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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Maite Murphy, Circuit Court Judge
Case No. 2021-CP-18-01486

Appellate Case No. 2023-000757

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 PETITION FOR REHEARING

The Appellant Mark Keel, in his official capacity as Chief of the South Carolina State Law Enforcement Division ("SLED"), respectfully requests rehearing of this Court's July 10, 2023 Order dismissing SLED's appeal. SLED appealed the

Circuit Court's February 28, 2023 Order granting Respondent John Trenton Pendarvis' ("Plaintiff") discovery motions and sanctioning SLED. The Circuit Court's rulings on certain discovery issues discussed below are subject to immediate review under established South Carolina law. More importantly, however, immediate review is required because the Circuit Court's Order—as drafted—reads as a personal attack on Chief Mark Keel ("Chief Keel"), who is not even named in the lawsuit in his individual capacity, and instead is only named in his official capacity.

Plaintiff's lawsuit is against Chief Keel in his official capacity as Chief of SLED; Plaintiff has not asserted any claims against Chief Keel in his individual capacity. Therefore, Plaintiff's lawsuit is against SLED—not Chief Keel personally. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (explaining that an official capacity suit "is not a suit against the official but rather is a suit against the official's office"). The Order on appeal ignores that important distinction. The Circuit Court's Order refers to the Defendant simply as "KEEL" approximately 175 times and, by doing so, indicates that Chief Keel personally engaged in discovery abuse:

> - "I FIND that KEEL's conduct regarding discovery in this case has been dilatory, prejudicial, willful, intentional and in bad faith and that his responses have been false, misleading, and incomplete." Order at 21.

- "KEEL is the Chief Law Enforcement Officer of the State of South Carolina. It is inconceivable that KEEL does not have the knowledge and capability to execute a key word/term search of his agency's digital email archives to identify and obtain every email communication that would be responsive to the Plaintiff's discovery requests. The record reflects KEEL failed to do so." Order at 26.

- "The Plaintiff has been forced by KEEL to expend substantial time and resources to obtain initial discovery responses that comply with the rules of civil procedure." Order at 28.

This language creates the false narrative that Chief Keel, as an individual, had his finger, personally, on the pulse of discovery proceedings and abused the litigation process in this case. A case where he is not even a party as an individual. The Circuit Court's Order undermines public confidence in Chief Keel and supports the belief that the State's highest-ranking law enforcement officer does not play by the rules.[1]

Troublingly, all of the incendiary language in the Circuit Court's Order appeared in Plaintiff's proposed order. By refusing to change this language, the Court allowed Plaintiff's counsel to lodge a personal attack against Chief Keel with the imprimatur of the judiciary. Instead of allowing such hyperbolic language to stand—a practice that has been criticized by members of the South Carolina

[1] *See e.g.*, Jody Barr, *Seize and Destroy: SLED Chief Mark Keel fined $11,300 for discovery abuses in hemp farmer civil suit*, QUEEN CITY NEWS, Feb. 28, 2023, https://tinyurl.com/mrxva6bk.

Supreme Court[2]—the Circuit Court should have, at the least, edited the Order to eliminate the narrative that Chief Keel personally played a role in any discovery abuse in a case where he is not even named personally as a defendant.

If this Court does not grant rehearing and allow SLED's appeal to proceed to a consideration of the merits, SLED would have to be held in contempt before it could obtain appellate review of the Circuit Court's Order. Of course, doing so would only add insult to injury by encouraging the false belief that Chief Keel does not comply with the rule of law.

SLED is keenly aware of the appellate courts' desire not to become entangled in discovery disputes. However, SLED respectfully submits that the Court overlooked the exceptional circumstances present that warrant immediate review of the Circuit Court's order. *See Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Env't Control*, 387 S.C. 380, 387, 692 S.E.2d 920, 924 (2010) (explaining that immediate appellate review of discovery orders may take place where "exceptional circumstances exist"). SLED asks the Court to reconsider its dismissal of this appeal for the foregoing reasons, in addition to the points SLED will now discuss concerning the immediate appealability of particular discovery rulings made by the Circuit Court.

[2] Oral Argument in *Owens v. Stirling*, Appellate Case No. 2022-001280, January 5, 2023, available at https://tinyurl.com/yc5bwpfk (discussing the problems associated with judges signing proposed orders "riddled with hyperbolic, false statements" (Kittredge, J.)).

DISCUSSION

The Circuit Court made three rulings that are immediately appealable: (1) the ruling that personnel files of non-party SLED agents are subject to disclosure without any confidentiality protections; (2) the ruling that two requests for admission are deemed admitted; and (3) the ruling that SLED pay monetary sanctions within thirty days of the Order as opposed to after final judgment. SLED will explain why each of these rulings warrants immediate review in turn.

I. Personnel Files

As a request for production in this litigation, Plaintiff sought "a copy of any personnel files for any agent/employee of SLED referenced at all in the complaint, your answer and/or in your discovery responses." SLED objected to this response on the grounds that it sought information not relevant to the issues in the litigation and not limited in time or scope. SLED further responded that, to the extent the circuit court ordered production of the information, it should be protected by a confidentiality order. Indeed, at the October 31, 2022 hearing on Plaintiff's motion to compel, SLED's counsel requested such a confidentiality order. *See* Rule 7(b)(1), SCRCP. Nevertheless, the Circuit Court's Order directs SLED to produce these personnel files "without protection." Order at 12-13.

