to by Defendant Bridge at page 45, line 12 through page 46, line 16 of his February 2, 2012 deposition attached hereto.

(ROA 333, 349, 360, 379). This request was objectionable because it called for the defendants to produce a document that was not already in existence, which is beyond the scope of Rule 34, SCRCP.

The Supplemental Requests also directed the defendants to:

> 2. Produce all records, including but not limited to any invoice receipts or correspondence regarding any communications you have had with the [eighteen previously identified companies] in the time period between January 2009 and the present [sic]

(ROA 333, 349, 360, 379). This Request is initially objectionable simply because its grammatical structure and/or lack of punctuation prevents the responding party to be able to discern what it is supposed to produce. To the extent the defendants thought they understood what IWM was requesting, they believed it was an overly broad request, and that Judge Dickson had already reviewed and limited that scope of inquiry (ROA 144-145 (p. 35, line 15-p. 36, line 9)).

The Supplemental Requests further directed the defendants to "[P]roduce completed, properly executed originals of" certain official forms to allow IWM to obtain defendants' tax return records from the Internal Revenue Service and/or South Carolina Department of Revenue (ROA 330-393). This request was objectionable because it called for the defendants to produce a document that was not already in existence, and it requested that the Defendants execute official government forms which are protected under applicable laws and regulations. Moreover, the entire

scope of IWM's inquiry into the defendants' financial matters had been explicitly limited by Judge Dickson's ruling and Order.

Given the unreasonable manner in which this appeared to be progressing, Defendants had no choice but to bring the issue back before the lower court for a definitive ruling. On August 20, 2013, Defendants' counsel filed a second Motion for Protective Order, and sent a letter informing Judge Dickson that an issue had arisen relating to his prior ruling that appeared suited for his review (ROA 327-329; 731-733). IWM filed its Second Motion to Compel one week later (ROA 394-412). These motions were ultimately heard by Judge Goodstein during two lengthy and contentious hearings on September 6 and 9, 2013.[3]

As a result of hearing extensive argument on the Motion to Dismiss, Judge Goodstein was well informed on the complexities of the case and the undercurrents of the dispute. Amongst the various defendants, Judge Goodstein dismissed a significant portion of IWM's claims and clarified others. (ROA 14-18). On the discovery motions, Judge Goodstein ordered the defendants to respond in full 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 (ROA 11-13; 734, 735). 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, and only requiring defendants to "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 of 2008-2012" (ROA 12).

[3] 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.

Defendants believed, and still believe, that Judge Goodstein inappropriately reviewed an issue that had already been decided by Judge Dickson and that there was no factual basis for monetary sanctions. However, given that there was no practical means of obtaining relief from that ruling, defendants proceeded to devote every resource available to attempt to comply with her Order. At exorbitant expense and substantial personal difficulty for 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. The defendants did not agree with her ruling, but they abided by it.

Although Judge Goodstein signed the Order on the Motion to Dismiss on November 8, 2013, IWM did not file a Second Amended Complaint until March 6, 2014 (ROA 58-86). On March 7, 2014, Judge Goodstein executed an Order designating the case as complex and assigning the matter to Judge Murphy to retain jurisdiction through trial, and discovery continued.

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 (ROA 541-555).

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.

Defendants filed their third Motion for Protective Order by way of Motion to Quash on December 5, 2014 (ROA 539-540). This Motion was heard and denied by Judge Murphy on April 6, 2015.[4] The Order from that hearing stated as follows:

> The subpoenas issued to Wells Fargo and Accountants Margavio & Schmidt are relevant; The 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.

(ROA 36-38).

On April 20, 2015, the case was administratively dismissed. Judge Murphy denied IWM's motion to restore the case, and then denied IWM's Rule 59 motion. IWM appealed those rulings, and this case proceeded through this Court and the South Carolina Supreme Court.

V. IWM'S THIRD MOTION TO COMPEL AND MOTION FOR SANCTIONS

The Supreme Court remitted this case to Dorchester County on February 27, 2019. On March 26, 2019, IWM issued a second subpoena to Margavio & Schmidt, CPAs. That subpoena directed that firm to produce:

> Any and all documents, including but not limited to tax returns. working papers, and P&L statements that pertain to Henry Wuertz. Crest Energy Partners GP, L.L.C., Crest Energy Partners L.P., Dunhill Products GP, L.L.C.. and Dunhill Products L.P. from June 3, 2015 to the present date.

