THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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 the …….……. Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for the Petitioner certifies that a Petition for Rehearing was made and finally ruled upon by the South Carolina Court of Appeals on August 29, 2023.

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in dismissing Petitioner's appeal where the Circuit Court's Order was drafted by opposing counsel as a personal attack against a non-party, Chief Mark Keel?

II. Did the Court of Appeals err in dismissing Petitioner's appeal where the Circuit Court's ruling that SLED must produce non-party personnel files without protection will be unreviewable after final judgment?

III. Did the Court of Appeals err in dismissing Petitioner's appeal where the Circuit Court's ruling that two requests for admission are deemed admitted required fact finding and involved the merits of the litigation?

IV. Did the Court of Appeals err in dismissing Petitioner's appeal where the Circuit Court ruled SLED must pay a monetary sanctions award within thirty days?

STATEMENT OF THE CASE

The Court of Appeals dismissed the appeal of Petitioner Mark Keel, in his official capacity as Chief of the South Carolina State Law Enforcement Division ("SLED"), in perfunctory fashion, relying on oft-cited precedent stating discovery orders are interlocutory and not subject to immediate review. In doing so, the Court of Appeals' error was twofold. The Court of Appeals overlooked the fact that the Order on appeal—a reproduction of Respondent's proposed order—reads as an unnecessary personal attack on SLED Chief Mark Keel ("Chief Keel"), who was not sued in his individual capacity, is not a party to this lawsuit in his individual capacity, and who played no direct role in the discovery proceedings before the Circuit Court. The Court of Appeals also failed to recognize that various rulings in the Circuit Court's Order speak directly to the merits of this litigation and cannot be reviewed after final judgment. Petitioner asks this Court to look beyond the title of the Order on appeal and allow immediate review.

This lawsuit arises from the intersection of Respondent's obligations as a licensee under the South Carolina Hemp Farming Act, S.C. Code Ann. §§ 46-55-10, *et seq.* ("the Act"), and SLED's enforcement powers under the Act. Respondent's lawsuit challenges the actions of SLED in seizing and destroying Respondent's hemp crop that was in violation of both the Act and the South Carolina Hemp Farming Program Participation Agreement between Respondent and the South Carolina Department of Agriculture. Respondent sued Chief Keel, in his official capacity as Chief of SLED, along with other official capacity Defendants.

During discovery, Respondent filed motions to compel and to determine the sufficiency of SLED's responses to Respondent's requests for admission. The Circuit Court adopted Respondent's proposed order and granted his motions on February 28, 2023. Despite Plaintiff naming Chief Keel only in his official capacity as Chief of SLED, the Circuit Court's Order refers

to SLED simply as "KEEL" hundreds of times (in all caps) and states that he personally engaged in abusive discovery conduct. Relevant to Petitioner's appeal, the Circuit Court also (1) ruled that personnel files of non-party SLED agents are subject to disclosure without any confidentiality or security protections, (2) ruled that two requests for admission are deemed admitted, and (3) awarded $11,307.36 in monetary sanctions to be paid by "KEEL" within thirty days of the order as opposed to after final judgment.

In a timely motion to reconsider, Petitioner "respectfully requested [the Circuit Court] to alter the Order to reflect the proper party as the Defendant SLED and to make it clear that this Order is not directed at Mark Keel individually," among other requested relief. The Circuit Court denied Petitioner's motion for reconsideration by a Form 4 order dated April 5, 2023.

Petitioner appealed the Circuit Court's February 28 and April 5 Orders. Respondent moved to dismiss Petitioner's appeal. In its return to Respondent's motion to dismiss, Petitioner discussed the specific rulings in the Circuit Court's Order subject to immediate review. Nevertheless, the Court of Appeals dismissed Petitioner's appeal, declining to address Petitioner's arguments and instead relying on the general rule that discovery orders are not ordinary immediately appealable. Petitioner filed a petition for rehearing, which the Court of Appeals denied on August 29, 2023. This Petition timely follows.

ARGUMENT

I. The Circuit Court's Order is Immediately Appealable Because it is Drafted as a Personal Attack on Chief Keel

"The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs." S.C. Const. art. V, § 5. "A writ of certiorari may be issued to review a discovery order where exceptional circumstances exist." *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) (quoting *Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009)). Although the Court reviews discovery orders on certiorari only on rare occasions, *see id.* at 388, 692 S.E.2d at 924, the Court has done so where the public interest is involved and where review is necessary to provide guidance to the lower courts. *See Hollman*, 384 S.C. at 577, 683 S.E.2d at 498; *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 472, 674 S.E.2d 154, 160 (2009).

Here, the exceptional circumstance is created by the language and tone of the Circuit Court's Order. Immediate review is required because the Order—as drafted—reads as a personal attack on Chief Keel, who is not even named in the lawsuit in his individual capacity. Respondent's lawsuit is against Chief Keel in his official capacity as Chief of SLED. Therefore, Respondent's action 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 Circuit Court ignored that important distinction. The Order refers to Petitioner simply as "KEEL" approximately 175 times and, by doing so, indicates erroneously 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.

