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SC Court of Appeals

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

Common Pleas Case Number 2022-CP-27-00109
Appellate Case Number 2023-000791

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,

RECORD ON APPEAL, VOLUME X (Page No. 4501-4574)

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The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,

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1 Now, apparently, I named the wrong
2 company, but it's very difficult to figure out
3 which company it is. But there is a motion to
4 amend the complaint to fix the name, but I've got
5 no word on whether that's set.

6 THE COURT: What's the correct name?

7 MR. BUTCHER: Wright Directions Family
8 Services, comma, LLC.

9 THE COURT: All right. Okay.

10 MS. MORRISON: Wright Directions. It's
11 in my brief. Don't care. It's not very
12 important. Wright Directions, LLC.

13 THE COURT: Okay. Wright Directions,
14 LLC.

15 Yes, sir. Go ahead.

16 MR. BUTCHER: All right. So I've been
17 representing the foster kids and kids who have
18 been abused in the system for about 16 years, and
19 this is the first time any behavioral health
20 company has ever refused to give me the records.
21 Two of my kids, J.J.G. and S.T.S., those two boys
22 are about to turn 19 on May 10th and May 8th. So,
23 as you know, there's a statute of limitations
24 coming. Because Wright Directions employed
25 licensed professional counselors, I have an

1 affidavit requirement in order to sue this
2 company. So, they're holding the ball, and I have
3 to be able -- I have these records to be able to
4 sue.

5 They've given me some records, and then
6 they're claiming they have a whole bunch of other
7 records that are under -- and I'll let them make
8 their argument -- some type of psychological
9 records exception to HIPAA.

10 And because I wasn't super sure on where
11 all they were going to go with this, I also
12 remember in law -- it's fairly lengthy, but I
13 wanted to lay out that there was an actual need
14 for these records and to show that there's
15 (inaudible). But at the end, I talked about that
16 all my kids were Medicaid beneficiaries and
17 Wright Directions was signed up to accept
18 Medicaid. And in part of that process, they have
19 to have certain records available for Medicaid to
20 inspect at any time. You know, it's unannounced
21 or announced. And bottom line, a lot of these
22 records, these clinical service notes, and these
23 service notes that Wright Directions is holding
24 back are part of those records.

25 So, you know, from whatever type of

1 psychological exception, I think, one, that they
2 don't really have it, and, two, the court can --
3 if the court wants to put any restraint on the use
4 of those records, or anything, we would certainly
5 consent to that. But bottom line -- and I have a
6 pediatrician -- or a pediatric psychiatrist who's
7 waiting for me to hand him these records so he can
8 decide whether or not that any standards of care
9 were breached in this case.

10 So, overall, that's what we're here for,
11 is to get my children's records for these five
12 kids.

13 THE COURT: Okay.

14 MR. BUTCHER: And I know I filed a
15 lengthy brief. I printed out a copy, if you're
16 more of a paper person.

17 THE COURT: I've got a paper copy in
18 front of me, sir.

19 MR. BUTCHER: Okay. All right,
20 appreciate it.

21 THE COURT: Sure.

22 Yes, ma'am.

23 MS. MORRISON: Thank you, Your Honor.
24 May it please the Court? My name is Liz Morrison.
25 I practice with Hall Booth Smith in Mount

1 Pleasant, South Carolina, and I've been retained
2 to represent Wright Directions in this matter.

3 There's two big issues here, but I want
4 to make clear that we're here today for finality.
5 I want to raise as the first point that,
6 procedurally, I don't understand why we're here.
7 He filed a motion for complaint for specific
8 performance and a motion to show cause to get
9 records. That's not how this works.

10 He served a medical authorization on
11 Wright Directions. The correct party, so I don't
12 know why he's saying he didn't know who the party
13 was. And they can find and produce the records
14 that are not protected under the HIPAA
15 psychotherapy exception. As noted in his more
16 than 1,000-page memo and brief, he has several
17 records from Wright Directions. Those that are
18 producible and come forward.