(ROA 583-85). IWM's counsel also informally requested that the defendants provide updated financial statements and execute "authorizations" for IWM's counsel to transmit to Margavio & Schmidt and Wells Fargo, to accompany an extraordinarily broad subpoena *duces tecum* (ROA 586-88). During a telephonic status conference on April 23, 2019, the parties advised the court

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

that these issues were outstanding, but those issues were not argued or fully addressed.[5] On April 17, 2019, Margavio & Schmidt filed a Motion to Quash that subpoena in Jefferson Parish, Louisiana, which was granted on June 10, 2019 (ROA 604-05).

On May 7, 2019, undersigned counsel transmitted a letter to IWM's counsel following up on the discussion during the April 23, 2019 teleconference. That letter clearly stated that Wuertz was willing to provide the requested financial statement, that the Crest entities were no longer in business and therefore had nothing to produce, and that none of the Crest Defendants were willing to execute the requested releases/authorizations (ROA 591-92). In response, IWM filed its Third Motion to Compel on May 14, 2019 (ROA 570-591).

IWM's Motion was heard on June 5, 2019 (ROA 151-175). In advance of the hearing, counsel transmitted correspondence to the court to advise of the progress that had been made following the April teleconference (ROA 740-41). During that 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 (ROA 154-155 (p. 4, lines 11-13; p. 5, lines 10-20)).

[5] The lower court's orders, which were drafted by IWM's counsel and therefore track the language of IWM's motions, state that the Crest Defendants agreed to produce the requested documents by May 6, 2019. The record is clear that there was no such agreement. (ROA 151-175 (p. 10, lines 8-14 ("after our teleconference -- my letter was May 7th. We talked about me getting back to him by May 6th, and I was unable to do that, but I was able to get to him in a pretty thorough letter, which he has attached to his motion, the following day.")). IWM's counsel's transmittal correspondence of May 14, 2019 further establishes that he made the request during the teleconference, but the parties remained at impasse as of May 14, 2019.

IWM's counsel also made the remarkable admission that IWM was simply unwilling to follow the proper procedure to obtain the documents it was seeking, stating:

> Your Honor has ordered that the information is relevant, discoverable, but we go into another jurisdiction, and then we have to fight there. And so I don't want to say that they're thumbing their nose at the authority of this Court, but that's what's happened. So the gist of our argument on the bank records and on the CPA records that we've previously requested by subpoena is that 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.

(ROA 157(p. 7, lines 13-24)).

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.[6] 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, all in open court (ROA 172-174 (p. 22, line 3-p. 23, line 9; p.24, lines 7-12)).

The court granted IWM's Third Motion to Compel on June 18, 2019 (ROA 40-42). The Court's Order purported to require 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

[6] 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.

Order also directed the Crest Defendants to provide current certified financial statements, and to pay $1,950 in costs and fees.

The Crest Defendants filed a timely Motion to Alter or Amend on June 25, 2019 (ROA 667-669). Among other things, that Motion pointed out that the court's Order was defective in that it referred to exhibits that were not attached. 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 (ROA 43-45).

The Crest Defendants continued to work to provide IWM with available documents that should have satisfied its requests for information, and which were supplementary to previous discovery responses, to no avail. Defendant Wuertz produced a Reviewed Financial Statement, and Crest produced 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. (ROA 752-53).

All of these efforts were detailed in correspondence to Judge Murphy on August 30, 2019 (ROA 754-756). 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.

(ROA 754).

IWM responded to the Crest Entities' efforts by filing a Motion for Sanctions on September 13, 2019 (ROA 672-683). The Motion was heard on September 23, 2019 (ROA 176-204). As noted above, the Crest Defendants had all produced CPA/GAAP financial statements, and the Crest entities had also produced its recently filed tax returns. 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"[7] (ROA 187 (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 Order, despite explicitly referencing them as attachments, and despite that being one of many salient points of the Motion to Alter or Amend.

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?
>
> 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.

[7] 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)

(ROA 202-203 (p. 27, line 20-p. 28, line 11)).

Of course, Judge Goodstein actually denied IWM's motion to compel the defendants to produce executed releases, instead Ordering the defendants themselves to produce the working papers behind their tax returns, only through the year 2012, which they did (ROA 11-13). That was but one of the many continued misrepresentations of the record, asserted by IWM, accepted by the court without factual support, and incorporated into the court's ruling.

On October 1, 2019, the court granted IWM's Motion for Sanctions (ROA 46-57). The Court's Order, once again tracking the misleading references of the Plaintiff's Motion, made findings of fact unsupported by the record, found that the Crest Defendants generally 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.[8] The court therefore sanctioned the Crest Defendants by striking their Answer 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.