Similar language appears throughout the Order and creates the false narrative that Chief Keel, as an individual, had his finger 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] As such, the Order raises an issue of upmost public interest—confidence in law enforcement—and is suitable for immediate review. *See Hollman*, 384 S.C. at 577, 683 S.E.2d at 498 (explaining review of discovery order was appropriate because it presented an "issue of significant public interest").

Troublingly, all the incendiary language in the Circuit Court's Order appeared in Respondent's proposed order. By refusing to change this language, the Court allowed Respondent'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

[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.

criticized by members of the Court[2]—the Circuit Court should have, at the least, edited the Order to eliminate the erroneous 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. Of course, the Circuit Court denied Petitioner's motion for reconsideration making that precise request. The Court should review the Order and clarify that courts should not rubber-stamp proposed orders drafted with improper language designed to further the ulterior motives of a party's adversaries. *See Hollman*, 384 S.C. at 577, 683 S.E.2d at 498 (reviewing discovery order to provide guidance on a recurrent issue facing the lower courts).

If this Court does not grant certiorari 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.[3]

SLED is keenly aware of the appellate courts' desire not to become entangled in discovery disputes. However, SLED respectfully submits the exceptional circumstances present warrant immediate review of the Circuit Court's Order.

II. The Circuit Court's Ruling That SLED Must Produce Personnel Files Without Protection is Immediately Appealable Because It Would be Unreviewable After Final Judgment

[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.)).

[3] Indeed, Respondent has already filed a Petition for Rule to Show Cause with the Circuit Court, "so that the Court may move immediately upon the dismissal of Defendant KEEL's improper appeal to hold the requested rule to show cause hearing." *Pendarvis v. Knight*, C/A No. 2021-CP-18-01486, filing dated May 8, 2023. Petitioner respectfully contends this filing is further evidence of Respondent's desire to cast aspersions at Chief Keel rather than pursue the merits of the underlying claim.

As a request for production in this litigation, Respondent 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 Respondent'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 Respondent'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.[4] 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.").

This 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 Court held the denial of

[4] The General Assembly recently enacted the Law Enforcement Personal Information Privacy Protection Act, which protects precisely this sort of information from unnecessary disclosure. Act No. 56, 2023 S.C. Acts ---, ---. This law takes effect on July 1, 2024.

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 of Appeals erred in 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.*

III. The Circuit Court's Ruling that Two Requests for Admission Are Deemed Admitted Involves the Merits of this Litigation and Is Immediately Appealable

The Circuit Court's ruling that two requests for admission are deemed admitted is also subject to immediate review. In those requests for admission, Respondent 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.

Our appellate courts have never considered whether a decision on a motion to determine the sufficiency of responses to requests for admission is immediately appealable. Accordingly, the Court should exercise its discretion and grant certiorari to address this novel issue. *See* Rule 242(b), SCACR. In any event, review is warranted because the Circuit Court's ruling on this point plainly involves the merits of this litigation and is therefore appealable under S.C. Code Ann. § 14-3-330(1).

By virtue of the Circuit Court's Order, it is now conclusively established in this litigation that SLED sought judicial approval to destroy Respondent's crop and such judicial approval was denied. Apart from being incorrect, this ruling is appealable because it resulted from the Circuit Court's finding of fact. 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 Respondent 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).

IV. The Circuit Court's Imposition of Monetary Sanctions Payable Within Thirty Days is Immediately Appealable

The Circuit Court awarded $11,307.36 in attorneys' fees and costs to be paid by "KEEL" "within thirty (30) days of the filing of this order." Order at 30. SLED submits that the time limit imposed by the Circuit Court makes this ruling unique and warrants immediate review.

There is no authority under Rule 37, SCRCP, or any statute that allows the court to place a pre-judgment time limitation on the payment of a monetary sanction. Accordingly, Petitioner requested the Circuit Court to not to place a time limitation on SLED's payment of sanctions to protect its ability to later appeal the Circuit Court's ruling. The Circuit Cout rejected SLED's

request, thereby eliminating SLED's right to appeal the sanction after final judgment. Simply put, if SLED complies with the Circuit Court's Order and pays the sanction, the issue will be moot after final judgment because the sanction will have been paid.

SLED is aware of the Court of Appeals' recent holding that an award of attorneys' fees and costs under Rule 37 is not immediately appealable. *See Richardson v. Halcyon Real Est. Servs., LLP*, 439 S.C. 419, 426, 887 S.E.2d 153, 157 (Ct. App. 2023). However, the appellant in *Richardson* never petitioned this Court to review the Court of Appeals' decision, which involved "a matter of first impression in South Carolina." *Id.* at 424, 887 S.E.2d at 155. In any event, the facts here are distinguishable because the appellant in *Richardson* 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 Petitioner has argued, a sanctions award should not have a time limitation imposed that requires payment before appeal rights attach. Where such a time limitation has been imposed, the sanctioned party should have the right to an immediate appeal.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant its petition for a writ of certiorari.

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