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Jun 22 2023

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

H. Steven DeBerry, IV, Circuit Court Judge

Case No. 2022-CP-27-00109

A.M.L., and J.J.L., by and through
Their Next of Friend, John Doe,
R.D.M., by and through his Next of
Friend, Jane Snow, J.J.G., and S.T.S.,

Appellants,

v.

Wright Directions Family Services,
LLC,

Respondent.

RESPONDENT’S MEMORANDUM IN RESPONSE TO APPEALABILITY ISSUE

Respondent Wright Directions Family Services, LLC (“Wright Directions” or “Respondent”) hereby serves this memorandum addressing the issue of appealability as requested by the Court in a June 2, 2023, Letter to the parties. The Court’s June 2, 2023, Letter states “[a] preliminary review of the orders challenged on appeal indicates they might not be appealable.” Respondent requested an extension to respond that was granted by the Court and extended the deadline to June 22, 2023. In their Memorandum dated June 12, 2023, Appellants clarified that

their only concern is “the lower court’s decision to award an extraordinary amount in costs to the Defendant.” (Memo, p.3). For the reasons set forth below, this issue is not appealable.

Relevant Procedural History

This action arises from the production of certain records that were withheld on the basis that they were psychotherapy records not subject to disclosure under HIPAA.

On or about February 25, 2022, prior to filing the subject lawsuit, Appellants faxed Respondent a request for records, which provided no deadline to respond. Less than two weeks later, on March 10, 2022, Respondent provided records to Appellants through their counsel via email. The records provided were non-privileged and/or not subject to the confidentiality provisions pursuant to HIPAA.

On March 3, 2022, Appellants filed a Complaint in the Jasper County Court of Common Pleas seeking specific performance for the records and, on the same date, filed a “Motion to Show Cause And For Expedited Hearing.” Appellants subsequently filed an Amended Complaint on March 10, 2022. Respondent timely filed an Answer to the Amended Complaint noting several procedural issues with the Complaint and also agreed to an expedited hearing on the issues. Appellants’ motion was fully briefed by the parties, and the Court heard oral arguments on April 7, 2022.

On April 8, 2022, the Court issued a Form 4 Order, which was substituted with a formal Order issued on April 12, 2022. In the Order, the Court granted in part and denied in part Appellants’ Motion, ordering, in pertinent part:

1. Defendant Wright Directions, LLC, shall deliver to the Plaintiffs’ counsel any and all records within their possession or control that relate to the care of A.M.L., J.J.L., R.D.M., J.J.G., and S.T.S.

a. This includes psychotherapy notes, including but not limited to the statements of the Children.

b. Defendant Wright Directions, LLC may redact the impressions of the clinician(s).

2. These records must be delivered to the Children's counsel within fourteen (14) days of this Order.

3. Defendant Wright Directions, LLC, may seek costs associated with these records as allowed under 45 C.F.R. § 164.524(c)(4), because time is of the essence, the records must be delivered to the Plaintiffs and a bill for any cost is to accompany the records or may be billed separately after receipt of said records by the Plaintiffs. Should any issue arise concerning the cost in this matter, it can be brought before the Court but only after the records are delivered to Plaintiff.

On April 22, 2022, Respondent timely produced to Appellants the records with the impressions of the clinicians redacted per the Court's Order, incurring \$7,811.44 in costs. On April 27, 2022, Appellants filed a second "Motion to Show Cause and For Emergency Hearing" on the basis that *inter alia*, the record production was insufficient and in bad faith. An expedited hearing on the matter was heard on April 29, 2022, and the Court denied Appellants' Motion.

On May 5, 2022, Respondent submitted its invoice to Appellants for costs as allowed in the Order. Appellants refused to pay the costs.

On October 26, 2022, Respondent filed a Motion to Compel Costs along with supporting exhibits. Appellants filed a memorandum in response with exhibits. The motion was argued on March 9, 2023.

On March 28, 2023, the Court issued a Form 4 Order granting Respondent's Motion to Compel Costs to be paid within thirty (30) days of the date of the Order. Appellants moved for reconsideration on April 6, 2023. The Court denied Appellants' Motion to Reconsider on May 12, 2023. Within a few hours of the Court's decision, Appellants filed their Notice of Appeal on May 12, 2023.