19 The law is very clear, HIPAA has a very
20 strict and narrow exception of records that can
21 never be -- they are not subject to production.
22 Two reasons; one, these are not the records of the
23 patients. These are counselor notes. And what
24 HIPAA says is, psychotherapy notes can never
25 produced to anyone. And those are defined by

1 HIPAA as, "Notes recorded (in any medium) by a
2 health care provider who is a mental health
3 professional documenting or analyzing the contents
4 of conversation during a private counseling
5 session or a group, joint, or family counseling
6 session and they are separated from the rest of
7 the individual's medical record."

8 Your Honor, those records are what we're
9 talking about today. We cannot turn those records
10 over. Everything else that's not part of this
11 category have been turned over.

12 Separately, Mr. Butcher, has reached out
13 and said he thinks that there are some additional
14 records that don't fall under psychotherapy that
15 are missing, and I've made inquiries. I think he
16 might be right. And once I get those records, I'm
17 happy to turn them over.

18 But all of the records that fall under
19 this, which my client referred to as progress
20 notes that I've have had a chance to review, they
21 all under this exception.

22 So I have -- you know, again,
23 procedurally, not the proper way to ask for these
24 records. Regardless, even if he does do it the
25 correct way, he can't get them.

1 I've recently argued this the family
2 court in Georgetown County where Judge Holmes
3 issued her findings where family court had
4 subpoenaed a professional counselor for her
5 records and the judge quashed it, that subpoena.
6 I have a copy of the order, if you would like to
7 see it. But, again, it's based on the principle
8 that there is this exception in HIPAA where these
9 records cannot be provided.

10 I see his reference to Medicaid, that
11 doesn't trump it though. That doesn't give anyone
12 the right to the psychotherapy record. So I think
13 what he's talking about Medicaid requires, those
14 records have already been turned over, Your
15 Honor.

16 THE COURT: All right. What about the
17 position that the psychotherapy records are
18 prohibited from being produced by HIPAA?

19 MR. BUTCHER: They're not prohibited.
20 They're -- it's -- they can claim a privilege --
21 my belief and understanding is that, if you can
22 show need. We are evaluating whether or not there
23 was malpractice. So, very much so, these records
24 and what was told and said in these -- and what
25 we're -- let me pull this. In order for these

1 companies to be paid by Medicaid, it's called
2 rehabilitative behavioral health services. And
3 there's a question as to whether it's really
4 effective or if it's just Medicaid money to pay
5 for baby-sitters.

6 But, nonetheless, every time they have
7 contact with a child, they're supposed to use
8 clinical notes, and these clinical notes are the
9 privilege they use to get paid. So anytime
10 Medicaid comes in, they show these notes to show
11 what they talked about, what was said, and also to
12 show progress. This is how the insurance company
13 monitors that this patient is supposedly getting a
14 good bang for their buck.

15 And in Exhibit 72 to the memorandum of
16 law that I submitted -- and I've got a printed
17 copy of that, if you want it. But, nonetheless, I
18 produced the provider manual for Medicaid that
19 lists all these things.

20 And so with a normal therapist, like, you
21 know, social worker therapist where you go in and
22 you sit on the couch and everything, they can keep
23 a separate set of notes that can be for their
24 reminder. If they did that, that's fine. But,
25 bottom line, these Medicaid notes -- I mean, these

1 clinical notes and everything, there's no -- if
2 they're showing them to an insurance company, then
3 the privilege and confidentiality is gone for
4 that.

5 So for that purpose, if they're required
6 to do it by insurance, then everything they're
7 required to do by the insurance company needs to
8 come to me and needs to be allowed for my doctor
9 to look at.

10 So from that perspective, I believe that
11 they can assert the privilege, but the privilege
12 isn't there because it's -- it's been -- it's
13 already been opened by Medicaid inspections and
14 it's required by, you know, State law in the State
15 Medicaid procedures. So that's my position with
16 that, sir.

17 And I can tell you in -- I've sued most
18 of the companies in this state, and I've never had
19 a problem getting daily notes, weekly notes,
20 monthly notes.