VI. THE CIRCUIT COURT ABUSED ITS DISCRETION IN GRANTING SANCTIONS

a. The Circuit Court Granted IWM's Third Motion to Compel In Error

When IWM filed its Third Motion to Compel, there was no Order or pending discovery requiring a response from the Crest Defendants. IWM served its expansive financial discovery in October 2012. (ROA 209-214). In April 2013, Judge Dickson limited the scope of that discovery to requiring defendants to "provide a sworn or certified financial statement indicating its/his net worth" (ROA 7-10). After IWM served additional discovery and sought to compel defendants to

[8] 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.").

execute releases so that IWM could directly obtain their tax records, Judge Goodstein expanded the scope of financial discovery only to require the defendants to produce the working papers behind their returns, and only for the years 2008-2012.

Judge Murphy's April 6, 2015 Order declared (erroneously) that most of the financial discovery IWM sought from third parties was relevant, but that order did not require the Crest Defendants to do anything in response to that finding, and the Order only applied to those documents from 2009 to "the present", not through trial, and therefore through the date of the Order[9] (ROA 32-35). IWM never served any additional or supplementary requests on the Crest Defendants after 2013. IWM certainly could have sought review of either prior discovery order during its prior appeal. Accordingly, Judge Murphy's 2019 review of the 2013 Orders from Judge Dickson and Judge Goodstein was an improper collateral attack on a prior interlocutory order, in violation of the long-standing rule that one judge of the same court cannot overrule another. See, e.g., Charleston Cnty. Dep't of Soc. Servs. v. Father, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995).

In 2019, IWM requested that the Crest Defendants supplement the responses that Judge Dickson Ordered, which the Crest Defendants agreed to do when the information was available, and which they did. When IWM demanded that they execute authorizations for additional discovery from Margavio & Schmidt and Wells Fargo, the Crest Defendants refused for several reasons.

Regardless, there was no discovery request or court Order to the Crest Defendants that asked, let alone required, the execution of the authorizations. Judge Goodstein had already ruled

[9] Under the UIDDA, issues of relevance are decided by the court where the action is pending. See Union Carbide Corp. v. Martin, 349 S.W.3d 137, 141 (Tex. App. 2011). Accordingly, that statement in Judge Murphy's Order was sufficient to address any objection to the subpoena by the Crest Defendants in any other jurisdiction. .

that the Crest Defendants were not required to execute authorizations, and she had limited the period for which the Crest Defendants were required to produce their own working papers (ROA 7-10). That ruling was correct because there is no rule of discovery that allows a party to demand that another party execute authorizations for the disclosure of documents in the hands of third parties.

While there is no South Carolina opinion directly on point, federal courts interpreting Fed. R. Civ. P. 34 concur that a party cannot invoke Rule 34 (a) to require another party to create or prepare a new or previously non-existent document. See, e.g., Mir v. L-3 Commc'ns Integrated Sys., L.P., 319 F.R.D. 220, 227 (N.D. Tex. 2016); Alexander v. Federal Bureau of Investigation, 194 F.R.D. 305, 310 (D.D.C.2000). See also Waters v. Stewart, Case No. 4:15-CV-4143-RBH-TER (D.S.C. Feb. 28, 2017). Likewise, Rule 34 does not provide a means by which to request that a party sign a release or to compel production of a signed release. See, e.g., Equal Emp't Opportunity Comm'n v. Thorman & Wright Corp, 243 F.R.D. 426, 429 (D. Kan. 2007) (court would not grant a motion to compel the plaintiff to sign a release because the Rule 34 cannot command a signature and the defendant had not attempted to issue a subpoena); Klugel v. Clough, 252 F.R.D. 53, 55 (D. D.C. 2008); Clark v. Vega Wholesale Inc., 181 F.R.D. 470, 471 (D. Nev. 1998); Neal v. Boulder, 142 F.R.D. 325 (D.Colo.1992).

Notably, in Barnette v. Adams Bros. Logging, Inc., 586 S.E.2d 572 (S.C. 2003), the Supreme Court found that a circuit court did not abuse its discretion by dismissing claims by a plaintiff who repeatedly refused to sign a medical release authorization to allow a plaintiff access to her social security records. The Barnette Court did not directly face or address the question of whether the lower court actually had the authority under Rule 34, SCRCP to order a party to execute a release. More importantly, it is one thing to require a party to execute a release of

information to support a claim that the party has put at issue; it is an altogether different issue for a court to order a defendant to execute a blanket release in favor of a plaintiff on an issue that a defendant contests. See McKnight v. Blanchard, 667 F.2d 477, 481-82 (5th Cir. 1982). It is yet another altogether unique step to say that that a defendant who has not put a question at issue can be compelled under Rule 34 to execute a previously non-existent release for a plaintiff to obtain financial discovery from a third party outside of the court's jurisdiction.