ARGUMENT

I. Appeals that Solely Arise on the Issue of Costs are Not Appealable.

Appellants have acknowledged in their Memorandum to this Court that the only issue is “the lower court’s decision to award an extraordinary amount in costs to the Defendant.” (Memo, p. 3). Importantly, these are costs incurred directly by Respondent allowable under HIPAA and do not include or contemplate attorney’s fees. Long-established jurisprudence in South Carolina as well as the United States Supreme Court have held that an appeal relating to costs alone, will not be sustained. See Foster v. Elk Fork Oil & Gas Co., 99 F. 617, 617 (4th Cir. 1900) (In the courts of the United States an appeal does not lie from a decree for costs.) (citing Glendale Fabrics Co. v. Smith, 100 U.S. 110, 35 L.Ed. 458; Paper-Bag Cases, 105 U.S. 766, 26 L.Ed. 1157.); Canter v. Am. Ins. Co., 28 U.S. 307, 319, 7 L. Ed. 688 (1830)(As to the costs and expenses, we perceive no error in the allowance of them in the circuit court. *They are not matters positively limited by law but are allowed in the exercise of a sound discretion of the court. And, besides, it may be added, that no appeal lies from a mere decree respecting costs and expenses.*) (emphasis added); see also, Jenkins v. Bennett, 40 S.C. 393, 18 S.E. 929, 932 (1894) (As to the appeal from that portion of the order imposing the costs of the motion upon the defendants, it may be possible that we would have no authority to consider it if it stood alone....); Fraser v. Davie, 11 S.C. 56, 63 (1878)(An appeal relating to costs alone will not be sustained.); Stegall v. Bolt, 11 S.C. 522, 523 (1879) (No appeal will lie on mere question of costs.).

Thus, for the reasons set forth above, Appellants have no grounds to appeal the Court’s Order of April 6, 2023.

II. In its Current Format, there is no Final Order, and thus this Case is not Subject to Appeal.

Appellants are appealing the Form 4 Order issued by the Court on April 6, 2023, that was denied reconsideration on May 12, 2023. However, in its current form, the Order is not a final order of the case, although the parties agree that there are no other outstanding matters at issue in this case. Indeed, Respondent's further agree with Appellants that the Court's Order of April 12, 2022, that included a provision for Respondent to seek its costs as allowed under 45 C.F.R. § 164.524(c)(4), is a final order on the merits, wherein the time to appeal has expired.

Rule 72, SCRCPC, states that an Appeal may be taken, as provided by law, from any *final judgment or appealable order*. (emphasis added). In addition, Rule 60(a), SCRCPC, states that "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, leave to correct the mistake must be obtained from the appellate court."

Based on Appellants' Memorandum, Respondents are informed that the sole appealable issue is the *amount* of the costs awarded by the Court on April 6, 2023. However, given how quickly they filed their Notice of Appeal following entry of the Order denying their Motion for Reconsideration on April 12, 2023, the lower court lost jurisdiction to correct the harmless error that the Order of April 6, 2023, was *not* a final Order.

CONCLUSION

Accordingly, the well-established law of both the South Carolina Supreme Court and the United States Supreme Court have held that where the sole issue before an appellate court relates to costs, there is no appealable issue. Thus, even if the harmless error was corrected to deem the April 6, 2023, Order a final judgment, the issue itself is not one that can be appealed. Thus, for

the reasons set forth above, Respondent respectfully asks that this Honorable Court remand this issue back to the lower court for final adjudication.

Respectfully submitted,

/s/ Elizabeth F. Morrison

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COUNSEL FOR RESPONDENT

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PROOF OF SERVICE

I, the undersigned attorney of the law offices of Hall Booth Smith, P.C., do hereby certify that on June 22, 2023, I have served all counsel in this action with a copy of the filing hereinbelow in accordance with the Supreme Court's Administrative Order by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System.

Document served: Respondent's Memorandum Regarding Appealability

Counsel Served: Via Email Only

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Respectfully submitted,

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June 22, 2023