THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY

Court of Common Pleas

Hon. 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.

BRIEF OF RESPONDENT

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(2) Did the trial court abuse its discretion in granting the October 1, 2019 Order striking Appellants' pleadings?

(3) If Appellants are allowed to challenge prior discovery orders contrary to *Davis v. Parkview Apartments*, would any of Appellants' arguments materially affect the trial court's grant of sanctions in the October 1, 2019 Order?

APPELLANTS' STATEMENT OF ISSUES ON APPEAL

(1) Did the trial court abuse its discretion in compelling the Appellants to execute authorizations for detailed corporate and personal financial records unrelated and irrelevant to the plaintiff's claims?

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

(3) Did the trial court's 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

Appellants Crest Energy Partners Group, LLC, Crest Energy Partners LP, Dunhill Products, LP and Henry Wuertz's (hereinafter referred to as Appellants) Notice of Appeal purports to appeal the following four orders of the Hon. Maite Murphy (hereafter referred to collectively as "the Appealed Orders"):

(1) October 1, 2019 Order Granting Plaintiff's Motion for Sanction Pursuant to Rule S.C.R.C.P. 37 (R. pp. 46-57);

(2) August 1, 2019 Order Amending June 18, 2019 Order Granting Motion to Compel (R. pp. 43-45)

(3) June 18, 2019 Order Granting Third Motion to Compel (R. pp. 40-42), and

(4) April 6, 2015 Order Denying Defendants' Motion to Quash and for a Protective Order (R. pp. 36-38).

(Appellants' Notice of Appeal)

As an initial matter, only one of the three orders, the October 1, 2019 Order striking Appellants' pleadings, is properly before the Court. As set out below, Appellants failed to appeal any order prior to the October 1, 2019 Order granting sanctions. The prior Orders, and their findings, are the "law of the case" and are not properly preserved for review. Likewise, Appellants' attempts to re-litigate the March 15, 2013, June 3, 2013 and September 27, 2013 orders of the trial court, none of which are listed in their Notice of Appeal, and none of which are subject to this Appeal. This Court need not go outside the bounds of the October 1, 2019 Order and the Record on Appeal to find that the granting of sanctions and striking of Appellants' pleadings was a proper exercise of the trial court's discretion.

The October 1, 2019 Order is not, as Appellants suggest, inconsistent with any rule of law or prior order of the trial court. The order granting sanctions is a proper exercise of the trial court's discretion and well founded in law and fact in response to Appellants' documented discovery abuse, willful noncompliance with court orders, and constant manipulation of the system.

Appellants' brief includes a statement of the case and procedural history that are inaccurate and as such Respondents provide the following factual and procedural history to properly contextualize this Appeal.

Factual and Procedural History

This case stems from Respondent's allegation that Appellants failed to pay the Respondent for over $1 million dollars of oil that Appellants acquired by fraudulent means from Respondent in April of 2010. (R. pp. 66-72, p. 558) In addition, Appellants interfered with the existing and prospective business relationships of the Respondent, all for the purpose of taking Respondent's clients and misappropriating millions of dollars in business from Respondent. (R. pp. 66-72, p. 558-559) Respondent's expert Oliver Wood calculated that Appellants' conduct have caused Respondent no less than $12,000,000.00 in economic losses. (R. p. 570-571)

This case has a long history. Respondent originally filed its complaint in South Carolina District Court on April 29, 2011 styled *Innovative Waste Management v. Crest Energy Partners Group, LLC, Dunhill Products Group, LLC, Henry Wuertz, Edward H. Girardeau and Rodney Bridge* 2:11-cv-01023-RMG. Respondent pled various causes of action, including but not limited to breach of contract, fraud, unjust enrichment, violations of the South Carolina Unfair Trade Practices Act, conversion, and tortious interference with contractual relationships. In the federal court action, the Appellants failed to provide full answers to discovery and the Respondent was forced to file a Motion to Compel. (R. pp. 480-481) The federal action was later dismissed on

jurisdictional grounds for lack of complete diversity. The key piece of evidence in the Federal Court's jurisdictional determination was a South Carolina Driver's License that Appellants failed to produce until after nearly a year of litigating the case. (R. p. 113, lines 7-15)

The underlying case was re-filed in Dorchester County Court of Common Pleas on May 11, 2012. Respondent pled the same causes of action as had been pled in the federal action and later amended its complaint to add certain causes of action including interference with prospective contractual relationships. (R. pp. 58-86) Respondent alleged that Appellants had stolen its trade secrets, clients, and business and that Appellants had thereby enriched themselves at the Respondent's expense. (R. pp. 58-86) Appellants filed a counterclaim alleging economic damage for an entirely different transaction between Appellants and Respondent that was completed prior to the events set out in the Amended Complaint. (R. pp. 91-93 ¶ 38-56) Since both Respondent and Appellants made allegations that they had suffered economic loss and damage due to the conduct of the other party, discovery relating to both parties' financial information was necessary. (R. pp. 559-564)

On October 2, 2012 Respondent served Appellants with Respondent's First Requests for Production and Interrogatories, including requests for Appellants' financial information. (R. p. 283, pp. 221-234, pp. 253-269) Respondents sought Appellants' banking and tax accounting records and also included requests pertaining to the amount of business (by dollar and volume) that Appellants had done with certain third-party, business clients alleged by Respondent to have been taken by Appellants. (R. pp. 283-286, pp. 221-234, pp. 253-269)

The Appellants did not provide any response to the discovery requests and Respondent sent Appellants' counsel a S.C.R.C.P. 11 letter and attempted to confer (R. pp. 283-286, p.481, ¶¶7-10) In response, Appellants' counsel represented that responses to the overdue discovery requests were

forthcoming. (R. pp. 283-286, p. 481, ¶10) Appellants did not provide responses as promised and Respondent filed its first Motion to Compel on January 31, 2013. (R. pp. 205-208)

Shortly after the Respondent's First Motion to Compel was set for a hearing, Appellants agreed to and signed a Consent Order. (R. pp. 4-6) The Consent Order was agreed to and signed by counsel for both parties on March 15, 2015 and provided that "the Defendants shall serve responses, including all responsive documents and to all outstanding discovery requests on or before Wednesday March 20, 2013." [1] (R. pp. 4-6) Also, the Order deferred the hearing on Plaintiff's Motion to Compel that was scheduled for March 15, 2013 and noted that it had been rescheduled to April 1, 2013. (R. pp. 4-6) Finally, the Order noted it was without prejudice to Plaintiff's right to move to compel additional response should it contend that Defendants' responses are inadequate. (R. pp. 4-6) In addition, Appellants' Counsel agreed to pay Respondent's Counsel's attorney fees related to bringing the Motion to Compel. (R. p. 481, ¶ 14)

The Appellants failed to comply with the terms of the March 15th Consent Order. (R. pp. 282-290) Specifically, Appellants provided an un-indexed CD containing 2254 pages of documents which were largely duplicate copies of nonresponsive documents previously produced by Respondent in the Federal Court action. (R. p. 481, ¶ 14) Appellants failed to answer any of the interrogatories and instead filed a Motion for a Protective Order. (R. p. 482, ¶17-20) The Motion for Protective Order raised objections regarding the number of interrogatories posed – an issue that was not raised while the March 15th Consent Order was being negotiated – and was inconsistent with the portion of the Consent Order requiring Appellants to provide a response to all outstanding discovery by March 20, 2013. (R. p. 398) In addition, Appellants made no attempt to confer

[1] The Consent Order was entered into and executed by counsel for the parties on March 15, 2013 but for reasons unknown was not signed by Judge Dickson until April 2, 2013 and was not stamped as filed until April 5, 2013.

pursuant to S.C.R.C.P. 11 prior to the filing of the Motion for Protective Order. (R. p. 482, ¶ 17-20)

Respondent filed an Amended Motion to Compel and incorporated its response in opposition to Appellants' Motion for Protective Order within its Amended Motion to Compel. (R. pp. 282-290) On April 1, 2013 a hearing was held before Judge Dickson on Respondent's Amended Motion to Compel and Appellants' Motion for Protective Order. (R. pp. 110-150) Judge Dickson ordered Appellants to respond to Respondent's previously served Interrogatories, provide responsive documents to all outstanding requests for production, and provide Respondent with a production log. (R. pp. 7-10) In addition, Judge Dickson ordered Appellants to provide a sworn or certified financial statement indicating income and net worth.[2] (R. pp. 7-10) There is nothing in the June 3rd Order precluding the Respondents from seeking additional discovery nor is there any mention by Judge Dickson that he is granting Appellants' Motion for Protective Order. (R. pp. 7-10) The Court set a deadline of July 1, 2013 for Appellants to comply with the June 3rd Order. (R. pp. 7-10)

