

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Chief Justice (Retired)

Civil Case No. 2022-CP-40-00583
Appellate Case No. 2023-000415

Ex Parte: Uber Technologies, Inc. and Riser, LLC,.....Appellants

In re:

Tracy Harvey,.....Respondent

v.

Jennifer Evely and Lyft, Inc. d/b/d Lyft Drives South Carolina...Defendants

Motion to Dismiss

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, Respondent Tracy Harvey requests this Court to dismiss this appeal. As discussed herein, the trial court’s order granting Respondent’s rule to show cause motion—finding Appellants had to provide complete discovery responses within ten days—is interlocutory. Thus, this appeal is not properly before the Court. Accordingly, the appeal should be dismissed, and this matter returned to the trial court to proceed with litigation. *See* Rule 221, SCACR.

Procedural History

By way of background, this case arises from a ride share—automobile accident in which the defendant driver was working for Lyft at the time of the rear-end collision. Notably, the driver

worked for both Appellant Uber and Lyft. Respondent's counsel subpoenaed Appellant Uber's and Appellant Raiser's records through a third-party subpoena. Appellant Uber objected to the subpoena to which Respondent's counsel sought to enforce the subpoena through a Rule to Show Cause motion. The trial court granted Respondent's motion and ordered Appellants to fully comply to the subpoena within ten days and to pay attorneys' fees and costs.

Argument

The trial court's order granting Respondent's Rule to Show Cause motion to enforce the subpoena is interlocutory, and, thus, not immediately appealable. For this reason, this appeal should be dismissed.

Section 14-3-330 of the South Carolina Code sets forth which judgments and orders are appealable. The statute provides, in pertinent part:

The Supreme Court shall have appellate jurisdiction for correction of error of law in law cases, and shall review upon appeal:

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.

S.C. Code Ann. § 14-3-330(2). Our courts have interpreted this language to mean only final judgments and certain interlocutory orders are immediately appealable. *Id.* Thus, when a final judgment has not been rendered, as in this case, the inquiry becomes whether an interlocutory order is immediately appealable.

It is well-settled that an order directing a non-party to submit to discovery is not immediately appealable. *Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881 (1986). A non-party must be found in contempt of the trial court's order before the non-party may appeal the underlying

discovery order. *Id.* In reaching this decision, the Supreme Court explained that a non-party has two options when ordered to submit to discovery: (1) submit to the discovery order or (2) be held in contempt and then appeal. *Id.* In establishing this framework for a non-party to appeal, our Supreme Court noted this is the same rule as in the federal courts. *Id.* (citing *United States v. Ryan* 402 U.S. 532, 1971); *Cobbledick v. United States*, 309 U.S. 323 (1940); *Federal Trade Commission v. Alaska Land Leasing, Inc.*, 778 F.2d 577 (10th Cir. 1985); *Newton v. National Broadcasting Co.*, 726 F.2d 591 (9th Cir.1984)).

While Appellants will likely argue that the Rule to Show Cause order is substantively a contempt order such argument is without merit. The trial court's authority to order discovery is distinct from its contempt power. *See* Rule 45(e), SCRCP ("Failure by *any person* without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued.") (emphasis added). A review of case law demonstrates that there must be a finding of contempt for an appeal to proceed. *Davis v. Parkview Apartments*, 409 S.C. 266, 280, 762 S.E.2d 535, 543 (2014) (stating "to challenge the specific rulings of [a] discovery order[], the normal course is to refuse to comply, suffer contempt, and appeal from the contempt finding"); *Whetstone*, 289 S.C. at 580, 347 S.E.2d at 881-82 ("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.").

Because Appellant has only been ordered to comply with discovery and not held in contempt, this appeal is not properly before this Court. For these reasons, this appeal must be dismissed.

Respectfully submitted,

By: /s/ Whitney B. Harrison

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March 14, 2023
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