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June 30, 2021

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Jun 30 2021

S.C. SUPREME COURT

VIA S.C. COURTS E-FILING AND U.S. MAIL

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: Mark Douglas Hill, III by and through his Duly appointed Guardian ad Litem Helen Kaci Hill v. Cranston Print Works Company d/b/a Cranston Trucking Company, Ryder Truck Rental, Inc., Optimum Staffing, Inc., d/b/a Optimum Logistic Solutions, and Jason E. Burdette
and
Gregory Jones, Sr., as the father and duly appointed Personal Representative of the Estate of Jessica Dawn Jones v. Cranston Print Works Company d/b/a Cranston Trucking Company, Ryder Systems, Inc., Optimum Staffing, Inc. d/b/a Optimum Logistic Solutions, and Jason E. Burdette

Appellate Case No. 2021-000613

Dear Mr. Shearouse:

Enclosed for filing please find the original of the Respondents' Return to the Petitioners' Petitions for a Writ of Certiorari, along with the original Proof of Service in the above referenced matter. We are serving all counsel of record via email and U.S. Mail.

Should you have any inquiries, or if I may be of some further assistance, I await the Court's instructions.

With warmest regards,

Alexander P. Lewis

Encls.

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Jun 30 2021

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable R. Keith Kelly, Circuit Court Judge

Appellate Case No.: 2021-000613

Mark Douglas Hill, III by and through
his Duly appointed Guardian ad Litem, Helen Kaci Hill, Plaintiff.....Respondent,

v.

Cranston Print Works Company D/B/A Cranston Trucking Company, Ryder
Truck Rental, Inc., Optimum Staffing, Inc., D/B/A Optimum Logistic Solutions
Optimum Logistic Solutions, and Jason E. Burdette, Defendants,

Of whom Cranston Print Works Company d/b/a Cranston Trucking
Company, Optimum Staffing, Inc., d/b/a Optimum Logistic
Solutions, and Jason E. Burdette are.....Petitioners,

and

Gregory Jones, Sr., as the Father and Duly Appointed Personal Representative
of the Estate of Jessica Dawn Jones, Deceased, PlaintiffRespondent,

v.

Cranston Print Works Company D/B/A Cranston Trucking Company, Ryder
Truck Rental, Inc., Optimum Staffing, Inc., D/B/A Optimum Logistic Solutions
Optimum Logistic Solutions, and Jason E. Burdette, Defendants,

Of whom Cranston Print Works Company d/b/a Cranston Trucking
Company, Optimum Staffing, Inc., d/b/a Optimum Logistic
Solutions, and Jason E. Burdette are.....Petitioners.

**RESPONDENTS' RETURN TO PETITIONERS'
PETITIONS FOR A WRIT OF CERTIORARI**

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STATEMENT OF THE CASE

The Respondents, by and through their undersigned Counsel of record, hereby respectfully submit, pursuant to Rule 242(f), SCRAP, this Return and respectfully request that this Honorable Court reject the Petitioners' Petitions for a Writ of Certiorari. The instant litigation stems from a violent collision that occurred on February 1, 2019, between a tractor trailer that was driven by Petitioner Burdette and a Kia Minivan that the decedent, Jessica Dawn Jones, and minor Mark Douglas Hill, III, were traveling in as rear seat passengers. Petitioner Burdette was employed by Petitioner Optimum at the time of the collision, and was leased from Optimum to Petitioner Cranston. Petitioner Burdette was deposed on March 20, 2020. Following the deposition of Petitioner Burdette, Counsel for the Respondents served Requests to Admit upon the Petitioners' counsel of record based upon the aforementioned deposition testimony. Petitioner Burdette, by and through his then attorney, provided Answers on May 19, 2020, signed by William T. Young, III, Esquire. (Appx. 208-211). The Answers were unverified by Petitioner Burdette himself. *Id.* Counsel for Respondents espoused additional Requests for Admission upon Petitioner Burdette's then attorney, which were answered on June 26, 2020. (Appx. 213-215). Petitioner Burdette's then Counsel, William T. Young, III, Esquire, answered that the discovery sought was vague, and therefore refused to answer. *Id.* Further, Petitioner Burdette claimed an objection on the grounds of privilege. *Id.* Again, each of these Answers were unverified by Petitioner Burdette. *Id.*

Respondents filed various discovery motions including a Motion to Deem Certain Matters Admitted on July 16, 2020. The motion was heard along with various other motions regarding discovery issues by the Honorable R. Keith Kelly on July 27, 2020. On October 8, 2020, the Circuit Court issued an Order wherein among other things they granted in part the Respondents' Motion to Deem Certain Matters Admitted, and critically stated that:

“The Court hereby Orders that each of the aforementioned Requests for Admission be re-answered in light of the sworn deposition testimony of Defendant Burdette, and that Defendant Burdette sign and attach a verification pursuant to Rule 11(c) of the South Carolina Rules of Civil Procedure when providing the new answers within ten (10) days.”