There are many reasons why it makes bad policy for the courts to require litigants to execute document releases. For example, requiring the Crest Defendants to execute "authorizations", particularly of the breadth that IWM would likely seek, would impinge privacy concerns that were outside of the Crest Defendants' authority to release. That issue would seem to be best addressed by the responding party, i.e., Wells Fargo and Margavio & Schmidt, in the jurisdictions where the production is sought. There is a procedure for IWM to follow if they want to serve out-of-state subpoenas. IWM made the choice to sue Texas defendants in South Carolina. There is nothing unreasonable or abusive about requiring IWM to follow the proper interstate procedures if it wants to engage in interstate discovery in its case against citizens of other states.

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"). 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).

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.

With regard to the Wells Fargo subpoena, IWM did not even try to comply with Texas law, 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" (ROA 576).

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.").

Finally, the June 18 and August 1, 2019 Orders directing the Crest Defendants to execute authorizations was based on an error of law because IWM's requests exceeded the scope of relevancy for pre-trial discovery. In addition to the fact that the court's Order directed the Crest Defendants to execute releases that were not already in existence, and therefore outside the scope of Rule 34, SCRCP, IWM expressly sought the authorizations for financial discovery that address its concerns about collectability, which is beyond the scope of pre-trial financial discovery. IWM repeatedly conceded that fact before the lower court (ROA 151-157, p. 1 ("Defendants now claim that they are not collectible."); ROA 153, (IWM issued the first M&S subpoena because "defendants were claiming they were not collectible"); ROA 154, p 4, lines 3-5 ("We were talking about relevance, but we were also talking back then about the defendants' collectability."); ROA 157 p. 6, lines 3-4 ("We talked about issues of collectability." ROA 157 p. 6, lines 23-25 ("they're relevant, and they also go to matters of collectability")).

Defendants never contested the idea that evidence of net worth is relevant to a party's ability to pay punitive damages. In fact, defense counsel was the one to raise the idea of providing certified or sworn financial statements before Judge Dickson as an alternative to the abusive discovery that had been served by IWM (ROA 37 (p. 37, lines 2-17)). Evidence of net worth is relevant to a defendant's ability to pay, "extrapolations from net worth" are not. Branham v. Ford Motor Co., 390 S.C. 203, 239, 701 S.E.2d 5, 24 (2010) (quoting State Farm Mut. Auto. Ins. Co. v.

Campbell, 538 U.S. 408, 427, (2003)). Issues relating to collectability must be confined to post-judgment proceedings, particularly in cases such as this where the adverse parties conduct business in the same industry. See Ex parte Wilson, 367 S.C. 7, 14, 625 S.E.2d 205, 208 (2005) (post-judgment discovery may not be conducted without the issuance of a writ of execution or the commencement of supplementary proceedings).

At the hearing on its Motion for Sanctions, IWM's counsel referred to the Crest Defendants' most recent financial production as "more of the same" (ROA 204 (p. 28, lines 6-10)). One would think that "more of the same" would be sufficient as IWM did identify one single discrepancy or false statement in the extensive financial data provided prior to the first appeal. IWM also did not identify a single relevant, let alone admissible, item of evidence that it had obtained as a result of Margavio & Schmidt's production of 1674 pages of financial data in response to the April 6, 2015 Order. It strains the concept of relevance to say that the breadth of IWM's financial discovery in 2015 was reasonably calculated to lead to the discovery of admissible evidence. That same depth of discovery for records between 2015 and 2020, relating to claims from 2009 and 2010, bears no relation to pre-trial relevance. South Carolina law requires limited particularity in pleading and a scintilla of evidence to get to trial before a jury. Those entrenched standards should not be abused to provide every litigant capable of filing a Complaint or an Answer the ability to obtain unfettered access to a decade's worth of raw financial data from their adversaries, as IWM demanded and the lower court Ordered.

b. The Circuit Court's Findings of Fact Have No Support in the Record

Judge Murphy's October 1, 2019 Order granting IWM's Motion for Sanctions, supplied by IWM's counsel to the Court, track's the language of IWM's Motion and is therefore replete with findings that are without support in the record. Those findings form the basis of the court's ruling

that the Crest Defendants had engaged in a pattern of willful discovery abuse. It was an abuse of the court's discretion to order sanctions under Rule 37(b)(2)(D) based on these findings, as they are not supported by the record and there were no other grounds for striking the pleadings.