21 THE COURT: Have you ever had a problem
22 getting psychotherapy notes?

23 MR. BUTCHER: No problem. Absolutely no
24 problem.

25 And the other thing is, all these

1 documents were given to DSS, so we haven't -- well
2 -- and we had a bunch of these documents from DSS.
3 We just didn't -- we just don't have all of them
4 to be able to do it. You know, the clinical --
5 the daily notes, those are important because
6 that's -- and, as you saw in my brief -- or in the
7 motion, they saw these kids over a hundred times
8 each. And those daily notes from when they kids
9 were being starved and beaten, those daily notes
10 are very important in what was going on. Because
11 we certainly know that one of the kids was a
12 discloser, like, non-stop disclosing. He was
13 regularly beaten for disclosing by the school --
14 or not by the school, but by his mother. And so
15 those things are important for that.

16 So from our perspective, I think in the
17 defendant's memorandum of law, they said, at a
18 minimum, the first step, if you're inclined to do
19 anything, take an in-camera review of these notes,
20 and we're fine with that.

21 You know, but from our perspective, we
22 have a physician who's ready to look at these
23 documents, and I think it's important for him to
24 be able to review them in order to determine
25 breaches of standard of care. If it's any other

1 doctor, we can get x-rays and test results. We
2 don't have that.

3 THE COURT: So, counsel, let me ask you
4 this: Have you provided him everything that you
5 contend that's he's entitled to under the rules?
6 That's already been provided to him?

7 MS. MORRISON: Correct, Your Honor. I
8 think there might be a few that he said we're
9 missing, so I'm checking again with the provider.
10 But, yes. I mean, the psychotherapy notes
11 exception even says what it doesn't include, and
12 it defines -- it's on page (sound inaudible).
13 Psychotherapy notes excludes medication
14 prescription and monitoring, counseling session
15 start and stop times, the modalities and
16 frequencies, results of clinical tests, any
17 summary of the following items: Diagnosis,
18 functional status, the treatment plan, things like
19 that. We provided those summaries.

20 THE COURT: So let me just ask you this:
21 So are you saying medication notes are not allowed
22 to be disclosed to the patient?

23 MS. MORRISON: No, that is something that
24 is. But, again, we don't have that. That's in
25 HIPAA. That's an exception of what's not a

1 psychotherapy note.

2 THE COURT: Okay.

3 MS. MORRISON: To be perfectly clear, we
4 don't have daily notes. That's not something that
5 is being withheld. What are being withheld are
6 psychotherapy notes.

7 THE COURT: Okay.

8 MS. MORRISON: So everything that's --

9 THE COURT: So what are psychotherapy
10 notes?

11 MS. MORRISON: The things for when you
12 are in a therapy session either with an individual
13 or a family or a breakout session, and those are
14 notes of what happened, and that is what HIPAA
15 says can never be disclosed. I mean, it's in the
16 red. It says, HIPAA prevents an individual from
17 accessing psychotherapy notes. And then there's,
18 you know, in terms of --

19 THE COURT: But I read that to mean like
20 the solicitor can't go and try to get some
21 psychotherapy notes to use in a criminal case
22 against the poor schlub that had been abused and
23 basically robbed somebody and they're trying to
24 show X, Y, or Z.

25 In civil, I think of all the defense

1 lawyers -- which my son will soon be one. Okay?
2 He's working at Clawson & Staubes starting in
3 August. So he's going to go and send out one of
4 50 million record requests that I got when I
5 practiced law that says, here's a copy of what
6 we're sending to this doctor, or that doctor. I
7 think that would be designed to stop him from
8 being able to gain access to that.

9 But what you're saying is that the
10 individual patient is prohibited from that.

11 What's the definition of "individual?"
12 Surely the rule defines it.

13 MS. MORRISON: It does.

14 THE COURT: That's what I need. Where is
15 it? Because see, that's actually very
16 important.

17 MS. MORRISON: Okay.

18 THE COURT: Because everything is --
19 everything in these codes have got to have a
20 definition. And so if "individual" is defined to
21 include the patient, then, sir, I think you got a
22 problem. But if "individual" is not defined,
23 well, that's another matter.

