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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Maite Murphy, Circuit Court Judge

Appellate Case No. 2023-000757
Case No. 2021-CP-18-1486

John Trenton Pendarvis, ... Respondent,

v.

L.C. Knight, in his official capacity as Dorchester County Sheriff; Mark Keel, in his official capacity as Chief of the South Carolina State Law Enforcement Division; Hugh E. Weathers, in his official capacity as the South Carolina Commissioner of Agriculture; and John Doe(s),..... Defendants,

Of whom, Mark Keel, in his official capacity as Chief of the South Carolina State Law Enforcement Division is ..... Appellant.

APPELLANT'S RETURN TO RESPONDENT'S MOTION TO DISMISS APPEAL

The Appellant Mark Keel, in his official capacity as Chief of the South Carolina State Law Enforcement Division ("SLED"), has appealed an Order of the Circuit Court filed February 28, 2023, which addressed and granted in part

Plaintiff's Motion to Compel Discovery and Plaintiff's Motion to Determine Sufficiency of Defendant Keel's Responses to Plaintiff's Requests for Admissions. The Appellant SLED has also appealed a Form 4 Order Denying Motion for Reconsideration filed April 5, 2023. The Respondent has filed a motion to dismiss that appeal arguing that the orders are not immediately appealable. The Appellant SLED opposes that motion on several bases.

By way of background, the Respondent has brought this action pursuant to the South Carolina Tort Claims Act challenging the actions of the Appellant SLED and other Defendants in seizing and destroying the Respondent's hemp crop which was in violation of both the Hemp Farming Act, S.C. Code Ann. § 46-55-10, *et seq*., and the South Carolina Hemp Farming Program Participation Agreement entered between the Respondent and the South Carolina Department of Agriculture.

During the course of discovery, the Respondent filed the subject motions to address a number of discovery disputes, including the sufficiency of the Appellant SLED's responses to certain requests for admissions under Rule 36, SCRCP. The Circuit Court made certain rulings in the orders on appeal that are subject to immediate review, including (1) the determination that two requests for admissions should be deemed admitted, (2) the imposition of monetary sanctions payable within thirty days of the order as opposed to after final judgment, and (3) the

determination that personnel files of non-party employees of SLED are subject to disclosure with no confidentiality protections imposed.

I. Determination that Two Requests for Admissions Should be Deemed Admitted

According to this Court's precedent, an order denying or compelling pretrial discovery is generally not directly appealable "because it leaves some further act to be done by the court before the rights of the parties in an enforcement proceeding are determined." *Ex Parte Wilson*, 367 S.C. 7, 625 S.E.2d 205, 208 (2005). However, neither this Court nor the Supreme Court has addressed whether a decision on a motion to determine the sufficiency of responses to requests for admissions is immediately appealable particularly, as in this case, where the trial court ordered the requests to be admitted because "the record shows both requests should have been admitted." (Order, p. 20). In the only published decision regarding an interlocutory appeal pertaining to requests for admissions, which was decided prior to the adoption of Rule 36, SCRCP, the Supreme Court found that an order overruling objections to requests for admissions is not appealable before final judgment. *See*, *Jacobs v. Harman*, 282 S.C. 17, 316 S.E.2d 146 (1984). However, that is significantly different from the situation in the case at bar, where the trial court deemed the requests for admissions admitted based on the merits of the issues raised by those requests. The trial court analyzed the evidence presented

(Order, pp. 20-22), and akin to granting a motion for partial summary judgment, the trial court issued binding findings of fact.

South Carolina law clearly provides that the grant of partial summary judgment is immediately appealable. *See e.g., Link v. School District of Pickens County*, 302 S.C. 1, 393 S.E.2d 176 (1990) (order granting partial summary judgment is immediately appealable under S.C. Code Ann. § 14-3-330(1) and (2)); *Trivelas v. South Carolina Department of Transportation,* 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001) (immediate appeal adjudicated on order granting partial summary judgment). Under S.C. Code Ann. § 14-3-330(1), an interlocutory order "involves the merits" when it "finally determines some substantial matter forming the whole or a part of some cause of action or defense." *Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456, 456 (1988). In the case at bar, the trial court's ruling on the two requests for admissions resulted in an adjudication of a substantial issue forming the part of one or more causes of action and defenses, and hence, it "involves the merits" and falls within the scope of S.C. Code Ann. § 14-3-330(1). The trial court, in fact, ruled that the two requests "are clearly relevant, material facts to the Plaintiff's claims." (Order, p. 19).