(Appx. 217-224). Petitioners filed a Motion to Alter and/or Amend, along with a supporting Memoranda pursuant to Rule 59(e), SCRPC, on October 19, 2020. After considering the positions of each side, and upon review of the record before it, the Circuit Court issued an Order denying the Petitioners’ Motion to Alter and/or Amend on December 18, 2020. (Appx. 226-233).

While awaiting the Circuit Court’s ruling on Petitioners’ Motion to Alter and/or Amend, the underlying cases were placed on the status roster for November 23, 2020. On that date, all Counsel, including Petitioners’ Counsel at the time, agreed to place the Jones matter on the date certain roster for the term of court beginning April 5, 2021. Thereafter, on December 8, 2020, Respondents’ Counsel was informed that Geoffrey Gibbon, Esquire, would be assuming the defense of Petitioner Burdette, and Robert Peele, Esquire, would be assuming the defense of Petitioner Optimum moving forward. Following the issuance of the Circuit Court’s December 18, 2020 Order, Petitioner Burdette’s new attorney informed Respondents’ Counsel that his client intended to appeal the Order rather than to comply with it, or in the alternative, face contempt for failure to comply. That Appeal was filed on December 29, 2020. (Appx. 237-261). Thereafter, on January 11, 2021, Respondents filed a Motion to Dismiss Burdette’s appeal. (Appx. 199-233). On January 12, 2021, Respondents’ Counsel received notice that Petitioners Optimum and Cranston had also filed an Appeal to the Circuit Court’s Interlocutory Orders. (Appx. 190-198). Thereafter, all Petitioners filed Returns to the Respondents’ Motion to Dismiss (Optimum, Appx. 111-117) (Cranston, Appx. 121-160) (Burdette, Appx. 161-189), and a Reply was also filed by Respondents. (Appx. 104-110).

On February 11, 2021, the Court of Appeals dismissed the appeal on the basis that the underlying orders on appeal are not immediately appealable. (Appx. 3-4). All Petitioners then petitioned for rehearing. (Optimum, Appx. 29-35) (Cranston, Appx. 36-76) (Burdette, Appx. 77-103). Following a request from the Court of Appeals, a Return was filed opposing the Petition for Rehearing. (Appx. 18-26). Following the submission of Replies by the Petitioners (Cranston, Appx. 5-7) (Optimum, Appx. 8-11) (Burdette, Appx. 12-17), on May 12, 2021, the Court of Appeals denied the Petitions for Rehearing. (Appx. 1-2). Now each Petitioner has again brought these appeals before this Honorable Court seeking a Writ of Certiorari where the Orders appealed upon are admittedly Interlocutory in nature, and no novel issues exist that this Court need entertain despite the pleas of the Petitioners to the contrary.

ARGUMENTS

I. **A WRIT OF CERTIORARI IS INAPPROPRIATE IN THIS MATTER AS THE ORDERS AT ISSUE IN THIS APPEAL ARE ADMITTEDLY INTERLOCUTORY AND ARE NOT IMMEDIATELY APPEALABLE BY ANY OF THE PETITIONERS.**

While the Petitioners have advanced several “red herring” arguments as novel issues, such issues and arguments are unavailing and improper for the reasons contained herein. Specifically, while each Petitioner has stated that their Petition should be granted because a substantial right would be affected, or a defense would be foreclosed, none of them have actually articulated what or how that substantial right or defense would be affected. The reason for this failure is that none of them can actually articulate how they are affected from the Trial Court’s Orders that require Petitioner Burdette to amend his answers to Requests for Admission with an eye to his earlier sworn testimony. In fact, while each Petitioner attempts to state that the Trial Court has forced some harsh medicine upon them, each Petitioner has repeatedly incorrectly asserted that the Circuit Court’s Orders presuppose answers upon Burdette, or that an admission is now required. Such simply is not the case.