24 MS. MORRISON: Your Honor, I agree with
25 you a hundred percent. There is a difference from

1 what you're describing and what I have been seeing
2 a lot lately in my practice, more in the family
3 court arena where, in a divorce action, they want
4 to call the psychiatrist or the psychologist as
5 witness, and you can't do that. It's the same
6 thing, even though the parents that want to see
7 the children. That's what I just argued in front
8 of Judge Holmes and she agreed.

9 THE COURT: Yeah, but --

10 MS. MORRISON: This is -- again, it's not
11 -- they're not medical records. These are the
12 notes of the psychiatrist or the licensed mental
13 health professional. And the way the
14 psychotherapy session -- I'll pull up individual,
15 Your Honor. But it's 45-CFR part 164.501 has all
16 the definitions for HIPAA.

17 It's 45-CFR 164. The person who is the
18 subject of the protected information, is how it's
19 defined.

20 THE COURT: You know, I always thought
21 that HIPAA was designed to protect the other folks
22 from getting at an individual's private records.

23 MS. MORRISON: It's certainly part of it,
24 Your Honor.

25 THE COURT: And so now -- hold on. So

1 now what we're doing is, we're using HIPAA as a
2 shield to prevent an individual from getting his
3 or her own health records. They got to be health
4 records because, otherwise, they wouldn't be
5 protected by HIPAA. So their health -- it's
6 preventing them from getting their own health
7 records. Let's see. Hold on.

8 MS. MORRISON: I can point you to it,
9 Your Honor. Again, this is what the statute says.
10 It's 45-CFR 164.524. It starts, A(1), except as
11 otherwise provided, a patient does have a right to
12 access their record. That 4 in number 1 is
13 psychotherapy notes. That's what the statute
14 says.

15 And, again, I will readily admit this is
16 a very odd situation to be in (inaudible), but
17 that's what the statute reads.

18 THE COURT: Yes, sir.

19 MR. BUTCHER: Your Honor, in my brief, I
20 did cite a case called Kalinoski vs. Evans, and
21 it's out of District of Columbia. It's a federal
22 court case. And in there, a plaintiff had a
23 signed a waiver, a Medicaid waiver -- or I'm
24 sorry, a HIPAA release. And the social worker
25 therapist objected to the release of the

1 documents. And the court went on and justified
2 and said, well, the plaintiff is claiming mental
3 damages, so, of course, he's going to get the
4 records. And then if you look at that case the
5 court said, the social worker doesn't really have
6 a standing to the release of the records. They're
7 the plaintiff's records. So I'd ask you to look
8 at that case, which is cited in my brief.

9 So from that perspective -- the other
10 thing is, too, limit who can look at it. I mean,
11 you could order that it goes from defense counsel
12 to the expert and no one else. I mean, there are
13 all sorts of ways to protect this information.

14 But the other thing is, the way that they
15 -- this agency has brought in psychotherapy notes
16 to basically include everything else that they
17 don't want us to see.

18 Your Honor, these -- in the
19 100-and-something times they saw each of these
20 kids over 18 months --

21 THE COURT: Hold on one second.

22 MR. BUTCHER: Okay.

23 THE COURT: Go ahead, sir.

24 MR. BUTCHER: Well, the notes they have
25 to create, and apparently they can put it on a

1 database, those include, you know, what the
2 children said, who was there, where they went, if
3 they went anywhere, because sometimes they met at
4 the school, and those are important -- those are
5 extraordinarily important things.

6 You know, if their impressions -- if they
7 want to delete their impressions, that's fine,
8 redact their impressions. But factual
9 information, that's my client's information.
10 That's so important.

11 You got to remember, I have five kids.
12 You said you have a son. Kids are not reliable
13 historians. In fact, most of them are horrible.
14 So, from that perspective, you know, it's much
15 better if we have some contemporaneous notes for
16 that.