The erroneous findings include the following:

1) The Court's Order found that, in the March 15, 2013 proposed Consent Order, "Defendants' promised to provide discovery requests, including the financial information sought by Plaintiff and to pay Plaintiff's attorney's fees as a sanction for its discovery abuse" (ROA 47, p. 2). This statement not only lacks support in the record, it includes at least three statements that are directly contradicted by the record and the language of the March 15, 2013 Order itself (ROA 4-6).
2) The Court's Order found that "[t]he Defendants failed to comply with the Consent Order and Plaintiff filed an Amended Motion to Compel" (ROA 47, p. 2). This statement is contradicted by the record. In fact, the Defendants filed a Motion Protective Order because IWMs discovery was patently in violation of Rule 33 (b)(9), SCRCP. When defendants filed their motion, and IWM subsequently filed their Amended Motion to Compel, the court had not yet issued an Order that could have been violated.
3) The Court's Order found that "[t]he Court granted that motion on August 22, 2013 and ordered Defendants to produced [sic] discovery including sworn, certified financial statements." Judge Dickson did not grant IWM's Motion, in fact drastically limiting the discovery sought by IWM. The Order also, at defense counsel's suggestion, Ordered "sworn *or* certified" financial statements (ROA 7-10, ROA 146, (p. 37, lines 13-17)). There is no evidence in the record that the Crest Defendants violated that Order.

4) The Court's Order found that "Plaintiff was forced to file a second Motion to Compel on August 27, 2013 when Defendants again failed to comply with the Court's Order." In fact, defendants filed a Second Motion for Protective Order because IWM continued to engage counsel with issues that had been raised and resolved by the prior motions and Judge Dickson's ruling (ROA 327-393). IWM subsequently filed a Motion to Compel, after the hearing had been set, and ten days before it was heard.

5) The Court's Order found that "[i]ssues from the failed settlement were appealed and the case was stayed pending and [sic] order of the Court of Appeals for three years." While this statement is technically correct, the Order implies that the court's denial of IWM's motions to restore the case and IWM's appeal of those rulings, is somehow fault attributable to the Defendants.

6) The record directly contradicts the Order's description of the April 22, 2019 teleconference, and there is no record that defendants ever agreed to provide any responses prior to May 7, 2019 (ROA 49, p. 4).

7) There is no evidence in the record supporting the Court's finding that "[p]laintiff had previously provided defense counsel with copies of these authorizations."

8) The Court's Order contains a paragraph about a previously served, but not filed, Notice of Appeal that the court found was "intended to cause delay." There is no evidence of intent to delay or actual delay relating to this issue. Moreover, the record directly contradicts that finding. Counsel's letter to the Court of August 30, 2019 informed the court of its intent to appeal and requested a finding of contempt to expedite that process. The circuit court Certificate of Service referenced by the Court's Order was exactly correct, the Notice was placed with a courier on August 30, 2019. Moreover, the Notice was actually delivered to

IWM's counsel on September 3, 2019, which would have constituted effective and timely service under Rule 262, SCACR. The record establishes that Counsel actually declined to file the Notice of Appeal after service but before the time designated by Rule 262(d)(1)(B) as the court had indicated it was willing to rule further, and counsel wanted to avoid any contention that the appeal was interlocutory. (ROA 760-761).

9) The description of the September 23, 2019 hearing contained in the Order is 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 <u>any order</u> issued by the Court." (ROA 52, p. 7 (emphasis in original); ROA 169-170 (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" (ROA 160 (p. 10, lines 13-14; p. 11, lines 4-6)). Undersigned counsel's only such statement on the last point was "[w]ith all due respect, Your Honor, I understand your ruling, and I disagree with it. My clients have asked me to appeal it" (ROA 164 (p. 20, lines 11-13)).

The findings of fact cited above are nothing more than a recitation of IWM's argument, which was without support in the record when IWM's counsel said it, and without support in the record when signed by the court. The Order cites these statements, and no others of material consequence, in support of the finding that the Crest Defendants had engaged in willful, bad faith, dilatory conduct in disobeying the Court's discovery orders. This is an abuse of discretion, and there is no basis for the Court's issuance of sanctions otherwise.

c. Seeking a Motion for Protective Order is not discovery abuse.

The recent orders of the lower court fail to recognize or credit the fact that each of these discovery disputes was brought before the court by way of defendants' motions. Defendants were faced with what they perceived to be excessive and overly burdensome discovery propounded by a plaintiff that was wholly unwilling to compromise, reconsider its positions, or give any quarter. Defendants had no choice but to file three separate Motions seeking separate protective orders (ROA 278-281, ROA 327-329, and ROA 539-540).