The Circuit Court has not invaded the roll of the fact finder, and has not made any findings of fact, or credibility. The trial judge has merely offered Petitioner Burdette a chance to amend his discovery to be consistent with prior sworn testimony and certify that his answers are in fact his, not that of his Counsel.¹

Under Rule 36 of the South Carolina Rules of Civil Procedure, a party may serve upon any other party a written request for the admission of the truth of any matters within the scope of Rule 26(b) set forth in the request that relates to statements or opinions of fact or of the application of law to fact. *See* Rule 36(a), SCRPC. Additionally, the party who has requested the admissions may move to determine the sufficiency of the answers or objections. *Id.* A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. *Id.* Where a party provides an evasive or incomplete answer it is to be treated as a failure to answer. *See* SCRPC 37(a)(3). Further, when discovery is expounded or answered, the Rules provide that:

“[E]very request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. . . The signature of the attorney or party constitutes *a certification in accordance with Rule 11.*”

SCRPC 26(g)(emphasis added). Rule 11(a) of the South Carolina Rules of Civil Procedure is clear that “[T]he written or electronic signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information

¹ It is this last requirement that is centrally in play. If Burdette is forced to certify his answers, then they will be his own unfiltered answers rather than that of Counsel. The original answers to these requests were answered in such a way as to benefit the aims of all Petitioners who were represented by singular Counsel rather than to be Answers from the actual party upon whom Answers were requested, and who had previously testified under oath. This factor will be articulated and elaborated on in further detail below.

and belief there is good ground to support it; and that it is not interposed for delay. . . If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction. . .” See SCRCP 11(a).

As a general rule, a discovery order is not immediately appealable. *Ferguson v. Charleston Lincoln/Mercury Inc.*, 344 S.C. 502, 510, 544 S.E.2d 285, 290 (Ct. App. 2001). Once a final order on the merits is issued, the prior discovery orders become appealable. *Hamm v. South Carolina Pub. Serv. Comm’n*, 312 S.C. 238, 439 S.E.2d 852 (1994). As has often been noted by this Honorable Court, “The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court.” *Downey v. Dixon*, 294 S.C. 42,45, 362 S.E.2d 317, 318 (Ct. App. 1987). Further, “an appellate court will not interfere with a trial court’s exercise of its discretionary powers with respect to sanctions imposed in discovery matters unless the court abuses its discretion.” *Davis v. Parkview Apartments*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014) (citing *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 542, 489 S.E. 2d 679, 681 (Ct. App. 1997)) (citation omitted). An abuse of discretion may be found by an appellate court with respect to discovery sanctions where the appellant shows “that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and therefore, amounted to an error of law.” *Davis*, 409 S.C. at 282, 762 S.E. 2d at 543 (quoting *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989)).

In seeking relief from an Order regarding discovery, former Chief Justice Pleicones aptly noted in his Concurrence that “[I]t is well-settled that a party can obtain review of the merits of a discovery order only after refusing to comply and being held in contempt. See *Davis*, 409 S.C. at 290-1, 762 S.E.2d at 548 (citing *Grosshuesch v. Cramer*, 377 S.C. 12, 659 S.E.2d 112 (2008)). Justice

Pleicones' statements were echoed in the majority decision where it was stated that "to challenge the specific rulings of the discovery orders, the normal course is to refuse to comply, suffer contempt, and appeal from the contempt finding." *See Davis*, 409 S.C. at 280-1, 762 S.E.2d at 543 (citing *Ex Parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881-2 (1986)). The Supreme Court clearly stated in *Ex Parte Whetstone* that "[A]n order directing a party to participate in discovery is interlocutory and not directly appealable." *Ex Parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881-2 (1986).

A review of the Orders upon which the instant appeal rests finds that the only thing imposed by the Circuit Judge on any Petitioner was upon Petitioner Burdette, by and through his then Counsel of record, with an instruction to amend his prior Answers to Requests for Admission to conform to his prior sworn deposition testimony. It is undisputed that Petitioner Burdette did not comply with either Order, or suffer contempt from the Circuit Court by failing to comply with Orders. Rather, Petitioner Burdette, by and through his new current Counsel, filed this appeal, and ground the underlying litigation to a halt despite having agreed to place the matter on the date certain roster prior to this appeal. Such an appeal should clearly be barred as interlocutory based upon the aforementioned legal precedents, and the arguments espoused below.

While each of the Petitioners have offered various erroneous arguments for why the instant Appeal should not be dismissed, they have again uniformly overlooked the fact that the instant appeal is improper as it is interlocutory in nature. Further, each of the Petitioners has misapplied and misunderstood the actual text, thrust and result of the Circuit Court's Orders. Namely, each of the Petitioners has again asserted that the Orders requiring Petitioner Burdette to amend his Requests for Admission to conform with his prior sworn testimony somehow means that he must admit the Requests as they were written. That simply is not accurate, and is not what the unambiguous explicit wording of the Court's Orders state. Additionally, while Petitioners seem to imply that the Trial Judge

has circumvented the roll of the jury as the fact finder, the Orders at issue on their face clearly contain no findings of fact, and make no credibility determinations. Further, enhancing the Respondents' position is the fact that Petitioner Burdette's current Counsel of Record has continually admitted that this matter is Interlocutory in nature. Nonetheless, Respondents will now turn to each of the Petitioners unavailing arguments.

