

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

S.C. SUPREME COURT

Appellate Case No. 2023-001533

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.

RETURN TO RESPONDENT'S MOTION TO DISMISS

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Pursuant to Rule 240 of the South Carolina Appellate Court Rules, Petitioner Mark Keel, in his official capacity as Chief of the South Carolina State Law Enforcement Division (“SLED”), submits this Return to the Motion to Dismiss (“Motion”) filed by Respondent John Trenton Pendarvis. The Court should deny the Motion because Respondent has fallen woefully short of establishing that SLED’s Petition for Certiorari is subject to dismissal—or any other sanction—under Rule 269, SCACR. Accordingly, SLED respectfully requests the Court to proceed to consideration of the merits of SLED’s Petition.

ARGUMENT

I. Respondent fails to show that dismissal is appropriate under Rule 269.

Respondent asks the Court to dismiss SLED’s Petition and impose sanctions against SLED under Rule 269, which applies to a petition or other motion that is “frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules[.]” Rule 269, SCACR. However, Respondent cannot satisfy this demanding standard. Dismissal would be improper under Rule 269 because SLED’s Petition is not frivolous, SLED does not seek appellate review solely for delay, and SLED’s Petition complies with the South Carolina Appellate Court Rules.

A. SLED’s arguments for immediate review are not frivolous.

As support for the position SLED’s Petition is frivolous, Respondent relies on the general rule that discovery orders are interlocutory and not subject to immediate appellate review. (Motion at 4-5). Respondent contends that because SLED and its former counsel were previously involved *in other unrelated cases* where the Court of Appeals and this Court declined to review discovery orders, SLED must know its appeal *in this case* is improper. (Motion at 5-7).

Respondent need not fish for evidence of SLED’s prior knowledge of appealability rules; SLED is both aware and mindful of the rule that discovery orders, “*in general*, are interlocutory

and are not immediately appealable[.]” *Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008) (emphasis added). SLED also acknowledges the *general* rule that a party must refuse to comply with the order and be held in contempt before an appeal may lie. *See, e.g., Tucker v. Honda of S.C. Mfg., Inc.*, 354 S.C. 574, 577, 582 S.E.2d 405, 407 (2003). Indeed, SLED recognizes as much in its Petition, noting “the Court reviews discovery orders on certiorari only on rare occasions” and “SLED is keenly aware of the appellate courts’ desire not to become entangled in discovery disputes.” (Petition at 4, 6).

Contrary to Respondent’s suggestions, SLED does not pursue this appeal with a blind eye towards this established precedent. Instead, as explained more fully below and in its Petition, SLED contends exceptions to the general appealability rules apply to allow for immediate review in this situation. SLED generally argues an “exceptional circumstance” is created by the language and tone of the Circuit Court’s Order, which reads as a personal attack on SLED Chief Mark Keel (“Chief Keel”), even though Chief Keel is not a party to Respondent’s lawsuit in his individual capacity and played no direct role in discovery proceedings before the Circuit Court. (Petition at 4-6). SLED also contends various rulings in the Circuit Court’s Order are immediately reviewable because they involve the merits under S.C. Code Ann. § 14-3-330(1) or are otherwise incapable of review after final judgment. (Petition at 6-10).

Ignoring these legitimate, non-frivolous bases for appellate review, Respondent instead cites to unpublished orders involving SLED and its former counsel that supposedly show SLED was “well-aware that this Order was unappealable.” (Motion at 6). Irrespective of their precedential value, those orders have no bearing on the merits of SLED’s Petition in this case.¹

¹ Respondent first cites *Locklear v. Marlboro County*, Appellate Case Nos. 2018-001510 and 2019-000064, in which the Court of Appeals and this Court declined to immediately review a discovery order appealed by a co-defendant of SLED. Of course, the decision of another party to appeal a

In any event, Respondent cannot satisfy the Rule 269 standard by pointing to other cases, he must show that SLED's Petition in *this case* is frivolous. Because he cannot, the Court should deny the Motion.

B. SLED is not pursuing this appeal for purposes of delay.

Although the Court may dismiss a petition that is “taken *solely* for the purposes of delay,” Rule 269, SCACR (emphasis added), that provision is clearly inapplicable here. SLED is not seeking this Court's review to drag out proceedings before the Circuit Court; SLED simply requests immediate review of several erroneous rulings that cannot be reviewed after final judgment. First, SLED asks the Court to clarify that because Respondent's lawsuit is against Chief Keel in his official capacity as Chief of SLED, the Circuit Court erred in drafting an Order that suggests Chief Keel personally engaged in discovery abuse. SLED also asks the Court to review the Circuit Court's rulings (1) that SLED must produce agent personnel files containing sensitive information without protection, (2) that SLED's answers to requests for admission were not supported by the record, and (3) that SLED must pay monetary sanctions within thirty days.