Appellants failed to comply with Judge Dickson's June 3, 2013 Order and Respondent's counsel made many attempts to confer with Appellants' counsel regarding numerous deficiencies. (R. pp. 286-289, pp.484-485, ¶23-32) On July 3, 2013, Respondent served Appellants with Supplemental Requests for Production seeking additional financial information relating to any transactions between Appellants and Respondent's clients whom Respondent alleged Appellants had interfered with and taken. (R. pp. 400-401, p. 485, ¶26-32) Appellants did not respond to the supplemental discovery requests and Respondent attempted to confer with Appellants' counsel

[2] The Court's Order granting Respondents' Motion to Compel was signed on June 3, 2013 but was not filed until August 22, 2013.

regarding the failure to comply with Judge Dickson's June 3, 2013 Order and refusal to provide any answer to the July 3, 2013 supplemental discovery requests. (R. pp. 400-401, p. 485, ¶26-32) In response, Appellants' Counsel informed Respondent that he would "follow up on the discovery" and would provide responses by Monday, August 19, 2013. (R. p. 485, ¶30) Instead, on Friday, August 16, 2013, Appellants filed a Motion for Protective Order. (R. p. 485, ¶31) Appellants again did not make any attempt to confer with Respondent, pursuant to Rule 11, prior to filing their Motion. (R. p. 485, ¶31) This was the second instance where Appellants filed a motion for protective order after the discovery deadline had passed and after providing assurances to Respondent's counsel that the overdue discovery responses were forthcoming. (R. p. 395)

On August 26, 2013 Respondent filed Plaintiff's Second Motion to Compel and integrated its opposition to Appellants' Second Motion for Protective Order within its motion. (R. pp. 394-412) A hearing was held before Hon. Diane Goodstein on Respondent's Second Motion to Compel and Appellants' Motion for Protective Order on September 9, 2013.[3] Respondent argued that Appellants had failed to provide complete discovery answers to Respondent's October 2, 2012 discovery requests as required by the March 15th and June 3rd Orders and failed to provide any answers to Respondent's July 3rd Supplemental Discovery Requests which included requests for financial information including Appellants' tax records. (R. pp. 398-400, 406-407, 413-477)

The purpose for requesting the tax records was two-fold: (1) to determine how much income Appellants had earned from certain business relationships which Respondent alleged had been illicitly interfered with and taken by Appellants and (2) to verify the economic losses

[3] Judge Dickson's June 3, 2013 order indicated that he would hear any issues relating to ongoing discovery disputes. However, Judge Goodstein heard arguments on the Appellants Motion to Dismiss and indicated that she would also hear arguments relating to the Appellants' Motion for Protective Order and Respondents' Second Motion to Compel. There is no transcript available for this hearing.

Appellants claimed in their counterclaim. (R. pp. 406-408) Respondent further argued that Appellants' failure to comply with the Court's prior orders appeared to be deliberate and willful, set out a history (to that point) of Appellants' discovery abuse and requested that the court grant sanctions pursuant to S.C.R.C.P. 37 including but not limited to striking Appellants' pleadings. (R. pp. 398-400, 406-407).

On September 23, 2013 Judge Goodstein denied Appellants' Motion for Protective Order (in full) and granted Plaintiff's Second Motion to Compel.[4] (R. pp. 11-13) Appellants were ordered to provide responses to the Respondent's initial October 2, 2012 discovery requests by October 9, 2014. (R. pp. 11-13) In addition, the Court ordered the Appellants to respond to the Respondent's supplemental discovery requests, specifically, that "Defendants shall produce the working papers such as W-2's, 1099s, K-1's, etc., used in preparation of Defendants' state and federal tax returns for the period 2008 – 2012.[5] (R. pp. 11-13) The Order noted that "[n]othing set out in this paragraph shall be construed as any limitation upon Respondent's right to seek additional discovery on these issues in the future." (R. pp. 11-13)

Judge Goodstein also found that Appellants had failed to comply with the March 15, 2013 and June 3, 2013 Orders: "Appellants failed to provide discovery responses in accord with this Court's March 15, 2013 and June 3, 2013 Orders and are hereby ordered to pay Respondent's counsel's attorney's fees and costs spent in drafting, preparing and arguing this Motion to Compel

[4] Appellants' Counsel wrote to the Court on September 17, 2013 attaching a red-lined version of the proposed order requesting that the Court characterize its ruling as a granting of Appellants Motion for Protective Order. Counsel also wrote in detail about Appellants objection to the Court granting sanctions for Appellants' conduct. The trial court declined to adopt Appellants suggested revisions to the proposed order. (September 17, 2013 Letter from Appellants' Counsel to the court and Proposed Order)

[5] The scope of time period for the financial information ordered to be produced was based upon one year prior to the events complained of in the Complaint through the present date of the most recent tax return filed by Appellants, which at that time was represented to be 2012.

…" (R. pp. 11-13) Appellants did not comply with the September 23, 2013 Order which later necessitated the subpoenas served upon Margavio and Schmidt and Wells Fargo. (R. p. 560)

On December 3, 2013 the parties entered into a Consent Confidentiality Order which provided protection from disclosure to any third party for any matters Appellants deemed to be confidential. (R. pp. 19-29) On March 10, 2014 the case was designated as complex and assigned to Judge Maite Murphy. (R. pp. 30-31)

On April 28, 2014 Appellants served a subpoena on Regions Bank requesting the banking records of Respondent and of Third Party Defendant Russ Lloyd, the owner of Innovative Waste Management. On May 1, 2014 Respondent filed a Motion to Quash the subpoena arguing that the subpoena was overbroad. (R. pp. 539-540) After conferring with Appellants on the subpoena seeking Respondent's banking records, Respondent entered into a consent order with Appellants by which Respondent agreed to withdraw its objection to the subpoena and allow the production of Respondent's banking records. (R. pp. 32-35)

Appellant Henry Wuertz was deposed in May of 2014. Portions of his testimony conflicted with the financial information previously provided in discovery. (R. pp. 560-564) For example, he testified that his personal net income was between $400,000.00 and $500,000.00 per year which was inconsistent with the financial statement produced. (R. pp. 560-564) Likewise, the financial statement produced by Crest indicated that it had over twenty seven million dollars ($27,000,000.00) in assets in 2012. However, the 2012 Crest tax returns produced by Appellants showed a loss of nine million dollars ($9,000,000.00). (R. pp. 560-564) When asked to explain portions of his tax returns related to these alleged losses, Mr. Wuertz responded, "I'm not an accountant." (R. pp. 560-564) In addition to the inconsistencies between the court-ordered production and the testimony, Mr. Wuertz was unable to give answers to basic questions such as:

(1) how much net income he had made in any of the last few years, (2) what year he had last filed his taxes, and (3) what Crest's net worth was. (R. pp. 560-564) Mr. Wuertz identified Margavio and Schmidt as Appellants' accountant and identified Wells Fargo as their banking institution.

Given these inconsistencies discovered in Mr. Wuertz's deposition and the failure to provide full discovery responses in accord with Judge Goodstein's September 23, 2013 Order, Respondent issued subpoenas to Margavio and Schmidt seeking Appellants' accounting records and to Wells Fargo seeking Appellants' banking records. (R. p. 560) The scope of the requests was 2009 to the present. The information was sought for the purpose of verifying income and alleged economic losses related to the matters in controversy and to verify the testimony of Mr. Wuertz. (R. pp. 560-564)

On December 5, 2014 Appellants filed a Notice of Motion to Quash and Motion for Protective Order relating to the Margavio and Schmidt and Wells Fargo subpoenas. (R. pp. 539-540) Appellants again failed to make any attempt to confer with Respondents pursuant to Rule 11 prior to filing their Motion. (R. p. 540) Appellants argued that (1) the subpoenas to Margavio and Schmidt and Wells Fargo were procedurally defective, (2) the information sought was protected by the Right to Financial Privacy Act, (3) and that the financial records sought by Respondent were not likely to lead to the discovery of admissible evidence. (R. p. 539)

Respondent filed a memorandum in opposition to Appellants' Motion to Quash on April 3, 2015. Respondent informed the Court that the subpoenas were necessary specifically due to the failure of Appellants to comply with the September 23, 2013 Order, failure to provide full and accurate discovery answers and because Appellant Wuertz's deposition answers were inconsistent with the discovery responses. (R. pp. 560-564) Respondent maintained that the subpoenas were properly served in accord with the South Carolina Interstate Deposition and Discovery Act, S.C.