A. Petitioner Burdette has again failed to show that this interlocutory appeal affects a substantial right, and that he would somehow suffer irreparable harm from following the established procedure of either complying with the Order or being held in contempt.

Despite previously acknowledging its interlocutory status, Petitioner Burdette has again attempted to continue this appeal for reasons that ring hollow. First and foremost, Petitioner Burdette continues to insist with the false premise that amending and re-answering Requests for Admission with an eye towards his earlier sworn testimony will in effect foreclose on a defense at the trial on the merits of the underlying case, or affect some unspecified substantial right of Petitioner Burdette. Such assertions continue to be baseless. The Circuit Court has not stated that any defense of Petitioner Burdette, or any other Petitioner, would be stricken or in any way effected by way of its Orders. The Circuit Court has merely ordered an amendment of Petitioner Burdette's answers, and has not ordered that Petitioner Burdette admit anything. (Appx. 217-224).

If as Petitioners' Counsel suggests Burdette has denied requests for admission because of the way that they are written, then amending their answers to state the same would cause them no harm, and certainly would not preclude any defense at the trial of this matter. In fact, pursuant to Rule 36(a), SCRCF, such a qualification is warranted. As noted above, Rule 36(a) clearly states that a denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. *See SCRCF 36(a)*. Critically,

in advancing their hollow arguments, Petitioner Burdette's Counsel has again failed to state what particularly important defense would be affected at the trial of this case by amending and/or re-answering the requests for admission, or what substantial right would be foreclosed. Surely, if such a critical defense or right would be affected, Counsel for Petitioner Burdette would be able to articulate the same with specificity. It is respectfully submitted that what is truly at play here is that the real party in interest was attempting to use Requests for Admission to change Burdette's prior sworn testimony that was unhelpful to the other Petitioners, who were represented by the same Counsel. This is why those Requests for Admission were unverified by Burdette, and why Petitioners are vehemently fighting to prevent Burdette from having to verify any amended answers.

While Petitioners have continued to bemoan Respondents' view of the explicit language of the Circuit Court's Orders, it does not change that the Orders at issue do not preclude Burdette from maintaining a denial to the request, denying the request as written, or offering a qualified denial as required under the Rules of Civil Procedure. Essentially, by Ordering an Amendment to the Answers, nothing has been altered, and the Order certainly does not say that a Denial could not be maintained. The Circuit Court's Orders generally hold that whereas here prior testimony of a party is later contradicted by a blanket denial without explanation, an amendment is warranted. Simply put, Petitioner Burdette cannot and has not pointed to any portion of the Circuit Court's Orders where they are being forced to admit anything, or where they are being foreclosed from offering a robust defense to the allegations against them. Petitioner Burdette is merely being offered a chance to amend the Requests for Admission that were before him in good faith and in conformance to his earlier sworn testimony, and to do so with a certification of the same.

In addition to the aforementioned erroneous positions taken in this Appeal, Petitioner Burdette also advances the concept that merely because the Orders at issue pertain to Requests for Admission

that they should have a right to avoid following the well settled law regarding Interlocutory discovery matters, and be allowed to immediately appeal the Orders because some unmentioned defense or substantial right is some how affected. As Counsel for Burdette notes in their Petition, this Honorable Court has stated that “[t]he phrase ‘involving the merits’ means the order ‘must finally determine some substantial matter forming the whole or a part of some cause of action or defense.’” *Tucker v. Honda of S.C. Mfg.*, 354 S.C. 574, 576, 582 S.E.2d 405, 406 (2003), citing *Mid-State Distrib., Inc. v. Century Imp., Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). Further, as was also noted, an order affects a substantial right when it, among other things, strikes out a defense such that the defense is lost. *Mid-State Distrib.*, 310 S.C. at 334 n.4, 426 S.E.2d at 780 n.4. Interestingly, each of these statements cited by Counsel for Petitioner Burdette are notably inapplicable here. Specifically, the very language of the Trial Court’s Orders in no way addresses any defense and certainly does not finally determine a matter forming the whole or part of any cause of action or defense. Additionally, the Orders in no way strikes out or precludes any defense. As such, Petitioner Burdette’s reliance on these cases is misplaced, and he has continually failed to in anyway show that the Orders at issue do in fact preclude or strike any defense for any claims against him from his Answer. While Petitioner Burdette has also argued that the Orders at issue have the effect of determining the scope of the issues at trial, again such an argument fails as the Orders on their face in no way make findings of fact, credibility determinations, or expressly limit the evidence to be presented at the trial on the merits.