However, the trial court's analysis of the disputed evidence on these "material facts" was in error. That ruling is no different than an erroneous grant of partial summary judgment when premised on genuine and material disputed facts.

As the Appellant SLED argued below, the requests as admitted are not consistent with the evidence presented to the trial court. The evidence reflects that Adam Whitsett, General Counsel for SLED, contacted the law clerk of Judge Diane Goodstein on September 11, 2019, to request a meeting with Judge Goodstein to discuss a proposed order entitled "Hemp/Marijuana Seizure Order and Order of Destruction" as well as the "Sworn Application for Hemp/Marijuana Seizure Order and Order of Destruction," both of which were also provided to the law clerk with attachments. The proposed order did authorize the seizure and destruction of the Respondent's hemp crop, but the order also provided the opportunity for a post-seizure hearing. Thus, the proposed order, if signed by Judge Goodstein, would have given the Respondent a post-seizure hearing upon request. The evidence further reflects that the law clerk for Judge Diane Goodstein informed Adam Whitsett that Judge Goodstein was not willing to sign the proposed order. Thus, contrary to the trial court's ruling, Judge Goodstein did not hear or adjudicate the merits of any matter.

The trial court's ruling is also at odds with this Court's analysis in *Sessions v. Withers*, 327 S.C. 409, 488 S.E.2d 888 (Ct. App. 1997), in which this Court explained that sanctions may be awarded only after the requesting party is successful in providing the truth of the matter raised in a request for admission. That is not done by way of a pre-trial motion but rather after the requesting party proves the truth of the request for admission at trial or

alternatively by a post-trial motion. There is no authority to allow a court to determine the truth of disputed facts *prior to trial* or without there at least being a dispositive ruling by way of summary judgment. Because the trial court ordered certain requests for admissions to be deemed admitted by way of a pre-trial Rule 37 motion, the trial court, in essence, has granted partial summary judgment on those factual questions. That is clearly not consistent with this Court's decision in *Sessions*, but because that is the ruling that the trial court made, it should be treated the same as a partial summary judgment and should be found to be immediately appealable.

II. Imposition of Monetary Sanctions Payable Within Thirty Days of the Order as Opposed to After Final Judgment

The trial court also imposed monetary sanctions that were payable "within thirty days of the filing of this order." (Order, p. 30). The Appellant SLED requested the trial court not to place a time limitation of any duration on the Appellant SLED's payment of those sanctions which would inhibit or prevent its ability to later appeal that judgment. As the Appellant SLED raised to the trial court, there is no authority under Rule 37 or any statutory authority to place a time limitation on the payment of a monetary sanction. The reason for that is to avoid an immediate appeal, such as this one. However, by placing a thirty-day time limitation on SLED's ability to pay the monetary sanction, the trial court has

eliminated SLED's right to appeal that sanction after final judgment. Simply put, if SLED complies with the trial court's order and pays that sanction, then the issue is moot – the sanction has been paid.

This Court's recent decision in *Richardson v. Halcyon Real Estate Services, LLP*, Op. No. 5981 (filed April 19, 2023), illustrates this very point. In that decision, this Court addressed a matter of first impression and concluded that "the award of attorney's fees and costs under Rule 37(b)(2) is interlocutory and not immediately appealable." However, in that case, the appellant had already paid the time-imposed sanction. The Court was, therefore, not called upon to decide the issue raised by SLED in the case at bar, i.e., whether a sanctions award that includes a time limitation for payment that makes the sanction payable prior to final judgment should be deemed immediately appealable. Logically, if a sanctions award *is required to be paid before appeal rights attach*, as we have here, that sanctions award violates a party's right to appeal thereby implicating important safeguards and issues of due process and fundamental fairness. Accordingly, as the Appellant SLED has argued, a sanctions award should not have a time limitation imposed that requires payment before appeal rights attach, and where, as here, such a time limitation has been imposed, the sanctioned party should have the right to an immediate appeal. Hence, the Appellant SLED submits that it has presented an issue which distinguishes *Richardson* and demonstrates the

necessity of an immediate appeal to address this important issue of due process and preservation of appellate rights.