Code Ann. §15-47-100 (1976) and that the Right to Financial Privacy Act did not apply. Respondent further argued that given the Confidentiality Order entered there was no threat of public disclosure. (R. pp. 557-559)

Judge Murphy heard arguments on Appellants Motion to Quash in chambers on April 6, 2015.[6] In denying Appellants' Motion to Quash and Motion for Protective Order in full, the court noted "[a]t the hearing the issues argued centered around relevancy and scope of the subpoenas at issue." (R. pp. 36-38) The court ordered "the subpoenas issued to Wells Fargo and Accountants Margavio and Schmidt are relevant; The scope of the subpoenas shall be limited to the years 2009 to the present; and Respondent shall re-issue the subpoenas in accordance with this order." (R. pp. 36-38)

Respondent promptly issued a subpoena to Margavio and Schmidt in Louisiana seeking Appellants' tax and accounting records. Margavio and Schmidt responded to the subpoena some months later (after the case had been mistakenly dismissed by the Clerk and was on appeal) by providing Appellants' financial records through 2013. (R. p. 157) At the same time, Respondent attempted to domesticate and serve a subpoena upon Wells Fargo in Texas but was unable to do so as that jurisdiction required an additional consent order for the purpose of domestication of the subpoena. (R. p. 168, p. 572, pp. 577-589)

On April 8, 2015 the parties were ordered to mediate this case. At mediation a settlement was reached in which Appellants agreed to pay a settlement amount within 30 days. The Appellants failed to pay the agreed upon settlement amount and breached the settlement agreement. The case was mistakenly dismissed by the Clerk of Court and Respondent appealed the dismissal.

[6] There is no transcript of these proceedings.

Respondent's appeal was granted and the case was remanded back to the lower court to be set for trial.

Given the long delay, the financial information previously sought by Respondents in 2013 needed to be updated. On March 26, 2019 Respondent served an updated subpoena on Margavio and Schmidt. (R. p. 572, pp. 577-589) The subpoena requested updated records through the present. (R. p. 572, pp. 577-589) Appellants' counsel was copied on the correspondence to the Louisiana Clerk of Court and made no objection regarding the subpoena. (R. p. 572, pp. 577-589)

On March 27, 2019 the Respondent wrote to Appellants' Counsel and requested that Appellants provide updated financial statements pursuant to S.C.R.C.P. 26I (R. p. 577) Also, Respondent advised Appellants that Harris County Texas required an additional consent order to domesticate the Wells Fargo subpoena, attached a proposed consent order, and requested that Appellants sign the consent order so that Respondent could effectuate the Wells Fargo subpoena. (R. p. 168, pp. 577-579) Respondent also requested that Appellants produce the records themselves to avoid the unnecessary time and expense. (R. pp. 577-589) The time period specified for the Wells Fargo subpoenas was January 2009 through the present. (R. pp. 577-589) Respondent referred Appellants to the Court's prior orders authorizing this discovery and requested an immediate response if Appellants were unwilling to provide the executed consent order for the Wells Fargo subpoena and provide updated financial statements. (R. pp. 577-589) Respondents requested and was granted an April 22, 2019 telephone conference with the court to discuss these discovery requests in addition to scheduling issues.[7] (R. pp. 572-573, pp. 736-739) When the April

[7] The April 22, 2019 conference with the Court to handle outstanding discovery matters and scheduling for the date certain trial constituted a Rule 26(f) conference. The function of such a conference, according to the Advisory Committee note is to "prevent discovery abuse by encouraging the court to intervene when abuse occurs, or when an attorney has failed to obtain the cooperation of opposing counsel and should have the assistance of the court." S.C.R.C.P. 26(f)

22nd telephone conference was scheduled, Appellants' counsel responded to Respondent's March 27, 2019 letter and advised that he would provide a response on the requested financial statements and the Wells Fargo consent order prior to the April 22nd conference. (R. pp. 572-573, pp. 577-589) Appellants did not provide any response on those issues prior to the April 22nd teleconference. (R. pp. 572-573, pp. 577-589) In the meantime, Margavio and Schmidt filed a motion to quash the subpoena, in Louisiana, despite the Court's April 6, 2015 Order authorizing the subpoena. (R. pp. 572-573, pp. 577-589)

During the April 22nd telephone hearing with Judge Murphy, Respondent's Counsel referenced the prior orders directing the disclosure of Appellants' financial information and summarized Respondent's efforts to acquire the records via subpoena. (R. p. 573) Respondent also advised the court of Appellants' failure to provide the updated financial statements and to sign the consent order necessary for the domestication of the Harris County Wells Fargo subpoena. (R. p. 573) In light of Appellants' refusal to provide the financial statements, cooperate with the Wells Fargo subpoena and third party efforts in Louisiana to quash the court-ordered Margavio and Schmidt subpoena, Respondent moved that Appellants be ordered to provide updated sworn financial statements and executed authorizations authorizing the release of their bank and accounting records held by Wells Fargo and Margavio and Schmidt. (R. p. 573) The court acknowledged Respondent's request at the conference and asked Appellants' counsel for a response. (R. p. 573) Appellant's counsel advised the Court that he required until May 6, 2019 to provide an answer to Respondent's requests. (R. p. 573)

May 6, 2019 passed with no response from Appellants and Respondent's Counsel advised Appellants they had missed the deadline. (R. p. 573) On May 7, 2019 Appellants' counsel replied that Appellants had no duty to supplement the 6 years old financial statements, refused to provide

authorizations for the bank and accountant records, and argued that Appellants did not have the ability to authorize the release of their own banking and accounting records. (R. pp. 590-591) Appellants instead offered to provide a financial statement that was being constructed for use in Appellant Henry Wuertz's criminal trial in which he had been indicted for illegally dumping toxic waste from his fuel refinery into a federally protected bayou in Texas. (R. pp. 590-591) However, Appellants failed to provide that financial statement. (R. p. 573)

On May 15, 2019 Respondent filed its Third Motion to Compel requesting an Order requiring Appellants do the following:

1) Produce updated, sworn, certified financial statements for each Defendant, and

2) Provide executed authorizations for the production of the Wells Fargo and Margavio and Schmidt records from 2009 through the present date or, in the alternative, produce the records themselves, and

3) Pay Plaintiff's attorneys fees and costs related to re-litigating these issues, and

4) For any other relief deemed appropriate.

(R. pp. 570-591) Respondent's counsel attached the prior discovery orders of the court, an affidavit detailing Appellants' pattern of discovery abuse and setting out the time that had been spent on issues created by the discovery abuse. (R. pp. 570-591, 592-594) No written response to Respondent's Third Motion to Compel was filed by Appellants until after the motion was heard and decided by the court.[8]

[8] Appellants Memorandum in Response to Plaintiff's Third Motion to Compel indicates that it was signed by Appellants' counsel on June 11, 2019. However, the date stamp on Appellants' electronic filing indicates June 25, 2019 as the filing date.

On June 5, 2019 a hearing was held on Respondent's Third Motion to Compel. Respondent's counsel presented the prior discovery orders as context, summarized Appellants' conduct and provided argument on why the requested relief was relevant and necessary. (R. pp. 153-156) Even though the Court had previously ruled upon the relevancy of the financial information sought, Respondent offered the following regarding the relevancy of the financial statements and for the authorization of the release of Appellants' financial records:

> "Remember, our client is alleging that we've got a 12 million dollar business loss, in addition to a million dollars for the theft of oil. And as that money is coming out of our client's coffers, the money has got to be going somewhere. So in addition to matters of collectability … we're talking about a business loss, the taking of a client which continues to be profitable for these defendants. So we are entitled to know what money they have received in their accounts from that business account."