A Motion for Protective Order is the only available resource available in the trial court to protect a party from overbearing or abusive discovery. Other courts routinely find it appropriate for a party to move for a protective order when faced with interrogatories in greater number than allowed by their civil rules. See Eleazer v. Ted Reed Thermal, Inc., 576 A.2d 1217, 1220 (R.I. 1990); Hanover Ins. Co. v. Lama, 629 N.Y.S.2d 945, 946 (N.Y. App. 1995). Some courts have even found that motions for protective orders must be filed to contest discovery that is perceived to be excessive and burdensome. See Capacchione v. Charlotte-Mecklenburg Sch., 182 F.R.D. 486, 492-93 (W.D.N.C. 1998).

In each instance a substantive discovery dispute arose prior to 2019, that dispute was raised by the defendants through the only means they had available, a Rule 26 (c) Motion for Protective Order. Moreover, those motions were not dilatory or without cause, each of those motions had legitimate grounds that were recognized as such by the court at the time they were argued. Unquestionably, there were too many discovery disputes in the lower court, but that has only resulted from the breadth and frequency of the discovery propounded by IWM. The Crest Defendants, and litigants in general, should not be later penalized for exercising their rights under the civil rules. The imposition and choice of sanctions under Rule 37 should serve to protect the

rights of discovery provided by the Rules of Civil Procedure. Karppi v. Greenville Terrazzo Co., 327 S.C. 538, 542–43, 489 S.E.2d 679, 682 (Ct. App. 1997). Presumably, that includes the rights conferred by Rule 26 (a) and (c), SCRCP.

d. Defendants Prevailed on their first 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), in turn, has a broad range of positive outcomes for the movant. As stated, the ruling court can order:

> one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than selected by the party seeking discovery; (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Rule 26 (c), SCRCP.

The initial discovery issue that arose in this case was documented by the filing of IWM's first Motion to Compel on January 31, 2013. (ROA 205-208). That motion was based solely on the defendants' failure to respond to the discovery, which was the only issue addressed and resolved by Judge Dickson's first Order. Thereafter, defendants' first Motion for Protective Order and the argument before the court addressed defendants' substantive concerns, namely the number

of IWM's interrogatories, the breadth of certain requests, and the issues raised by the financial discovery.

On the first question, Judge Dickson agreed the interrogatories violated Rule 33 (b)(9) and were therefore objectionable.[10] While Judge Dickson found that the nature of the case warranted additional interrogatories, that resolution was defense counsel's suggestion, is exactly what Rule 33 (b)(9) requires prior to the service of more than fifty general interrogatories, and is expressly reflected in the Order (ROA 7-10). On the third question, Judge Dickson's ruling explicitly limited the scope of the discovery sought by IWM. While the scope of his ruling on the second issue was a subject of later debate re-visited by Judge Goodstein, defendants' actual responses were not under Judge Dickson's review during the April 1, 2013 hearing. They were, however, provided to Judge Dickson before he issued his Order on the hearing and the motion was closed with all scheduled hearings cancelled.

Judge Dickson's Order from the April 1, 2013 hearing provides the outcomes identified by Rule 26 (c)(2) and/or Rule 26 (c)(4), as the interrogatories were to be answered "only on specified terms and conditions" and "the scope of the discovery [was] limited to certain matters". Accordingly, his ruling can only be characterized as granting the defendants' Motion for Protective Order or denying IWM's Motion to Compel "in whole or in part". Most importantly for the issues before this Court, Judge Dickson's ruling and Order did not imply, or come close to finding, that defendants had violated the March 15, 2013 Proposed Consent Order. That was the only question put squarely before the court by IWM's Amended Motion to Compel.

[10] The rules limit the number of interrogatories for a reason; parties should be encouraged to "make prudent and constructive use" of their interrogatories. The rules also allow and require some form of judicial scrutiny preventing the excessive use of such discovery. Fair Housing Center of Central Indiana, Inc. v. Welton, Case No. 1:18-cv-01098-JMS-DLP, 2019 WL 2422594 (S.D. Ind. June 10, 2019).

e. Defendants also prevailed on their Second Motion for Protective Order

Defendant's Second Motion for Protective Order, again filed before IWM's Second Motion to Compel, asked the court to restrict IWM's Supplemental Requests and enforce the "Protective Order. . . limiting the scope of financial discovery" (ROA 327-329). IWM's Second Motion to Compel sought to require defendants to respond in greater detail to the October 2, 2012 discovery, and also sought an Order for defendants to respond in full to IWM's Supplemental Requests for Production (ROA 394-412).

On the substance of those issues, Judge Goodstein's Order required defendants to respond further to the original interrogatories relating to the eighteen companies identified as relating to the corporate usurpation claims (ROA 11-13). Otherwise, defendants prevailed on the substance of their Motion as the court limited the scope of IWM's Supplemental Requests to documents already in existence, denied IWM's demand that defendants execute releases for their tax records, and limited the scope of financial discovery to "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 of 2008-2012" (ROA 11-13).