Importantly, throughout the duration of appellate proceedings, SLED has remained willing to proceed with discovery and any other matters not affected by this appeal. Although SLED

discovery order in a previous case involving SLED has no relationship to SLED's conduct in this case. The fact that SLED was represented by its former counsel's former law partner in *Locklear* is equally irrelevant.

Respondent also cites *Funny v. Waffle House, Inc.*, Appellate Case Nos. 2019-002081 and 2020-001050, in which the Court of Appeals and this Court refused to review a discovery order appealed by SLED's former counsel. Although SLED was not involved in the *Funny* case, Respondent appears to suggest it is relevant because the appellants sought review of an order imposing a monetary sanction. Unlike the Circuit Court's ruling in this case, however, the court in *Funny* did not set forth a timeframe in which the sanctions were to be paid. Additionally, SLED would note the Circuit Court's imposition of monetary sanctions is just one of several rulings SLED contends is immediately reviewable in this case.

appealed certain rulings contained in the Circuit Court’s Order, SLED has complied with other portions of the Order and provided Respondent with additional discovery. Exhibit 1, SLED’s March 30, 2023 Supplemental Responses to Requests for Production and Answers to Interrogatories. To put it simply, the only reason for this appeal is a proper one—to seek the Court’s review of certain rulings SLED contends are erroneous and immediately appealable. SLED is not pursuing this appeal in furtherance of any ulterior motives, delay or otherwise, and SLED vigorously denies Respondent’s arguments to the contrary.

Rule 269 provides the Court with harsh medicine it can dispense to address appellate misconduct. However, that medicine is only to be administered when appropriate under the plain language of Rule 269. Because Respondent falls far short of establishing that SLED’s Petition is frivolous or that it was brought solely for delay, Respondent’s Motion fails.²

II. Respondent has not provided justification for the language and tone of the Circuit Court’s Order.

In its Petition, SLED claims the language and tone of the Circuit Court’s Order, which is drafted as a personal attack on Chief Keel, creates an “exceptional circumstance” warranting immediate review. (Petition at 4-6). Respondent does not disagree that Chief Keel was the target of the Circuit Court’s order. Instead, in a failed attempt to rebut SLED’s argument, Respondent

² Rule 269 also applies to a petition that is “not in compliance with [the South Carolina Appellate Court Rules.]” Respondent makes the conclusory statement that “[SLED’s] appeal is not in compliance with the Rules.” (Motion at 26). Although it is difficult to decipher, it appears Respondent is claiming SLED did not comply with the appellate court rules because it has not been held in contempt prior to appealing the Circuit Court’s Order. As SLED has explained, however, a pre-contempt appeal may lie “where exceptional circumstances exist” or where the order involves the merits of the litigation. *See, e.g., 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); S.C. Code Ann. § 14-3-330(1). Even if the Court ultimately disagrees that those exceptions apply, SLED’s appeal does not violate any provision of the South Carolina Appellate Court Rules.

claims the Circuit Court's Order is appropriately addressed to Chief Keel as an individual. (Motion at 7-11).

As SLED has explained in its motion for reconsideration, in its filings with the Court of Appeals, and in its Petition, Respondent brought this action against Chief Keel in his official capacity as Chief of SLED. Therefore, Respondent's lawsuit is against SLED, not Chief Keel as an individual. *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"). Accordingly, SLED agrees with the statement in Respondent's Motion that "*a government entity* may be sued by filing suit against a state officer in his or her 'official capacity.'" (Motion at 8 (emphasis added)). In fact, that is exactly SLED's point—the lawsuit is against SLED (the governmental entity), not Chief Keel individually. Respondent misses the mark, however, when he ignores this important distinction and continues to contend Chief Keel is personally responsible for SLED's conduct in this litigation.³

In suggesting that his lawsuit is against Chief Keel rather than SLED, Respondent makes the same mistake committed by the Circuit Court. As SLED's Petition explains in detail, the Circuit Court's Order refers to Chief Keel as an individual and suggests he personally engaged in discovery abuse. Indeed, the Order refers to Petitioner simply as "KEEL" approximately 175 times, *without any clarification* that Plaintiff sued Chief Keel in his official capacity as Chief of SLED. In fact, on the second page of the Order, under the "History of the Case / Dispute" section, the language used suggests that "SLED" and "KEEL" are in fact separate defendants. Specifically, the Circuit Court's Order talks of a declaratory judgment and injunctive relief case "filed in Marion

³ *See* Motion at 8 ("He is the properly named party under the law and any discovery misconduct found and sanctioned by the Court is imputable upon Appellant as that properly named party under the law."); Motion at 11 ("The named party is responsible for what is done in his/her name.").