(R. p. 156, lines 5-16)

In response, Appellants represented to the court that they would provide the financial statement being constructed in connection with Henry Wuertz's criminal trial and that they would provide an executed 4506T form to allow Respondent to access the tax transcripts Appellants had filed with the IRS. (R. p. 162 lines 15-19) Appellants argued that they should not be required to sign authorizations for the release of the financial records because the information was precluded by Judge Dickson's 2013 Order, was not relevant, and because Respondent's subpoena to Margavio and Schmidt had been quashed in Louisiana. (R. pp. 162-167)

On June 18, 2019 the Court granted Respondent's Third Motion to Compel. (R. pp. 40-42) Judge Murphy ordered Appellants to sign authorizations for the release of their bank and accounting records within 7 days of the Order and to produce sworn certified financial statements within 21 days of the Order. (R. pp. 40-42) The Court also sanctioned Appellants for their noncompliance with the Court's prior order, finding Appellants had failed to comply with a prior

order to produce relevant, discoverable material, and required Appellants to pay attorney fees in the amount of One Thousand Nine Hundred and Fifty Dollars ($1,950.00). (R. pp. 40-42)

On June 25, 2019, the due date specified for the production of signed authorizations, Appellants filed a response in opposition to Respondent's Third Motion to Compel and a Motion to Amend the Court's order pursuant to S.C.R.C.P. 59 (R. pp. 765). The Court reviewed briefings from the parties and on August 1, 2019 issued an order amending its June 18th Order, still granting in full the relief requested by Respondent but altering its original Order allowing different classes of individuals to sign the requested authorizations. (R. pp. 43-45). The authorizations were to be signed within seven days and financial statements were to be produced within 21 days. (R. pp 43-45)

On August 9, 2019, after the Court's deadline had passed for the Appellants' production of authorizations and payment of sanctions without any production from Appellants, Appellants' counsel sent an e-mail to Respondent's counsel representing that he had not seen the August 1, 2019 Order and would obtain a copy of it. (R. p. 685) Respondent's Counsel sent a communication sixteen minutes later stating the deadline had already passed and requesting information on when Appellants would provide the court ordered authorizations. (R. p. 687)

On Monday August 12, 2019 counsel for Appellants requested copies of the authorizations that were to be signed. (R. p. 676, p. 688) Respondent's counsel had previously included these in their motion but provided them again to Appellants' Counsel at 10:03 am on August 12th and again requested when they would be signed. (R. p. 676, p. 692) Appellants' Counsel informed Respondent's Counsel that he did not believe there would be any issue getting all the signed authorizations to Respondent's counsel by August 16, 2019. (R. p. 676, p. 692) The executed authorizations were not provided by Appellants by August 16, 2019. (R. p. 676, pp. 684-703) On

August 19, 2019 Appellants' Counsel wrote that Mr. Wuertz was "meeting with the accountant later today" and he expected to have "something by tomorrow morning." (R. p. 676, pp. 684-703) Respondent's Counsel responded via e-mail later that day asking for Counsel to provide the signed authorizations within two days. No response was received. (R. p. 694)

On August 23, 2019, Respondent's counsel sent Appellants a letter, pursuant to S.C.R.C.P. 11, advising that Appellants had failed to comply with the Court's order on the signed authorizations and requesting compliance before noon on August 28, 2019. (R. p. 676, pp. 696) Appellants' Counsel e-mailed Respondent's Counsel at 11:00am on August 28, 2019 requesting until the end of the day to comply with the Court's August 1, 2019 Order. Appellants provided nothing further on August 28, 2019. (R. p. 676, pp. 684-703)

On August 29, 2019 Appellants produced certain documents purported to be the 2016 and 2017 tax returns of Crest Energy Partners LP, and a financial statement for Henry Wuertz. Appellants' counsel wrote, "[s]tand by, more to come" (R. p. 677, p. 698). On August 30, 2019 Appellants produced a letter from Sean K. Butler, an accountant who represented in the letter to have previously prepared tax returns for Crest Energy Partners, L.P. and is "familiar with that entity's corporate structure and financial condition." This document claimed that none of the Crest Appellants nor Dunhill Appellants have any real income in the 2016 and 2017 tax years and have not filed tax returns for 2018. (R. p. 677, 698) This document was not a financial statement for any entity and was not to be responsive to the Court's Order. (R. p. 677) Appellants' Counsel's e-mail transmitting these documents again stated "[m]ore to come…" (R. p. 700) No further discovery materials were produced. Appellants never produced financial statements for the Crest or Dunhill Appellants and refused to produce executed authorizations for the financial records. Also,

Appellants did not pay the $1,950.00 in monetary sanctions nor make any filing with the court regarding their inability to do so. (R. pp. 672-683, pp. 176-204)

On August 30, 2019 (the Friday before Labor Day) at 4:30 pm, Counsel for Appellants sent a letter to the Court stating he had complied as much as he would with the June 18th and August 1st Orders and requested that the Court hold him in Contempt for his client's refusal to comply with the remaining portions of the August 1, 2019 Order. (R. pp. 677-678, pp. 704-706) Appellant's counsel also wrote that he would be serving a notice of appeal that day. (R. pp. 677-678, pp. 704-706) On September 3, 2019 Respondents received by courier what purported to be a Notice of Appeal signed by counsel for Appellants. (R. pp. 677-678, pp. 707-719)

On September 13, 2019 Respondent filed Plaintiff's Motion for Sanctions Pursuant to S.C.R.C.P. 37 (R. pp. 672-683). No written response to Plaintiff's Motion for Sanctions was ever filed (R. pp. 764-772). A hearing was held on Respondents' Motion for Sanctions on September 23, 2019. Respondent summarized Appellants' noncompliance with the June 18th and August 1st Orders and provided correspondence, affidavits and prior orders in support of its motion and allegation that such noncompliance was willful. Specifically, Respondent argued that Appellants had failed to provide the court-ordered financial statements for the Crest and Dunhill Appellants, failed to provide the court-ordered executed authorizations for the financial records, and failed to pay the $1,950.00 in ordered monetary sanctions. (R. p. 677) Respondent further argued that it had been unduly prejudiced by Appellants' failure to comply with the June 18th and August 1st Orders given that trial was scheduled to begin on November 3, 2019. (R. pp. 672-683, pp. 176-204)

Appellants' counsel argued that he had complied with the Order as much as he could, that his clients were unable to pay the monetary sanctions ordered by the Court and requested the Court to issue an order finding Appellants in Contempt so they could appeal the August 1, 2019 discovery

order. (R. pp. 176-204, pp. 707-719) The following exchange occurred between Judge Murphy and Mr. Marvel at the September 23, 2019 hearing:

> THE COURT: Mr. Marvel, let me ask you this question. You are obviously an officer of the Court. So what you are telling me is that I am going to take what you say as if you are under oath today; do you understand?
> MR. MARVEL: Certainly.
> THE COURT: All right. Your letter to me is basically to find your client in contempt. For contempt that requires a willful violation of this Court's order. You are under oath telling me that your client has willfully violated this Court's order so that you can appeal; is that correct?
> MR. MARVEL: My client has directed me to pursue an appeal.
> THE COURT: Because they have failed to comply with this Court's orders. You have multiple orders awarding sanctions and awarding compliance with the discovery process that have not been complied with. This has been going on for seven years. Judge Dixon's order of 2012, I do recall that motions hearing and motions subsequent to that, because circumstances have changed. As stated in that order, the grammar of what was discoverable in 2015, 2016 has changed. Your client has failed to abide by all of these Court orders – refuses to do so. Now you are asking me to hold them in contempt. So you are telling me that they are in willful violation of these Court's orders. Is that what you are asking me?
> MR. MARVEL: First of all, the record is clear –
> THE COURT: The record is clear, sir. Just answer my question. Yes or no, are you asking me to find your client in contempt for being in willful violation of this Court's orders? Is that what you are asking me to do?
> MR. MARVEL: I am asking for the Court to find us in contempt, not because we believe that we have violated any prior order, but to the extent that Mr. Gruenloh is requesting that my clients sign the authorizations that Mr. Gruenloh has provided us, to my knowledge, is the only thing that we have not done in compliance with that order.
> THE COURT: Well –
> MR. MARVEL: Your Honor –
> THE COURT: Please let me finish. I didn't interrupt you during your presentation. You have filed nothing to the effect that they couldn't afford the sanctions; that you would not be able to comply without any financial documentation. The documentation has been requested, and you have filed piecemeal responses and nothing to back up what was previously ordered by Judge Goodstein before I even heard the case. So you have multiple years of willful disobedience of this Court's order, and now you are asking me to

> find you in contempt, so that basically you can appeal and put this case off three or four more years. That is basically what you are asking me to do; is that correct?
> MR. MARVEL: We do intend to appeal the Court's order. That is correct, Your Honor. I don't believe that the failure to pay the attorney's fees is willful.
> THE COURT: But you didn't file anything that you couldn't pay. There has been nothing filed with Court, that I am aware of, that once that order was issued, you filed any financial statement saying, "We just can't pay it." You just didn't do it.
> MR. MARVEL: That is correct, Your Honor. We didn't file anything.
> THE COURT: So multiple Court orders. You just didn't do it. Multiple Court orders you just didn't do it. So, counsel, anything else you would like the Court to consider at this juncture?
> MR. MARVEL: No, Your Honor. I guess my only point on that issue is that we wanted to produce everything that we could and that we felt was available to produce.
> THE COURT: Sir, wanting to do something and then backing it up is a whole different ballgame from just appearing in court and saying, "I will do it one of these days." You are wanting to do it and not providing responses as to why you can't do it or your inability to do it is a whole different ballgame, sir. So this constant manipulation of the process really is, quite frankly, not reasonably optimistic that you will ever comply with this Court's orders.