Judge Goodstein's collateral review of Judge Dickson's ruling was unfortunate, and the assessment of monetary sanctions an error of fact and/or law. Nonetheless, however the Order is stated, it cannot be characterized as granting IWM's Second Motion to Compel, because it did not Order "an answer . . . in accordance with" IWM's requests. Rather, the Order required defendants to respond "only on specified terms and conditions", "only by a method other than selected by" IWM, and to a "scope of discovery . . . limited to certain matters", each of which is a Rule 26 (c) remedy. Therefore, the Order denied the Motion to Compel in part, and granted a Protective Order.

f. IWM was the only Party that violated Judge Murphy's April 6, 2015 Order

Defendants' Motion to Quash and for Protective Order was addressed to IWM's third party subpoenas to Margavio & Schmidt CPA and Wells Fargo Bank. (ROA 520-521). The court's ruling was direct and succinct, finding the discovery relevant, and ordering IWM to re-issue subpoenas limited in scope "to the years 2009 to the present"[11] (ROA 32-35). The lower court's 2019 orders failed to appreciate the fact that *the April 6, 2014 Order did not direct the Crest Defendants to do anything.* Therefore, there is no possibility that the Crest Defendants violated the April 6, 2015 Order, then or now.

The only directive issued by the Court on the Motion to Quash was to IWM, not the defendants. The Order explicitly states, "Plaintiff shall re-issue the subpoenas in accordance with this Order." It was uncontested below that IWM never re-issued either subpoena (ROA 123 (p. 14, line 21-p.15, line 10)). The April 6, 2015 Order did not compel the defendants to do anything. As a result, there was nothing related to that Order for IWM to compel the Crest Defendants to do, and nothing for the Court to find that the Crest Defendants failed to do, willfully or otherwise.

g. The Circuit Court's Ruling and Order is a Failure to Exercise Discretion

When a party fails to obey an order to provide or permit discovery, Rule 37(b)(2)(C), SCRCP gives a trial court the power to "make such orders in regard to the failure as are just," including an order dismissing the action or proceeding, or any part thereof. Temple v. Tec–Fab, Inc., 370 S.C.383, 390, 635 S.E.2d 541, 544 (Ct.App.2006) (citing In re Anonymous Member of the S.C. Bar, 346 S.C. 177, 194, 552 S.E.2d 10, 18 (2001)). This is a powerful way for trial judges to "use their authority to make sure that abusive deposition tactics and other forms of discovery

[11] Margavio & Schmidt complied with the Order, as its counsel was monitoring the status of the motion following service of the first subpoena. (ROA 165-166 (p. 15, line 24-p.16, line 1)).

abuse do not succeed in their ultimate goal: achieving success through abuse of the discovery rules rather than by the rule of law." Id.

While the decision to impose sanctions under Rule 37 falls within the sound discretion of the trial court, "the sanction should be aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits of a case." Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., Inc., 334 S.C. 193, 198, 511 S.E.2d 716, 719 (Ct.App.1999). When issuing sanctions, the trial court must weigh the nature of the discovery, the discovery posture of the case, any willfulness on behalf of the non-disclosing party, and the degree of prejudice to the party seeking discovery. If the trial court fails to weigh the required factors, it has demonstrated a failure to exercise discretion, which amounts to an abuse of discretion. Jamison v. Ford Motor Co., 373 S.C. 248, 644 S.E.2d 755 (2007).

When the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is nevertheless harsh medicine that should not be administered lightly. Karppi v. Greenville Terrazzo Co., 327 S.C. 538, 542–43, 489 S.E.2d 679, 682 (Ct. App. 1997) (citing Orlando v. Boyd, 320 S.C. 509, 466 S.E.2d 353 (1996); Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). Before invoking this severe remedy, the trial court must determine that there is some element of bad faith, willfulness, or gross indifference to the rights of other litigants. Id. The sanction imposed should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case. Id. (citing Balloon Plantation v. Head Balloons, 303 S.C. 152, 399 S.E.2d 439 (Ct.App.1990). Whatever sanction is imposed should serve to protect the rights of discovery provided by the Rules of Civil Procedure. Id.

As an initial, and perhaps dispositive, matter, the authorizations were never actually attached to the court's Orders of June 18 or August 1, 2019, although explicitly referenced, and therefore the Order itself fails to direct the Crest Defendants to produce the documents that are the subject of IWM's Motion and the court's October 1, 2019 Order (ROA 40-42; ROA 43-45; ROA 46-57). Without the exhibits, there was nothing for the Crest Defendants to sign. If there was nothing for the Crest Defendants to sign, the Crest Defendants could not have violated an Order by failing to do so. If the Crest Defendants did not violate an Order, there is no basis for Rule 37 sanctions.