In addition to the clear attempt of Petitioners to now change the law of this state as it pertains to the clearly interlocutory nature of discovery orders, they also again overlook that they themselves have not followed the procedure in which to appeal discovery orders. Petitioner Burdette, by and through his former Counsel of Record, was presented with the opportunity to comply with the Trial Court’s opportunity to amend the Answers to Requests for Admissions that had been offered to him,

or face contempt. Rather than comply with the Orders or face contempt, Petitioner Burdette's prior Counsel, or the real party in interest, chose to not participate in discovery by way of the explicit language of the Circuit Court's Orders, and instead knowingly divested the defense of the case. Petitioner Burdette's current Counsel also made no attempt to comply with the Orders or face contempt, but rather filed an Interlocutory Appeal.

While Petitioner Burdette's current Counsel dislikes the state of the law concerning the interlocutory nature of discovery Orders, the law of this state and the prescribed procedure is clear. Burdette "can obtain review of the merits of a discovery order only after refusing to comply and being held in contempt." *See Davis, v. Parkview Apartments*, 409 S.C. 266, 290-1, 762 S.E.2d 535, 548 (2014) (citing *Grosshuesch v. Cramer*, 377 S.C. 12, 659 S.E.2d 112 (2008)). This view was not just limited to Justice Plicones, but rather the entire Court noted that "to challenge the specific rulings of the discovery orders, the normal course is to refuse to comply, suffer contempt, and appeal from the contempt finding." *See Davis*, 409 S.C. at 280-1, 762 S.E.2d at 543 (citing *Ex Parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881-2 (1986)). Thus, this appeal does not present a novel issue, as it is clear from the wording of the Orders and the language in Petitioners' earlier filings, that the instant appeal is interlocutory and improper. To the extent that Petitioners argue that simply because this matter deals with Requests for Admission that this Honorable Court's prior directives regarding discovery Orders are inapplicable, it is respectfully submitted that such a position is erroneous. In addition, it is respectfully submitted that no controlling South Carolina case has been cited to support this contention. Thus, the aforementioned standards regarding discovery Orders as being interlocutory still hold true, and should apply here.

To be clear, the express language of the underlying Trial Court Orders does not in any way presuppose upon Petitioner Burdette an answer, nor does it require a certain answer. This is the very

thing that each Petitioner, especially Petitioner Burdette, has missed, and is the critical reason why Petitioner Burdette should have either attempted to comply with the Orders, sought clarification from the Circuit Court, or raised the issues at any hearing on a Motion to hold him in contempt for failure to comply with the Orders. Instead, Petitioner Burdette, his Counsel of Record, or the real party in interest, apparently determined that Burdette would be precluded from offering an undefined defense at the trial of the case, or that an undefined substantial right was affected, changed his Counsel of record, and appealed. Petitioners Optimum and Cranston have joined in this ill-advised appeal with the same faulty logic, stating that the answers of one Defendant would somehow preclude these separate Defendants from offering their own evidence and defenses at the trial of this case.² Surely, Petitioners Cranston and Optimum can testify or offer whatever evidence they wish to offer at the trial of this matter to either refute or confirm the amended answers of Petitioner Burdette.

Clearly, Petitioner Burdette had the opportunity to revise his answers, maintain denials, issue qualified denials as required under the rules, or admit the requests. However, no attempt was made by Petitioner to in any way cooperate with the Court's Orders or to be held in contempt as is required prior to the initiation of an appeal. He has suffered no harm, has not articulated what particular harm that he would suffer, and cannot show how re-answering the Requests for Admission, as he sees fit, in conformance with his deposition testimony, will deprive him or any other Petitioner of anything, including defenses at the trial on the merits. As such Burdette's instant Petition should be denied.

² Petitioner Cranston has even gone so far as to attempt to justify the unqualified denials of Petitioner Burdette by attempting to offer an Affidavit of one of its other employees to try and speak on behalf of Petitioner Burdette in a wholly improper move.

B. Petitioners Optimum and Cranston have again failed to offer any basis for the continuation of this clearly Interlocutory Appeal by either of them.