(R. pp. 197-200)

The Court granted Respondents Motion for Sanctions on October 1, 2019 and stated:

> "Defendants have engaged in a deliberate pattern of discovery abuse and willfully failed to follow this Court's August 1, 2019 Order. For these reasons, as set out in detail below, the Court grants Respondent's Motion for Sanctions pursuant to Rule 37 of the South Carolina Rules of Civil Procedure and hereby strikes all pleadings of the Wuertz Appellants."

(R. pp. 46-47)

Law and Argument

The Appellants have addressed a variety of arguments seeking to undermine the previous orders of the trial court but the only Order properly before the court is the October 1, 2019 Order

granting sanctions. As such, the only reviewable question before this Court is whether the October 1, 2019 Order was entered in error.

Upon a finding that the October 1, 2019 Order is the only order properly before the Court the review of the order is limited to evaluating whether the trial court abused its discretion in granting sanctions. In awarding sanctions pursuant to S.C.R.C.P. 37 the trial court must have considered four factors in order to justify the grant of sanctions: 1) the nature of the discovery sought, 2) the discovery posture of the case, 3) the degree of prejudice caused by their failures 4) the willfulness of the conduct. *See*, *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (1997). If the sanction is tantamount to entering default, as it is in this case, the moving party must demonstrate bad faith, willful disobedience to the rules of discovery or the court, or gross indifference to the rights of the other party. *See*, *Griffin Grading and Clearing, Inc. v. Tire Service Equipment Manufacturing Co., Inc.*, 334 S.C. 193, 198-199, 511 S.E.2d 716, 718 -719 (S.C. App. 1999)(citing *Baughman v. AT&T Co.*, 306 S.C.101, 410 S.E.2d 537 (1991)).

I. IS THE ONLY ORDER PRESERVED AND PROPERLY ON APPEAL THE OCTOBER 1, 2019 ORDER GRANTING SANCTIONS?

The October 1, 2019 Order of the Court is the only order properly before the Court on Appeal. The trial court granted Respondent's Motion pursuant to S.C.R.C.P. 37, finding that Appellants had willfully abused the discovery process, making the impending date certain trial impossible, prejudiced the Respondent through their conduct and warranted the striking of their pleadings. Appellants brought this appeal challenging the October 1st Order as well as attacking the validity of the trial court's earlier orders.

Appellants inappropriately attempt to bootstrap a review of all the prior discovery orders of the trial court into their appeal of the October 1, 2019 Order granting sanctions. Appellants argue that the prior discovery orders of the trial court including the March 15, 2013 Consent Order, the

June 3, 2013 Order granting Respondent's Amended Motion to Compel, the September 27, 2013 Order granting Respondent's Second Motion to Compel, the April 6, 2015 Order denying the Motion to Quash, the June 18, 2019 Order Granting Respondent's Third Motion to Compel, and the August 1, 2019 Order reaffirming the Grant of Respondent's Third Motion to Compel in response to Appellants S.C.R.C.P. 59I motion were all entered in error and cannot be used to support the Court's October 1, 2019 Order granting sanctions. (Appellants' brief at 14 – 24.) However, Appellants did not request to be held in contempt or appeal any of these prior orders and so they are not subject to this appeal.

Orders which are not appealed are the law of the case and therefore are not proper for review before this Court. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). (An unappealed ruling is the law of the case and requires affirmance and reliance.) *See Also*, *Johnson v. S.C. Nat'l Bank*, 285 S.C. 80, 82, 328 S.E.2d 75, 76 (1985), *Cooper Tire and Rubber Co. v. Perry*, 201 S.E.2d 245 (1973). Additionally, if a party complies in anyway with an order, they lose the ability to later challenge that order.

> "An order directing a party to participate in discovery is interlocutory and not directly appealable . . . . Instead of appealing immediately, a non-party has two alternatives. He may either comply with the discovery order and waive any right to challenge it on appeal, or refuse to comply with the order and appeal after he is held in contempt for his failure to comply." *Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881, 882 (1986).

Much of Appellant's brief is spent challenging the validity of the June 12, 2019 Order granting Respondent's Third Motion to Compel. That order sanctioned Appellants and ordered Appellants to sign authorizations for the release of banking and accounting records, provide sworn certified financial statements, made the finding that Appellants failed to "produce relevant discoverable material to Plaintiff" and awarded attorney fees. (R. pp. 40-42)

A review of the procedural history reveals that Order is not subject to this Appeal. Appellants filed their Motion to Alter or Amend a Judgment pursuant to S.C.R.C.P. 59I on June 25, 2019. (R. pp. 667-669) On August 1, 2019 the Court entered a Form 4 order which amended the Motion Granting the Third Motion to Compel allowing Authorized Principals or Accounting Professionals to sign the authorizations and the remainder of the relief requested by Appellants was denied. (R. pp. 43-45) Appellants had two choices at that time, 1) request contempt and challenge the order on appeal or, 2) comply with the order and waive their right to appeal it later. Appellants accepted August 1, 2019 ruling, failing to follow proper procedure for being held in contempt and therefore waived their right to challenge the order on appeal. The following language from *Davis v. Parkview Apartments*, is analogous to the current facts:

> "Appellants did not follow that [being held in contempt] route here. Rather, they continued along in the litigation, attempting to divert the implementation of the court's rulings by providing incomplete responses and causing delay through other tactics while they decided whether or not to surrender to the possibility of being held in contempt of court. However, during this time, Appellants continued to accept the circuit court's formulation of discovery. Right or wrong, these decisions form the law of the case, and Appellants are bound by them now." *Davis v. Parkview Apartments*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014)

Appellants did not make any request to be held in contempt regarding the June 12, 2019 or August 1, 2019 Orders as required by *Davis*. Instead, the record reflects they acted just as the appellant did in *Davis*; Appellants made repeated assurances[9] that they would provide the ordered discovery and comply with the August 1, 2019 Order. (R. pp. 684-703, pp. 50-52) In addition, Appellants partially complied with August 1, 2019 Order by providing some of the ordered discovery between August 1, 2019 and August 30, 2019. (R. p. 677, pp. 684-703) After a month

[9] Appellants' Counsel sent e-mails stating he was continuing to attempt to comply with the order on August 12, August 19, August 28, and August 30. (R. pp. 684-703)

of feigning compliance with the order, Appellants served what purported to be a Notice of Appeal of the prior discovery orders delivered by Courier to Respondent's office on September 3, 2019 and signed August 30, 2019. (R. pp. 51-52) The orders Appellants sought to appeal in their August 30th un-filed Notice of Appeal were the very same orders that Appellants' counsel represented he would comply with and for which he provided partial responses. (R. pp. 684-703) Appellants later admitted in open Court that the purported notice of appeal was never filed with any court. (R. p. 194 line 25, p. 195 lines 1-6) After repeated assurances from Appellants that they were complying with the August 1, 2019 order of the Court and would soon provide the ordered materials but failed to, Respondent filed their Motion for Sanctions on September 13, 2019. (R. pp. 672-683)

Appellants filed no response to the Motion for Sanctions and a hearing on the matter was held on September 23, 2019. (R. pp. 764-765, pp. 176-204) On October 1, 2019 the trial court granted Respondent's Motion for Sanctions and struck Appellants' pleadings. (R. pp. 46-57) On October 9, 2019 Appellants filed their Notice of Appeal.

The Supreme Court of South Carolina addressed a similar circumstance to this case in *Davis v. Parkview Apartments*. The Court in addressing appellants' challenges to a privilege order and prior discovery order stated,

> "Only after Respondents filed a motion for sanctions, and Appellants were found to be in contempt of court as part of those sanctions, did they appeal. While this was a final order for purposes of appellate review, as it ordered dismissal of the case, the merits of the underlying discovery orders are not before this Court on appeal. Thus, despite Appellants' vehement objections to the Privilege Order and Discovery Order, the only reviewable question before this Court is whether the sanctions were properly awarded." *Davis v. Parkview Apartments*, 409 S.C. 266, 281, 726 S.E.2d 535, 543 (2012).