17 So that's the only thing I wanted to add
18 with these clinical notes that they're trying to
19 put up with the whole swap.

20 I think the purpose of having the
21 psychotherapy note privilege was for
22 psychotherapist to be able to put their thoughts
23 and feelings and impressions on things and protect
24 that. And if they want to do that, that's
25 perfectly fine. But everything else, date, time,

1 how long they met with the kids, what was said and
2 done, I think that's my client's information.

3 THE COURT: All right. Hold on one
4 second. All right. We'll be at ease for one
5 minute.

6 (Off the record.)

7 THE COURT: Counsel, let me ask you: You
8 made a statement about the psychotherapy notes
9 being disclosed to DSS. I mean, have these
10 psychotherapy notes been provided to DSS?

11 MS. MORRISON: Not that I'm aware of,
12 Your Honor. I am aware that these children were
13 removed from their home, and that, perhaps, one
14 the counselors testified to that at trial.

15 I will say, I didn't solely review the
16 1,000 pages, but I saw a lot of Wright
17 Directions's records in the file that appear to be
18 what I understood had been provided. I didn't see
19 anything that fell into these psychotherapy notes
20 that I have reviewed.

21 THE COURT: All right. What I'm going to
22 do is this: I have listened to the arguments.
23 I've reviewed the memorandums and documents in
24 support that were provided by both parties. What
25 I'm going to basically order is this: Number 1, I

1 think there is a general rule under HIPAA that an
2 individual is entitled to their records.

3 Number 2, I believe that there is a
4 psychotherapy exemption that's one of the
5 exclusions to the general rule. And so, to
6 that -- with that having been said, what I will
7 also say is that, Number 1, I cannot believe when
8 a defendant is being sued that they can hide
9 behind those notes and this record that it can't
10 be disclosed and, basically, don't have to do it.

11 I mean, for all we know is these kids sat
12 there and went off and reporting abuse after abuse
13 after abuse that should have been mandatory
14 reported. I can't believe that this individual,
15 this health care professional, wouldn't have been
16 somebody to mandatory report. But under the
17 defense argument, we would never know because they
18 wouldn't have to report anything. They could just
19 sit back and do nothing, because those notes, as
20 long as they're in the notes and they write that
21 down in their impression, if they want to hide
22 behind that, they can. He can't go after it. He
23 can't go after it.

24 Well, appeal away. I mean, but you
25 can't -- I mean, it's just -- I think when you're

1 being sued, you're hiding behind these documents.
2 And I also think that when you look at what is
3 included and excluded in the definition,
4 psychotherapy notes are defined as, and it goes on
5 and says, "Documenting or analyzing the contents
6 of a conversation." I think that really what
7 we're talking about here is analyzing. I
8 understand it says "documenting." I don't know if
9 that means documenting what the kids say or don't
10 say. But if you look in what's excluded, the
11 frequency of the treatment furnished, the results,
12 the clinical tests, any summary of the following
13 items; the diagnosis, the functional status, the
14 treatment plan, the symptoms, the prognosis, and
15 the progress to date, I think when you look at
16 those items, you're also talking about the
17 history -- the history that the patient would give
18 is so intertwined in being able to come up with
19 and arrive at a diagnosis, a functional status,
20 the treatment plan, the symptoms, the prognosis,
21 and the progress to date.

22 My position is that the history, which
23 would include the statements of the children,
24 would be something that I believe would be -- it's
25 not going to be covered under this prohibition.

1 So what I'm going to rule is, I'm going
2 to rule that the statements of the children, sir,
3 as it relates to what they may have said in their
4 psychotherapy sessions, that, you're entitled to.

5 As it relates to what the thought
6 processes are -- so, for instance, you know,
7 Miss Smith is beating me, okay, that would be
8 disclosed.

9 As it relates to the psychotherapist's
10 thought processes of what he or she thinks of that
11 and things of that nature, I think that gets into
12 what potentially could be protected. I'm going to
13 prohibit that at this time from being disclosed.