The materials the Circuit Court ordered SLED to produce without protection contain sensitive information that bears no relationship to Plaintiff's lawsuit. These

personnel files include law enforcement officers' home addresses, telephone numbers, family information, and other private information that could be extremely damaging if made available to the public. The Circuit Court's Order must be immediately reviewed because any review at a later stage—after these materials have been produced without protection—will be too late. *See Ex parte Cap. U-Drive-It, Inc.*, 369 S.C. 1, 8, 630 S.E.2d 464, 468 (2006) (noting that post-final judgment review of an order to unseal court documents "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.").

The Supreme Court has recognized that certain orders requiring the disclosure of private information are subject to immediate appellate review because they would otherwise be unreviewable. In *Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354 (2004), the Supreme Court held the denial of a motion to proceed anonymously was immediately appealable. In reaching that conclusion, the *Howe* Court focused on the sensitive nature of the information sought to be protected from disclosure: "[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." 362 S.C. at 217, 607 S.E.2d at 356. The Court held immediate review was necessary, in part, because the denial of Doe's motion "would be effectively unreviewable on final appeal once Doe's true identity was revealed." *Id.*

The Court applied a similar line of reasoning in *Ex parte Cap. U-Drive-It, Inc.*, holding an order unsealing court records is immediately appealable. Again, the Court analyzed the nature of the information sought to be protected and found traditional appellate review would be ineffective: "after a court file is unsealed and the information released, no appellate remedy is likely to repair any damage done by an improper disclosure." 369 S.C. at 8, 630 S.E.2d at 468.

Respectfully, the Court erred by overlooking the harm associated with only allowing review after the personnel files are disclosed "without protection" as required by the Circuit Court. The Circuit Court's Order respecting the personnel files is subject to immediate review under *Howe* and *Ex parte Cap. U-Drive-It, Inc.*

II. Requests for Admission

The Circuit Court's ruling that two requests for admission are deemed admitted is also subject to immediate review. In those requests for admission, Plaintiff asked SLED to (1) "Admit that SLED sought judicial approval to destroy Plaintiff's hemp crop" and (2) "Admit that judicial approval of SLED's action was denied." The Circuit Court, in addition to ruling SLED's responses to these requests were untimely and improper, played a fact-finding role and determined that "the record shows both requests should have been admitted." Order at 20 n.6.

By virtue of the Circuit Court's Order, it is now conclusively established in this litigation that SLED sought judicial approval to destroy Plaintiff's crop and such

judicial approval was denied. South Carolina's courts have not dealt with the issue of whether such a ruling on a motion to determine the sufficiency of responses to requests for admission is immediately appealable, but immediate review is plainly required. The Circuit Court's determination, based on its review of the evidence, clearly "involves the merits" of this litigation and is immediately appealable under S.C. Code Ann. § 14-3-330(1). Indeed, the Circuit Court's ruling essentially operates as the grant of partial summary judgment to Plaintiff on this issue, which is appealable under long-standing caselaw. *See, e.g., Link v. Sch. Dist. of Pickens Cnty.*, 302 S.C. 1, 6, 393 S.E.2d 176, 179 (1990) (holding order granting partial summary judgment is immediately appealable).

III. Sanctions

Finally, the Circuit Court's ruling that SLED pay attorneys' fees and costs "within thirty (30) days of the filing of this order" is immediately appealable. Order at 30. SLED submits that the time limit imposed by the Circuit Court makes this ruling unique and warrants immediate review.

SLED acknowledges this Court's recent holding that "the award of attorney's fees and costs under Rule 37(b)(2) is interlocutory and not immediately appealable." *Richardson v. Halcyon Real Est. Servs., LLP*, 439 S.C. 419, 426, 887 S.E.2d 153, 157 (Ct. App. 2023). Respectfully, however, *Richardson* dealt with an appellant who had already paid a time-imposed sanction. The Court was not asked to decide

whether a sanctions award that includes a time limitation for payment that makes the sanction payable prior to judgment should be deemed immediately appealable. An appeal prior to the payment of the time-imposed sanction is the only way to safeguard due process and fundamental fairness for the litigant.

CONCLUSION

SLED respectfully asks the Court to grant rehearing and reconsider its Order dismissing this appeal. Reconsideration is warranted because the Court overlooked the appealability of certain rulings within the Circuit Court's Order. SLED further submits that immediate review of the Circuit Court's Order is required to address the language throughout the Order suggesting that Chief Keel personally participated in discovery abuse.

[*Signature page to follow*]

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), the undersigned employee of Smith Robinson Holler DuBose and Morgan, LLC, counsel for the Appellant, does hereby certify that service of the **Appellant's Petition for Rehearing** in the above-captioned matter was made upon Respondent's counsel by email only this the 24th day of July, 2023, as follows:

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Cc:	Daniel Plyler; Fred Hanna; Austin Reed
Subject:	Pendarvis v. Keel (Appellate Case No. 2023-000757)
Date:	Monday, July 24, 2023 5:10:00 PM
Attachments:	image001.png Appellant"s Petition for Rehearing, 2.pdf COS-Appellant Petition for Rehearing, 4.pdf

Attached herewith and served upon you please find the Appellant's Petition for Rehearing in regard to the above matter.

Thank you!

Daniel C. Plyler

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