As such, the trial court's October 1, 2019 order granting sanctions pursuant to S.C.R.C.P. 37 is the only order which has been properly appealed. Appellants failed to preserve any issues related

to the orders entered prior to the October 1, 2019 Order; therefore they are now the law of the case. *See*, *e.g.*, *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013), *Davis v. Parkview Apartments*, 409 S.C. 266, 726 S.E.2d 535 (2012), *Johnson v. S.C. Nat'l Bank*, 328 S.E.2d 75, 76 (1985), *Cooper Tire and Rubber Co. v. Perry*, 201 S.E.2d 245 (1973).

Davis v. Parkview clearly illustrates that if Appellants fail to appeal the discovery orders, which in a later order for sanctions, make up the grounds for the sanction, the Appellant Court may only review whether the trial court has abused its discretion in granting the Sanction. Any issues pertaining to the underlying discovery orders have been waived. *See*, *Davis v. Parkview Apartments*, 409 S.C. 266, 281, 726 S.E.2d 535, 543 (2012).

II. DID THE TRIAL COURT ABUSE ITS DISCRETION IN GRANTING THE OCTOBER 1, 2019 MOTION STRIKING APPELLANTS PLEADINGS?

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

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

Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (1997). If the court finds the conduct offends these factors a sanction is justified.

In this case, "[w]here the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience, or gross indifference to its rights to justify the sanction." *Griffin Grading and Clearing, Inc. v. Tire Service Equipment Manufacturing Co., Inc.*, 334 S.C. 193, 198-199, 511 S.E.2d 716, 718 -719 (S.C. App. 1999)(citing *Baughman v. AT&T Co.*, 306 S.C.101, 410 S.E.2d 537 (1991)).

The Nature of the Discovery Sought

In evaluating the first factor, the underlying discovery orders which are not subject to this Appeal demonstrate that Respondents sought the financial discovery through numerous discovery requests and subpoenas and that the information sought was relevant, not privileged, and discoverable. The record reflects that the trial court found Appellants' accounting records and banking records to be relevant and necessary to the claims of economic damage and there are ample examples in the record of Respondent's arguments and the trial court's orders to that effect. (R. pp. 36-38, pp. 151-175, pp. 40-42, pp. 11-13, p. 570) The record also reflects that Respondent attempted to procure the sought after discovery through numerous methods (discovery requests, subpoenas, deposition, and finally by authorization) before asking for relief in their Third Motion to compel in the form of the requested authorizations.

Perhaps most telling is that Appellants sought discovery of the same nature, banking records for the Respondent and its principal owner. The difference being that after Respondent filed a Motion to Quash, engaged in meaningful discussions regarding the scope of the subpoena, and withdrew their Motion to Quash and cooperated with Appellants in acquiring the discovery.

(R. pp. 32-35) Considering the claims and counterclaims both alleged economic losses it would seem logical that the discovery was proper as to both parties.

The Discovery Posture of the Case And Prejudice

At the time of the filing of the Motion for Sanctions, this case had been in the South Carolina State Courts for seven years. The Court found that, prior to the Motion for Sanctions, three separate motions to compel filed by Respondent had been granted and Appellants' objections and motions to quash had been denied. (R. pp. 7-13, pp. 36-38, pp. 40-42) At the time of the hearing for the Motions for Sanctions, the date certain trial was 56 days away and pretrial motions due in 26 days. Discovery which was central to Respondent's claims of economic damage should have been produced long before the Court needed to address the Motion for Sanctions.

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

Willfulness of the Conduct

The trial court found that Appellants' conduct was willful as required in *Samples*, for the grant of a sanction but, further more found that Appellants were willfully disobedient and their

conduct constituted bad faith pursuant to *Griffin.* In the Order granting sanctions the Court makes the finding that prior to the Motion for Sanctions, the Courts had granted three separate motions to compel and denied a motion to quash. (R. pp. 46-57, pp. 7-13, pp. 36-38, pp. 40-42) The Court found that monetary sanctions were awarded in response to these orders yet, the monetary sanctions did not change the behavior of Appellants. (R. p. 54) The Court found that Appellants made representations to the Court and Respondent which they never intended to honor and demonstrated through their repeated assurances that compliance was forthcoming, only to later file motions for protective orders, a notice of appeal purporting to appeal unappealable discovery orders and finally requested a finding of contempt on the eve of trial. (R. p. 54, ¶1, p. 55, ¶1, pp. 282-290, pp. 478-515, pp. 556-565)

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

In *Davis* there were repeated discovery abuses, which resulted in not only a finding of contempt, but also the striking of the Appellants pleadings and an entry of default. That case is

analogous to this case. The Court in *Davis* stated that when a discovery order is issued the party seeking to challenge the order has two options, comply and waive any right to challenge it or refuse to comply with the order, be held in contempt, and appeal the contempt. *Davis* at 543.

In *Davis* the Court of Appeals found that the sanctioned party acted willfully and in bad faith when they,

> "continued along in the litigation, attempting to divert the implementation of the court's rulings by providing incomplete responses and causing delay through other tactics while they decided whether or not to surrender to the possibility of being held in contempt of court."

Davis at 543.

Appellants' Counsel's numerous representations that they would comply with the Orders set out above, coupled with their subsequent refusal to comply after deadlines (and extensions to deadlines) have formed a pattern. As in *Davis*, the Appellants attempted to avoid contempt and dance around the orders of the Court for the purpose of delay and, as in *Davis*, the Court properly exercised its discretion in striking Appellants' pleadings.

The trial court's October 1, 2019 order properly evaluated the factors set forth in *Samples* and *Griffin*, finding willful disobedience to the orders of the court, bad faith in their actions related to the discovery process, and a prejudicial effect on the Respondent. As such the Circuit Court's order of October 1, 2019 striking the pleadings of Appellants should be affirmed.

III. IF APPELLANTS ARE ALLOWED TO CHALLENGE PRIOR DISCOVERY ORDERS CONTRARY TO *DAVIS v. PARKVIEW APARTMENTS*, WOULD ANY OF APPELLANTS' ARGUMENTS MATERIALLY AFFECT THE TRIAL COURT'S GRANT OF SANCTIONS?

Appellants have presented four issues they ask this Court to address in their Appeal and their Initial Brief is divided into several subparts intermixing arguments for the four issues into those subparts. While most of these issues challenge the validity and factual basis of the trial court's

prior discovery orders which are not on appeal, the Respondent will address each of Appellants' arguments in the sequence in which they appear in Appellants' brief.

The June 12, 2019 Order Granting Respondent's Third Motion to Compel is Supported by the Record and Contains no Errors of law.

Appellants challenge the trial court's grant of Respondent's Third Motion to Compel. The Court's order was signed June 1, 2019 and an amended order in response to Appellants' 59I motion filed on August 1, 2019. As noted above, Appellants did not appeal the June 1, 2019 or August 1, 2019 Orders and therefore have not been preserved for appellate review. *Davis* at 281. Regardless, Respondent will address all Appellants' contentions.

First, Appellants argue that any order which came after the June 3, 2013 Order was an improper collateral attack on a prior interlocutory order. (Appellants Brief p.29) Appellants make the same argument regarding the September 27, 2013 Order. (Appellants Brief p.29) Next, Appellants argue that they cannot be forced or ordered to sign authorizations pursuant to Rule 34 of the South Carolina Rules of Civil Procedure and claim that Respondent's only option to obtain the necessary discovery was through a subpoena. (Appellants Brief p.30-32) Finally, Appellants challenge that the discovery compelled by the June 12, 2019 was not relevant. (Appellants Brief p.33) Each of these arguments are addressed in order below.

The Appealed Orders are not Collateral Attacks on the Prior Orders nor are the Prior Orders Subject to this Appeal.

Appellants claim that the September 27, 2013 Order, the April 6, 2015 Order, and the June 12, 2019 orders were all improper collateral attacks on the June 3, 2013 Order. As stated above, those orders are the law of the case and are not subject to this appeal. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) Appellants accepted the prior rulings, failing to follow proper procedure for being held in contempt to challenge the orders on

appeal. Any perceived defect in the prior orders should have been addressed at the time such orders were issued utilizing the framework explained in *Davis*. (*Davis* at 281)

Despite the fact that any potential issues regarding these orders are not properly preserved for appeal the record shows that the subsequent orders for discovery do not overrule Judge Dixon's order but instead allowed additional discovery as the case progressed. In each progressive order the Respondent made a showing to the trial court that the discovery sought was relevant, discoverable, and necessary over objections from Appellants at each juncture.

Respondent's Second Motion to Compel was in response to Appellants' failure to respond to their supplemental discovery requests seeking financial information related to Appellants' claimed losses and Respondent's claims of economic loss. (R. pp. 394-412) The Court found the discovery was proper and granted an order compelling it. Respondent later issued subpoenas for bank and accounting records following Mr. Wuertz's deposition because his testimony conflicted with the financial documents and tax returns Appellants had previously produced in response to Respondent's First Motion to Compel. (R. pp. 560-564) The record shows that the trial court again found the discovery sought to be necessary and relevant.