Neither Petitioner Optimum nor Petitioner Cranston have properly asserted a reason why they are entitled to continue to maintain an appeal of the Circuit Court's clearly Interlocutory Orders as to Petitioner Burdette, and can show no resulting prejudice or harm that they would suffer from the same. Petitioners Cranston and Optimum have put forth nearly identical and unavailing arguments for why they somehow should be allowed to avoid the Interlocutory nature of the Circuit Court's Orders, and should be allowed to protest the Orders before this Honorable Court. Petitioner Cranston has even gone so far as to state that the Court of Appeals Orders in this matter state something that they simply do not. The Orders of the Court of Appeals merely held that the Orders at issue are Interlocutory and thus not immediately appealable. Those Orders do not impose some duty upon Petitioner Cranston as its Counsel suggests in their Petition. *See Cranston Pet. Cert. at p. 7.*

It is respectfully submitted that neither Petitioner Cranston nor Petitioner Optimum have or can show that they will suffer any harm based upon the Interlocutory Orders being affirmed by this Court, and this frivolous appeal being dismissed yet again. As has been addressed above, as well as in the multitude of filings in this matter, the explicit language of the Circuit Court's Orders do not presuppose an Answer upon Petitioner Burdette, and certainly do not preclude Petitioner Burdette from maintaining a denial to the request, denying the request as written, or offering a qualified denial as required under the Rules of Civil Procedure. Further, the Court's Interlocutory Orders generally hold that whereas here, prior testimony of a party is later contradicted by a blanket denial without explanation, an amendment and/or explanation is warranted. Simply put, Petitioners Cranston and Optimum have not and cannot point to any portion of the Circuit Court's Orders where Petitioner Burdette is being forced to admit anything, or where he will somehow harm them. Petitioner Burdette

is merely being offered a chance to amend/re-answer the Requests for Admission that were before him in good faith and in conformance to his earlier sworn testimony, and to do so with a certification that the answers are actually his answers. As such, Petitioners Cranston and Optimum will be unaffected, and certainly despite their claims to the contrary, no issues regarding the merits of the case are involved in the instant dispute.

Petitioner Cranston's and Petitioner Optimum's Counsel have argued that their Appeal is proper because they were unable to either comply with the Order or face contempt, and each would be affected by the Orders in their supposed results. Such statements are somewhat disingenuous. While Counsel for Petitioners Cranston and Optimum state that they did not have a chance to properly comply with the Order or be held in contempt, and thus are outside of the scope in *Ex Parte Whetstone*, such a position should be examined given the unique position of Petitioner Cranston's Counsel in this case. It was in fact Petitioner Cranston's Counsel, who at the time of the Orders at issue, represented not just Petitioner Cranston, but also Petitioners Burdette and Optimum. As such, Counsel for Cranston was in fact in a position to comply with the Orders at issue, or to face contempt. Rather than do either of those things, the real party in interest divested the defense of the matter to different Counsel, and all appealed.

While Petitioners may be aligned on some issues, they clearly have divergent interests in others, and have since the beginning of this litigation. This fact is even admitted by Petitioner Optimum who averred that their defense with Burdette is "unified in most respects." See *Optimum Pet. Cert. at p. 7*. Such language by its very meaning implies that there are areas where their defenses are not unified but rather divergent. Despite these admitted divergent interests, all Petitioners were represented by the same Counsel for a significant period of time. This multiparty representation of individuals with obvious and admittedly divergent interests by Counsel for Petitioner Cranston

created a situation by which he was forced to serve the interests of three (3) masters with different interests. While caught between the duties to each Petitioner, Counsel was required to answer discovery in a fashion that did not hurt any one Petitioner, and in so doing created the very issues that they now complain of in each of their Petitions. Thus, neither the Circuit Judge nor its' Interlocutory Orders created the instant dispute, but rather the conflicts of interest of an attorney providing answers to written discovery that differed, or were inconsistent with, prior sworn testimony of one Defendant to minimize the impact of such answers upon his other Co-Defendant corporate clients.³

As has previously been mentioned, this Honorable Court should not allow a Defendant, or its counsel, to modify sworn testimony through later served written discovery for the benefit of other Co-Defendants. Such conduct is clearly not intended under the Rules of Civil Procedure, or the Rules of Professional Conduct. Clearly, this is precisely what occurred here. Petitioner Burdette, by and through his then Counsel of record, offered unqualified denials to Requests for Admission even where it was contradictory to Petitioner Burdette's earlier sworn testimony to benefit the other Petitioners, who had divergent interests from each other and Burdette.⁴

One example of this overt attempt to alter testimony to minimize its impact upon Petitioner Cranston can be seen when reviewing the provided Answer to Respondents' Request for Admission numbered 2. (Appx. 209). There, Petitioner Burdette was asked to admit that:

“On the morning of February 1, 2019, prior to impact with the vehicle Jessica A. Jones was traveling in, Defendant Jason E. Burdette was using his cellular phone while driving the tractor trailer for Defendant Cranston while employed by Defendant Optimum.”

³ This multiple representation of divergent clients has a negative and complicating impact on Respondents' ability to effectively and efficiently move this litigation forward.