On its merits, the October 1, 2019 Order referred to the law and factors for analysis cited above without actually considering or addressing any of them, other than the lower court's perception that the Crest Defendants had willfully disobeyed the Court's orders (ROA 46-57). Accordingly, the sanctions order was a result of the trial court's failure to exercise its discretion and is therefore an abuse of discretion. Jamison v. Ford Motor Co., 373 S.C. 248, 644 S.E.2d 755 (2007).

The trial court failed to consider the nature of the discovery, which is simply the Crest Defendants' failure to provide two executed authorizations.[12] Even if the lower court had the authority to order the defendants to execute the authorizations, there is no basis for doing so here where IWM failed or refused to properly serve subpoenas to obtain the documents directly from the persons in possession of them. Even if the authorizations were relevant to the Crest Defendants' net worth, or narrowly tailored to lead to the discovery or admissible evidence, the circuit court should have tailored the sanction to address the Crest Defendants' failure to comply. For one

[12] "[W]hat they have not produced is the one thing this Court has ordered them to produce; that is, the signed authorizations." (ROA 187 (p. 12, lines 12-14)).

example, the court could have issued a sanction under Rule 37(b)(2)(A) or 37(b)(2)(b), and simply instructed the jury that, if it chose to award punitive damages, it could presume that the Crest Defendants had the ability to pay any judgment. Arguably, the court could have removed ability to pay from the jury instructions altogether and issued an Order *in limine* prohibiting any such evidence. Whatever the appropriate remedy, striking the pleadings was excessive.

As for the discovery posture of the case, the case was certainly close to and ripe for trial. Given that the Motion to Compel did not seek information for pre-trial discovery purposes, this factor does not lend itself to a harsh sanction.

Finally. as discussed in detail above, the court's findings that the Crest Defendants willfully disobeyed the court's orders are unfounded. While the Crest Defendants did refuse to supply executed release/authorizations for Wells Fargo and Margavio & Schmidt, they did so only because the ruling was in error and intended to appeal the issue. The Crest Defendants also made a formal request for the court to hold them in contempt, so they could appeal that ruling under the procedures described in Davis v. Parkview Apartments, 409 S.C. 266, 296, 762 S.E.2d 535, 551 (2014) and Metts v. Mims, 384 S.C. 491, 682 S.E.2d 813 (2009), which the court refused.[13] Defendants provided IWM and the court in great detail the information that it was capable of providing, until such time as they had no recourse but to appeal. (ROA 662-663, ROA 576-579, ROA 589-591). Given that Defendants responded to each discovery dispute by bringing the issues front and center before the court, with candor and detail, these are not circumstances of willful disobedience warranting sanctions under Rule 373(b)(2)(C).

[13] Taken together, the Davis and Metts opinions seem to outline a means to escape error preservation and appealability issues relating to interlocutory discovery orders. The Crest Defendants believe they have preserved the error and the opinions for review and have followed the correct procedure to do so under these circumstances. Regardless, situations such as these call for the South Carolina appellate courts to provide clearer guidance and/or an alternative method for a litigant to obtain review of such pre-trial discovery orders, particularly in designated complex cases.

Finally, it is difficult to see how IWM was prejudiced by the Crest Defendants' actions. If IWM had complied with the April 6, 2015 Order, and served the subpoenas in accordance with proper interstate discovery procedure, it would have the documents it seeks. Moreover, as the documents address collectability and are not relevant for purposes of trial, there is no prejudice to IWM unless and until IWM obtains a judgment.

If the circuit court had considered and addressed these factors in the process of making its ruling and in its October 1, 2019 Order, that Order could not be supported by the facts or the law. Regardless, the court made factual findings that have no support in the record and, in addressing those facts, failed to even consider those factors. As a result, the trial court abused its discretion. The Order granting Sanctions, and the discovery orders leading to it, must be reversed.

CONCLUSION

This appeal asks this Honorable Court of Appeals to do nothing more than review the discovery orders of the circuit court to allow for fairness, efficient pre-trial procedure, and the enforcement of the Rules of Civil Procedure as they are written. 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 Appellants as a sanction. These discovery issues are properly presented for review by this Court. For all of the Reasons stated herein, and to be stated hereafter, Appellants respectfully request that this Honorable Court hold that the circuit court's June 18, 2019 Order erroneously compelled financial discovery, that the circuit court's October 1, 2019 is without factual support in the record and improperly sanctioned the Appellants, REVERSE the circuit court's Orders of June 18, August 1, and October 1, 2019, and remand for further proceedings not inconsistent with this Court's Opinion.

RESPECTFULLY SUBMITTED:

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