The Appellant SLED recognizes the body of case law holding that "a party must refuse to comply with a discovery order and be held in contempt before the decision becomes appealable." *Tucker v. Honda of South Carolina, Inc.*, 354 S.C. 574, 582 S.E.2d 405, 406 (2003). However, a monetary sanctions order should be treated differently because the sanctioned party is given the unfair (and arguably unconstitutional) choice of paying the sanctions and forfeiting its appeal rights even after final judgment because the payment will moot that issue or otherwise being held in contempt of court – which is a fundamentally unfair choice. For this reason, an order directing that a specific sum of monetary sanctions be paid before final judgment should be deemed an order subject to immediate appeal.

III. Determination that Personnel Files of Non-Party Employees of SLED are Subject to Disclosure With No Confidentiality Protections

The trial court also ordered the production of personnel files of non-party employees of SLED without providing protection for confidential or otherwise private information contained therein, including personal identifiers, medical information, insurance information, financial information, and such other personal information that has no pertinence to the litigation. The Appellant SLED made the simple and routine request that the trial court include language in its order making

those personnel records of non-parties confidential and for use solely in this litigation. The Respondent argued that the Appellant SLED did not seek a confidentiality order from the court, but such a request was made in the discovery responses and was further made to the court during the course of the October 31, 2022 hearing in addressing the personnel files issue, and that was permissible under Rule 7(b)(1), SCRCP. The Appellant submits that the trial court's refusal to provide those protections is immediately appealable.

In taking that position, the Appellant SLED relies on the cases of *Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354 (2004), and *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006). In *Howe*, the Supreme Court allowed for an interlocutory appeal to be pursued by a sexual abuse victim whose motion to proceed anonymously had been denied by the Circuit Court. The Supreme Court applied a three-factor test adopted from the federal courts that required a showing that the order on appeal "(1) conclusively determines the question, (2) resolves an important question independent of the merits, and (3) is effectively unreviewable on appeal from a final judgment." *Howe*, 362 S.E.2d at 216. The Supreme Court determined that "the denial of Doe's motion to proceed anonymously meets the criteria for appellate review [because] [t]he decision conclusively determines the question, is a question independent of the merits of the litigation and would be effectively unreviewable on final appeal once Doe's true identity was revealed." 362 S.E.2d at 217. In ruling that the order was immediately appealable, the

Supreme Court further recognized that "[t]he order denying Doe's motion to proceed anonymously prior to trial has the effect of revealing his identity, the very thing he was seeking to keep confidential." *Id*.

Similarly, in *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006), the Supreme Court addressed whether an order unsealing court records in a divorce proceeding was immediately appealable. In allowing that appeal to proceed, the Supreme Court noted its agreement "with courts which have been inclined to find such an order immediately appealable because, after a court file is unsealed and the information released, no appellate remedy is likely to repair any damage done by an improper disclosure." 630 S.E.2d at 468. As the Supreme Court further recognized, "[c]ompelling a party that disputes an unsealing order to forgo an appeal until the conclusion of the underlying litigation would let the cat out of the bag, without any effective way of recapturing it if the district court's directive was ultimately found to be erroneous." *Id*.

The same is true in the present case if personnel records are produced without confidentiality provisions to protect private information as described above and which is routinely part of personnel files. The resulting harm and violation of privacy rights cannot be corrected or undone after final judgment. That ruling would become essentially unreviewable after final judgment consistent with the decisions in *Howe* and *Ex Parte Capital U-Drive-It*.

In *Hensley v. South Carolina Department of Social Services*, 429 S.C. 144, 838 S.E.2d 510 (2020), the Supreme Court addressed whether to hear an immediate appeal regarding the disclosure of confidential information in the context of the distribution of a class notice. The Supreme Court, however, "decline[d] to address the question until the actual danger of disclosure of confidential information is squarely before the Court." 838 S.E.2d at 513-14. In the present case, unlike in *Hensley* which required further analysis by the trial court on remand, the actual danger of the disclosure of private or confidential information is squarely at issue. Thus, refusal by the trial court to provide any confidentiality protection for the personal information and documents contained in the personnel files is essentially unreviewable after final judgment consistent with the decisions in *Howe* and *Ex Parte Capital U-Drive-It*. At that point, the information has been disclosed without limitations or restrictions. Therefore, this issue also gives rise to an immediate appeal.

CONCLUSION

At the very least, the issues raised by the Appellant should proceed to full briefing and adjudication given the importance of the issues raised. The appeal should not be summarily dismissed. Each of the issues raised justifies an immediate appeal under the rationale of S.C. Code Ann. § 14-3-330 and the cited authorities. The Court is respectfully requested to deny the Respondent's motion.

Respectfully submitted,

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