County against Defendants SLED and the Department of Agriculture (‘DAG’),” while in the very next sentence stating, “this matter [was] served on KEEL....” *See* Order at 2. A plain reading of the Order would lead any reasonable person, unless they happened to be a well-versed, legal scholar, to believe that the Circuit Court was speaking solely about Chief Mark Keel individually, while Chief Mark Keel is not even a party, in his individual capacity, to the matter.

Respondent attempts to brush over the Circuit Court’s error by pointing to instances where SLED, through its former counsel, “self-identified” as “Defendant Keel.” (Motion at 7-10). Unlike the Circuit Court, however, counsel consistently identified the Defendant as Chief Keel “in his official capacity.” (Motion at 8). To the extent Respondent points to isolated emails and other filings where counsel referred simply to “Chief Keel,” SLED respectfully submits such casual references do not justify the incendiary language employed throughout the Circuit Court’s Order. There is a meaningful distinction between counsel referring to “Chief Keel” in an email and the Circuit Court stating that “KEEL” engaged in bad faith discovery conduct. Especially, when the offending Order makes no effort to explain that its use of the term “KEEL” refers only to the official capacity of the officer, which is actually a suit against the governmental entity, as opposed to referring to the individual.

Respondent also misinterprets SLED’s argument about the “hyperbolic” and “erroneous” language in the Circuit Court’s Order. (Petition at 5-6). Respondent contends “[SLED] makes absolutely no attempt in the petition to identify any such ‘hyperbolic, false statements’ in the Order, because there are none.” (Motion at 12). However, Respondent ignores the support Appellant placed into its petition.

Contrary to Respondent’s argument, SLED cited several excerpts from the Order in support of this position on page 5 of the Petition. For example, the Circuit Court’s Order states:

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 (emphasis added)). This is precisely the sort of misleading language that appears throughout the Order that SLED asks the Court to review. SLED continues to assert immediate review is warranted to end the erroneous narrative that the State's Chief Law Enforcement Officer does not comply with the rule of law.⁴

III. SLED makes non-frivolous arguments that three of the Circuit Court's rulings are subject to immediate review.

In its Petition, SLED identifies three rulings by the Circuit Court that are immediately appealable. First, SLED argues the Circuit Court's ruling that SLED must produce agent personnel files without protection is immediately appealable because it would be unreviewable after final judgment. (Petition at 6-8). Specifically, SLED contends this ruling must be reviewed now because any post-judgment appeal, after the personnel files have been produced, would be too late to protect sensitive information like law enforcement officers' home addresses, telephone numbers, and family information from disclosure. Second, SLED argues the Circuit Court's ruling that two requests for admission are deemed admitted is subject to immediate review. (Petition at 8-9). SLED contends that because the Circuit Court determined the requests should have been admitted based, in part, upon its review of the record, this ruling plainly "involves the merits of the litigation" and is appealable under section 14-3-330(1). Finally, SLED argues the Circuit Court's

⁴ As explained in the Petition, this incendiary language appeared in Respondent's proposed order. To be sure, Respondent has carefully crafted the narrative that Chief Keel is the source of discovery abuse, and the media has run with that erroneous narrative. *See* 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>.

imposition of \$11,307.36 in attorneys' fees and costs to be paid by "KEEL," "within thirty (30) days," is immediately appealable. (Petition at 9-10). SLED contends this ruling cannot be reviewed after final judgment because the sanctions will have already been paid.

The sole question raised by Respondent's Motion is whether SLED's Petition should be dismissed under Rule 269. Accordingly, the question at this stage is not whether SLED's arguments will win the day and persuade the Court to grant certiorari, but rather whether they are so "frivolous" as to warrant Rule 269 sanctions. For the reasons set forth in SLED's Petition, which SLED incorporates herein by reference, SLED contends these arguments are plainly non-frivolous. SLED further submits the arguments raised in Respondent's Motion are better suited for a Return to SLED's Petition under Rule 242.

CONCLUSION

For the foregoing reasons, SLED respectfully requests that this Court deny Respondent's Motion.

Respectfully submitted,

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