⁴ While each Petitioner has offered only three (3) examples of their Answers to Requests for Admission to attempt to justify their position, this Court would benefit from examining the actual Answers to the two (2) sets of Requests for Admission that are a part of the Record on Appeal as contained in the Respondents' Motion to Dismiss that was before the Court of Appeals. (Appx. 208-215).

Id. To which, Petitioner Burdette, through his then Counsel of record, responded:

“Defendant Burdette objects to plaintiffs’ request to admit number 2 upon the grounds it is vague and ambiguous, as it does not specify a particular time in which he was using his cellular phone. Further responding, Defendant Burdette denies using his cellular phone at the time of the accident or in the moment immediately preceding the accident.”

Id. Clearly, as admitted through this appeal Petitioner Burdette was using his phone on the morning of February 1, 2019, which is what he stated during his sworn testimony of record. (Appx. 183-7). Despite this widely known and admitted fact, Petitioner Burdette’s prior Counsel of record went to great lengths to avoid answering the question for some unknown reason. Such conduct is clearly improper. Despite this impropriety, Petitioner Cranston, through the same Counsel, still maintains that the Circuit Court’s Orders are the real problem here.

In further illustrating the improper discovery practice at hand, Petitioner Optimum even admits in their Petition that Burdette testified that he was never provided a handbook prior to February 1, 2019 from Petitioner Optimum, yet when asked this very thing in Requests for Admission he responded with an unqualified denial. *See Optimum Pet. Cert. 5.* Thereafter, Optimum states that there is documentation in Burdette’s employee file that showed he signed for the handbook. *Id.* What Counsel for Petitioner Optimum leaves out is that when confronted with that very fact, and this supposed documentation, Petitioner Burdette stated that the signature was not his, and that he had never been presented with a handbook or signed for the same until a day prior to his deposition. (Appx. 90-94). This omission by Optimum in their Petition is critical as this part of Burdette’s testimony is clearly at odds with Optimum’s interests, and by allowing prior Counsel for all Petitioners to make such a glaring change to Burdette’s sworn testimony for the benefit of another party without any explanation would imply that either Petitioner Burdette had knowingly perjured

himself at his deposition, or that he, or someone on his behalf, was providing inaccurate answers in Requests for Admission, which had been signed by Counsel under Rule 11, SCRPC.

Either way, these very examples highlight why the Circuit Court's Orders do not impose some harsh medicine, but rather show the lenient nature of the Circuit Court allowing Petitioner Burdette to amend his answer without penalty, even where such egregious conflicts existed and penalties could have been warranted. Further, while Petitioners Optimum and Cranston have each alleged that the Trial Court's Orders somehow would foreclose their ability to offer evidence at the trial of this matter, such statements are meritless. Certainly, Petitioner Burdette has the ability to offer his version of events and to answer discovery as he sees fit, independent of the other Defendants, as is the case with any multiparty litigation. In this case, like all other multiparty suits, each Defendant will have the ability to offer evidence to support their own contentions, whether that is helpful or harmful to their Co-Defendant. The fact that Petitioners Cranston and Optimum feel that they would be unable to offer evidence that would be different or contrary to the testimony of Petitioner Burdette is simply without support. This bear assertion has not been demonstrated with supporting evidence. The Trial Court's Orders in no way affect any defense of any Petitioner, do not affect any ability to present evidence, and in fact do not actually make any findings of fact or offer any credibility analysis. As such, Petitioners Cranston and Optimum's Petitions should be rejected as improper.

Finally, Petitioner Cranston has stated that even if their arguments fail, which for the reasons discussed herein they should, that a Writ of Certiorari should still be granted to give litigants a road map for discovery moving forward. In support of this specious position, Petitioner Cranston relies upon *Oncology and Hematology Assoc. of S.C., LLC. v. S.C. Dept. of Health and Envtl. Control*, 387 S.C. 380, 692 S.E.2d 920 (2010). Petitioner Cranston's reliance on such a case is interesting as this matter is wholly different from the one raised in that case, and in fact the actual positions of this Court

in that case would seem to bolster the very position of the Respondents. Specifically, this Honorable Court noted in that decision that:

“[O]ur willingness to review a discovery order by way of a writ of certiorari will be as rare as the proverbial ‘hen’s tooth.’ We have no desire to micromanage discovery orders. It is our hope that in resolving this matter, we will speak to trial courts generally.”