The Trial Court did not abuse its Discretion in Ordering Appellants to Execute Authorizations to Obtain the Financial Discovery.

Appellants argue that it was error to require them to sign authorizations for the release of their bank and accounting records. In summary, Appellants argue that the trial court could not command them to execute authorizations under S.C.R.C.P. 34 and so Respondent could only obtain the discovery through subpoena. (Appellants Brief pg 30) Appellants' argument confuses the issue as the court did not order the Appellants to sign authorizations pursuant to S.C.R.C.P. 34 but instead as a failure to provide documents within their "legal right" as a sanction pursuant to S.C.R.C.P. 37.

After the remand to the trial court from this Court in the unrelated appeal, Respondent sought updated discovery which had previously been deemed relevant and discoverable and ordered by the trial court. Appellants made numerous representations that they would comply with the previous order of the trial court, first making representations to Respondent's counsel (R. pp. 592-594), then to the trial court, culminating in yet another request for additional time to comply (R. pp. 592-594) and then another failure to provide the promised discovery. Respondent filed their Third Motion to Compel and in the face of Appellants' continual manipulation and refusal to provide the discovery, the trial court ordered the Appellants to provide authorizations for the records.

In South Carolina it is generally accepted that the trial court is given broad discretion to control the scope of discovery. S.C.R.C.P. 26I. The trial court also has broad discretion in ruling on discovery issues and crafting orders in response to a failure to provide discovery pursuant to S.C.R.C.P. 37. *See*, *Dunn v. Dunn*, 298 S.C. 499, 381 S.E.2d 734 (1989). The trial court ordered Appellants to sign authorizations pursuant to S.C.R.C.P. 37 in response to their failure to provide discoverable material which was in their possession, custody, and control.

While it remains the position of the Respondent that Appellants have failed to preserve this issue for appeal, pursuant to *I'On*, there are numerous grounds that support the October 1, 2019 Order. *See*, *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419-20, 526 S.E.2d 716, 723 (2000). (Acknowledging the Court's power to sustain a trial court's ruling on additional grounds beyond those raised in the original order if the record supports such a finding.)

The information Respondent's sought consisted of bank records and client provided documents for their tax returns. These files are generally owned by the client and contain documents provided by the client, whether those are hard documents such as invoices and receipts

or client created documents like bookkeeping entries. This discovery would consist, in large part, of back up information and forms that were once in the sole custody and control of the entities who provided them to the Accountant. Accountants have a requirement to hold such documents as tax professionals for no less than seven years, before destroying them as opposed to the entities themselves who may dispose of them in accordance with their own procedures. Association of International Certified Public Accountants *Management of an Accounting Practice Handbook* (February 1, 2003). In this case the Appellants have represented that they have economic losses yet at the same time preserved none of the supporting documents from which confirm those losses.

The Fourth Circuit has explained that Rule 34's "possession, custody or control of the party" requirement extends to documents which they have a 'legal right' to. The Court has adopted the "Legal Right plus notification test." The documents, especially the documents and bookkeeping entries provided by Appellants to their tax professionals for the purpose of preparation of their tax returns, are within their Legal Right. In an analogous situation the Court has found that documents in possession, custody or control of a party's attorney or former attorney are within the party's control for purposes of Rule 34." *Poole v. Textron, Inc.*, 192 F.R.D. 494 (2000). Federal Courts have addressed the issue of these documents in respect to accounting documents as well, "This order should also extend to documents and evidence not in the actual possession of defendants. If defendants do not have copies of the tax returns and bank account records, they are still in their control within the meaning of Rule 34, since they can obtain certified copies of them from the government agency or bank concerned." *Paramount Film Distrib. Corp. v. Ram*, 91 F. Supp. 778, 781 (D.S.C. 1950)

As discussed above, the Appellants had failed to provide appropriate, relevant discoverable materials within their possession and control in response to multiple Motions to Compel. The

record and law of the case from the prior unappealed orders, show the discovery sought was discoverable, relevant, and not privileged.

The Respondent was not Restricted to one method of Discovery.

Appellants claim that Respondent had no right to obtain discovery on the Appellants' financial records directly from the Appellants and that Respondents only avenue to obtain the discovery was via a third party subpoena. (Appellant Brief at p.32 ¶2) Appellants' argument that Respondent may only utilize one method by which to obtain the discovery is incongruent with S.C.R.C.P. 26. S.C.R.C.P. 26(a) clearly states "Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admissions." The rule continues in subsection (d) in relevant part stating, "methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery."

The record shows that Respondent's sought the discovery via requests, deposition testimony, and subpoenas. Only when Appellants failed to abide by their obligations under the rules of discovery did Respondent request the Court to grant the remedy of requiring signed authorizations for the records pursuant to S.C.R.C.P. 37. (R. pp. 570-591, pp. 592-594) The Court's granting of that request in allowing authorizations to be the particular method of acquiring the discovery was a proper exercise of discretion pursuant to S.C.R.C.P. 37.

The Discovery Ordered by the Court was Relevant and Necessary.

Appellants argue that Appellants' banking and accounting records were only relevant for post-trial collectability issues. Appellants' arguments ignore the important fact that both parties

made allegations of economic damage. (R. pp. 58-86, pp. 87-104) The Appellants' accounting and banking records are relevant and necessary to the claims of economic damage and there are ample examples in the record of Respondent's arguments and the trial court's orders to that effect. (R. pp. 36-38, pp. 151-175, pp. 40-42, pp. 11-13, p. 570)

S.C.R.C.P. 26 provides the method by which discovery can be sought. The Rule in relevant part states: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action […] It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." S.C.R.C.P. 26(b)(1) "In South Carolina the scope of discovery is very broad and 'an objection on relevance grounds is likely to limit only the most excessive discovery request.'" J. Flanagan, South Carolina Civil Procedure 216 (2d ed. 1996)." *Samples v. Mitchell*, 329 S.C. 105, 110, 495 S.E.2d 213, 215 (Ct. App. 1997) "Rule 26, S.C.R.C.P., allows broad pre-trial discovery. 'The Rules do not differentiate between information that is private or intimate and that to which no privacy interests attach. . . . Thus, the Rules often allow extensive intrusion into the affairs of both litigants and third parties.'". *Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853-54 (1994) *Citing*, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 30, 104 S. Ct. 2199, 2206, 81 L. Ed. 2d 17, 25 (1984).

For purposes of admissibility, a higher standard than that of discovery, relevant evidence is defined as evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, SCRE. "The trial judge must have wide discretion on innumerable questions of relevancy before her, and her decision should be reversed only for abuse of that

discretion." *State v. Sweat*, 362 S.C. 117, 127, 606 S.E.2d 508, 513-14 (Ct. App. 2004) *Citing*, *State v. Anderson*, 253 S.C. 168, 182, 169 S.E.2d 706, 712 (1969).

The Appellants' banking and accounting records were necessary and relevant to the claims of economic damage and Respondents have maintained that position and sought this discovery from the beginning of this case:

> "So I would say at the heart of the issue – there's a whole bunch of discovery that hasn't been answered and we will get into that. But at the heart of the issue, those receipts. Show us that you actually spent money on this prior deal and what business did you do with these individual companies. Those are really important things we believe – we're on the trial roster right now for April the 8th and we believe that we've been prejudiced as to the counterclaim and we've certainly been prejudiced as to our ability to prove the loss of business."

(R. p. 117 lines 5-14)

Likewise, Respondent's counsel stated during its argument for its Third Motion to Compel:

> "Remember, our client is alleging that we've got a 12 million dollar business loss, in addition to a million dollars for the theft of oil. And as that money is coming out of our client's coffers, the money has got to be going somewhere. So in addition to matters of collectability … we're talking about a business loss, the taking of a client which continues to be profitable for these defendants. So we are entitled to know what money they have received in their accounts from that business account."

(R. p. 156 lines 5-16) Moreover, the court has made it clear in each of its successive rulings, particularly so in the April 6, 2015 Order denying Appellants Motion to Quash, that these records are relevant: "At the hearing the issues argued centered around relevancy and scope of the subpoenas at issue." The court ordered,

> "[t]he subpoenas issued to Wells Fargo and Accountants Margavio and Schmidt are relevant; The scope of the subpoenas shall be limited to the years 2009 to the present; and Respondent shall re-issue the subpoenas in accordance with this order."