Oncology and Hematology Assoc. of S.C., LLC, 387 S.C. at 388, 692 S.E.2d at 924. Further, in that case this Honorable Court was addressing whether the discovery orders allowed for one party to obtain documents that were abusive and outside of the scope of the underlying litigation. The instant case is clearly distinguishable, and it is respectfully submitted that the case at hand does not present issues that would be consistent with the proverbial rare “hen’s tooth.” As such Petitioner Cranston’s and Petitioner Optimum’s Petitions should be denied as improvident and improper as they seek review of a clearly Interlocutory Order that in no way infringes upon any of the Petitioners’ rights or defenses.

II. THE TRIAL JUDGE’S ORDERS IN NO WAY ACT TO MAKE A FINDING OF FACT, OR INVADE THE PROVINCE OF THE JURY ON THE MERITS OF THE UNDERLYING LITIGATION.

Each Petitioner has in one way or another contended that the Circuit Court has somehow made factual determinations in the Orders at issue, and thus invaded the province of the jury. Such assertions however distort the very wording of the Orders, and require one to make a fairly large and illogical leap. It is respectfully submitted that a review of the Orders on their face show that the Circuit Judge in no way made any factual findings. (Appx. 217-224; 226-233). Additionally, the Circuit Judge never made any credibility determinations or findings regarding any of the parties’ credibility. *Id.*

Rather, the Circuit Court’s clear and unambiguous language merely ordered that Petitioner Burdette be given the opportunity to amend his prior answers to Respondents’ Requests for Admission, without ever stating what the amended answer had to be. It is critical to this appeal to

understand that the Circuit Judge never instructed what Petitioner Burdette's answers should be, and never struck any defenses of any of the Petitioners. In doing so, the Circuit Judge did exactly what is allowed under Rule 36(b) and allowed Petitioner Burdette to amend his answers in light of his prior sworn testimony. No Petitioner is prejudiced or harmed by way of the Circuit Judge's Interlocutory Orders allowing for the amendment of an answer, where such an amendment has not even happened. The Circuit Judge's role in this matter, like so many others, is to help resolve discovery disputes and to make sure that litigants are not abusing the discovery process to suit their own ends. That is what occurred here, as outlined above.

Petitioner Cranston has even gone so far as to suggest that the Circuit Court has exceeded its authority and has weighted the evidence and Ordered Petitioner Burdette to answer the Requests for Admission in a manner that conforms to the Court's view of the evidence. *See Cranston Pet. Cert.* at 14. Such a position ignores the actual wording of the Orders at issue would seem to be placing language into the Circuit Court's Orders that simply is not there. Counsel for Petitioner Cranston states in their Petition that:

“[H]ere, the Court did not ‘permit’ Burdette to either withdraw or amend his responses to Requests for Admission but instead, ordered him to serve revised responses that conform to the Court’s and Respondents’ view of his prior deposition testimony. Nor did the Court, upon a motion to determine the sufficiency of the responses, ‘order either that the matter is admitted or that an amended answer be served,’ pursuant to the third paragraph of Rule 36(a), SCRCP. The Court did not find that Burdette’s responses were insufficient but, instead, that they were incorrect based on the Court’s view of his deposition testimony.”

See Cranston Pet. Cert. at 14. Here, the Circuit Court's Orders clearly did order that an amended answer be served, and such a required amendment by the Petitioner's own admission is allowed under Rule 36(a) where answers are insufficient. The Circuit Court never stated that Petitioner Burdette's Answers were incorrect. They merely stated that an amended answer was necessary. Critically, what

comprises those amended answers is left to Petitioner Burdette to offer in whatever manner he chooses, so long as he verifies his answers.

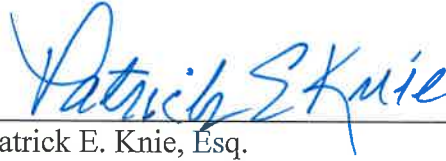
Overall, no Petitioner has been able to clearly articulate how requiring Petitioner Burdette to amend his prior answers to Requests for Admission, in whatever fashion he chooses, would somehow foreclose upon any element of any defense of a Petitioner, or would have any impact on any substantial right of any party. Further, no Petitioner has shown that the Orders at issue have in anyway invaded the role of the jury as the ultimate fact finder in the litigation. As such, it is respectfully submitted that these ill-advised Petitions should be rejected as Interlocutory and improper.

CONCLUSION

It is respectfully submitted that these instant Petitions for Certiorari should be denied, as they have failed yet again to raise any meaningful new issue or to have in any way pointed to a novel issue that would necessitate continuing an appeal of an admittedly and undisputedly Interlocutory Order. Further, no Petitioner has pointed to any defense or substantial right that has been stricken, invalidated, or affected by way of the Circuit Court's Orders, which on their face speak for themselves. It is respectfully requested that these Petitions should be dismissed as Interlocutory, improvident and improper.

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RESPECTFULLY SUBMITTED,



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