(R. pp. 36-37) It is important to note, as pointed out above that Appellant did not move for a finding of contempt following the Court's April 6, 2015 Order or take any other steps to contest or preserve that matter for appeal. As such the Court's April 6, 2015 is not subject to this appeal and is the law of the case. *See*, *Shirley's Iron Works* at 573, 785.

The Circuit Court's Findings of Fact Are Well Supported by the Record.

Appellants argue that the Court's October 1, 2019 Order is based upon findings that are not supported by the record and, therefore, the October Order was an abuse of discretion. Appellants Initial Brief contains a list of nine (9) excerpts and issues, which Appellants contend to be erroneous findings. (Appellants' Brief at 34-37) First, many of the "erroneous findings" listed by Appellant are not bases of the Court's October 1, 2019 Order but rather dicta providing context for the Order. Second, it is important to note that Appellants never filed a written response to Plaintiff's Motion for Sanctions nor a proposed order. As noted below, each of the following excerpts and issues raised by Appellants are well supported by the record:

1) "Defendants promised to provide discovery requests, including financial information sought by Plaintiff and to pay Plaintiff's attorney's fees as a sanction for its discovery abuse." This statement, referring to the March 15, 2013 Consent Order, is well supported by the record. The March 15, 2013 Consent Order agreed to and entered into by Appellants plainly stated that "the Defendants shall serve their responses, including all responsive documents, to all outstanding discovery requests on or before Wednesday, March 20, 2013." (R. pp. 301-305) The outstanding discovery requests referenced include requests for the Appellants financial information. (R. pp. 330-393) Likewise, Appellants paid Respondent the sum of Five Hundred Dollars ($500) specifically for the purpose of reimbursing attorney fees for time spent pursing the outstanding discovery. (R. p. 481, ¶ 14)

2) "The Defendants failed to comply with the Consent Order and Plaintiff filed an Amended Motion to Compel." This is exactly what occurred and Respondent's Counsel's January 25, 2013 Affidavit attached to the Amended Motion to Compel, provides this sequence of events in detail. (R. pp. 293-294 ¶ 5-9.) Also, Appellants argue that when they filed their First Motion for Protective Order there was not yet an Order that could have been violated. (Appellant Brief at pg. 35) Appellants are well aware of the fact that they signed and entered into the Consent Order on March 15, 2013, well in advance of the filing of their First Motion for Protective Order. Appellants' current argument is an attempt to make use of the delay in the filing of the March 15, 2013 Consent Order which was signed by counsel for both parties on March 15, 2013 but, for reasons unknown, was not filed by the Clerk until April 5, 2013. Timing issues aside, there is ample support in the record that Appellants did not comply with the March 15, 2013 Consent Order and that Respondents filed an Amended Motion to Compel in response.

3) "The Court granted [Plaintiff's Amended Motion to Compel] on August 22, 2013 and ordered Defendants to produce discovery including sworn, certified financial statements." This finding is well supported by the record, specifically by the June 3, 2013 Order granting Plaintiff's Amended Motion to Compel. (R. pp. 7-10) In addition, in granting Plaintiff's Second Motion to Compel Judge Goodstein found that Judge Dickson had granted Plaintiff's Amended Motion to Compel and more importantly, that Appellants had "failed to provide discovery responses in accord with the March 15, 2013 and June 3, 2013 Orders" and granted sanctions for the noncompliance. (R. pp. 11-13)

4) "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." This finding is correct and supported by the record. (R. pp. 482-485, ¶21-32, pp. 12-13)

5) "Issues from the failed settlement were appealed and the case was stayed pending an order of the Court of Appeals for three years." This statement, as Appellants admit in their brief, is correct. The October 2019 Order nowhere states (or implies) that the trial court's denial of Respondent's motion to restore the case in 2015 was the fault of or attributable to Appellant.

6) The record does not contradict the October 2019 Order's description of the April 22, 2019 conference with the Judge Murphy and Appellants have provided no specific cite or support for this allegation. In fact, the October 2019 Order sets out precisely what occurred at the April 22, 2019 hearing. (R. pp. 179-180)

7) Appellants claim 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." This claim is also incorrect. Appellants had been provided copies of the authorizations as a part of their proposed order to the court which copied counsel for Appellants. (R. p. 481, ¶ 14)

8) Appellants argue that there is no support in the record that the Notice of Appeal signed on August 30, 2019, served on September 3, 2019 and never filed with the Court of Appeals was intended to cause delay as stated in the Court's October 2019 Order. In fact, there is ample evidence in the record that Appellants August Notice of Appeal was intended to cause delay and that it did, in fact cause delay. (R. p. 182, lines 22-25, p. 183, lines 1-20, pp. 678-679)

9) Appellants claim that there is no support in the record that Appellants made arguments to the effect that Appellants had "substantially complied with the court's [June 12, 2019] [O]rder," that they "could not file the threatened appeal … without being held in contempt," or that he had been ordered by his client to appeal any order issued by the court." (Appellants' Brief at pg. 37) The exchange which occurred between Judge Murphy and Mr. Marvel at the September 23, 2019 that is set out in full in the statement of facts show that Appellants argued (1) they had substantially

complied with the court's order by providing everything except the ordered authorizations, (2) that Appellants intended to appeal the court's order no matter the outcome or substance of the order, and (3) that Appellants requested the trial court to find them in contempt specifically so that Appellants could file this appeal. (R. pp. 197-200)

Appellants' Motions for Protective Order were Filed in Bad Faith as a Delay Tactic.

Appellants argue that they were forced to file Motions for Protective order due to overly burdensome, irrelevant or otherwise improper discovery propounded by "a plaintiff that was wholly unwilling to compromise, reconsider its positions, or give any quarter." (Appellants' Brief pg. 38) Appellants further state that they 'won' each motion for protective order and therefore the trial court's order on Sanctions is inconsistent and inappropriate. Appellants' arguments are inapposite to the facts in the record.

While the trial court's October 1, 2019 Order granting sanctions provides a history of the prior discovery orders and responses to such orders, it also provides numerous findings between the date the case was restored in 2019 and the October 1, 2019 Order. The actions of the Appellants during that time frame are cited with some particularity and are amply sufficient to support the Court's October 1, 2019 Order. (R. pp. 54-55)

Second, while Appellants argue that their Motions for Protective Order support an overturning of the October 1, 2019 Order, the record bears out their history of protective orders was in bad faith and actually provides additional reasons to affirm the October 1, 2019 Order. *See*, *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419-20, 526 S.E.2d 716, 723 (2000)

The proper and required method by which to seek relief via protective order from a Court is, if a party believes discovery extends beyond the bounds of discovery, to timely consult with opposing counsel and attempting to remedy the dispute. S.C.R.C.P. 11. Here, Appellants attempted

to use the Rules of Civil Procedure to obfuscate and delay. Appellants negotiated and signed a consent order agreeing to respond to already overdue discovery, again failed to provide it and filed their first motion for protective order without consulting Respondent's counsel. (R. pp. 282-290) Appellants then repeated this behavior in response to Respondent's Supplemental discovery, representing they would contact Respondent's due to their failure to produce it and instead waiting days before filing a protective order without consulting Respondent's Counsel. (R. pp. 478-515, pp. 556-565)

The Record reflects that Appellants filed three motions for protective order and on each occasion the motions were filed 1) after the production deadline for the discovery for which the motions were seeking protection and 2) without making any attempt to confer with Respondent. As such, the record reflects that Appellants utilized motions for protective order for the purpose of delay and in bad faith.

Conclusion

Appellants have appealed the trial court's October 1, 2019 Order granting discovery sanctions and striking their pleading as the sanction. Appellants have attempted to improperly bootstrap the trial court's earlier orders into this appeal. Having failed to follow the Court's procedure to appeal prior discovery orders, those orders and their findings are the law of the case and must be accepted as proper. *See Davis v. Parkview*. Despite the Appellants' efforts to inject uncertainty into the record on appeal by challenging these orders, this Court need only evaluate whether the trial court properly exercised its broad discretion to craft a sanction pursuant to S.C.R.C.P. 37 in its October 1, 2019 Order. The trial court's October 1, 2019 Order found Appellants had engaged in willful disobedience to the orders of the court, bad faith in their actions related to the discovery process, and that these actions had an unduly prejudicial effect on the

Respondent and each of these findings was well supported by the record. As such, the Circuit Court's order of October 1, 2019 striking the pleadings of Appellants should be affirmed.

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March 31, 2021

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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY

Court of Common Pleas

Hon. Maite D. Murphy, Circuit Court Judge

Case No. 2019-001719

Innovative Waste Management Inc., Respondent,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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March 31, 2021