14 Now, of course, I think what happens is,
15 your expert could then take a look at whatever
16 they need. And if there's another matter on
17 another day as it relates to that -- but maybe
18 that's going to give him or her the information
19 she needs to formulate an opinion. I don't know.
20 But I think it can be molded. I'm molding it.
21 I'm shaping it. I'm limiting it in that scope.

22 So there impressions -- also group. Not
23 what other kids said. Only what the kids
24 1 through 5 said. Now, if they said -- whatever
25 the various initials.

1 Now, if they're in a group together and,
2 you know, child 1 says X, and child 2 says Y, and
3 child 3 says Z, then fine for each one, that can
4 come in, but not the impressions of the therapist.

5 I think that's reasonable under these
6 circumstances given the fact that the defendant is
7 being sued. I think, at a minimum, that you're
8 going to be entitled to that, sir. And so I would
9 ask --

10 I'm assuming all these records are
11 electronic?

12 MS. MORRISON: Yes, Your Honor. This is
13 perfectly fine with me. The only thing I wanted
14 to raise was that we have not been sued yet. This
15 is some weird request for records.

16 THE COURT: Well --

17 MS. MORRISON: I just wanted to make that
18 for the record that this is some weird procedural
19 thing that I've never been involved in.

20 THE COURT: Well, the situation he's in
21 is that his expert -- because the only other thing
22 I was going to do is have him provide an
23 affidavit. I'm not going to do this. He can
24 provide an affidavit from his expert that says he
25 needs these records to help formulate his

1 opinion.

2 MS. MORRISON: He already did that.

3 MR. BUTCHER: I did that, last night,
4 actually, Your Honor.

5 THE COURT: Last night?

6 MR. BUTCHER: Yes.

7 THE COURT: What time? Was it after,
8 like eight, nine o'clock, because, if it was, I
9 was sleeping.

10 MR. BUTCHER: It may have been.

11 THE COURT: I can't -- you know, I should
12 have known that through osmosis. Great minds
13 thing alike.

14 MR. BUTCHER: Yes, sir.

15 THE COURT: You know, if he had an
16 affidavit from the expert, then, again, I think
17 that is additional information. I'm informed that
18 he does and he's filed that and opposing counsel
19 has seen that.

20 I understand the uniqueness of the
21 situation because you haven't been sued. I
22 understand that completely. But I also understand
23 that there's requirements as it relates to having
24 the affidavit and so forth before he can file
25 suit.

1 So I guess what I'm asking is -- I'm
2 going to order -- I'm going to order that he's
3 entitled to the documents as I've outlined, and
4 that you-all provide him those documents within 10
5 days. Can you get them in 10 days? Two weeks?
6 Fourteen days.

7 MS. MORRISON: I'll try.

8 THE COURT: Fourteen days. They're
9 electronic. There may be some redacting, I
10 understand that, but, within 14 days, have them.
11 Okay?

12 If they're not to him within 14 days,
13 then all you got to do is get me back on the
14 computer and contact my clerk and we're very
15 accessible.

16 MR. BUTCHER: About filing suit, I
17 understand. We have other cases besides this.

18 THE COURT: But I'm going to try to get
19 them and have some timeframe. If she says,
20 listen, it's going to 15 days. That's what I'm
21 going to put in the order.

22 MS. MORRISON: Your Honor, can I press my
23 luck? You can tell me no. There is provision for
24 us to paid to compile these records under HIPAA.

25 THE COURT: And what I was going to say

1 is this -- I was getting ready to say that -- as
2 it relates to costs, what I want to do is this, I
3 want you to compile -- in other words, don't
4 compile the cost, send it to him, get the money
5 before you give him the records.

6 In other words, a lot of times, I'll
7 request records from a doctor when I'm practicing,
8 and then all of a sudden they'll send me back
9 something to say they want \$87, and then I got to
10 send it to them, and then it goes to get
11 processed, and then all of a sudden -- then I get
12 the records three months later.

13 So what I want to do is, you-all keep up
14 with your time, because HIPAA is going to say what
15 it does. And what that statute says is going to
16 govern it, in my opinion. So what you do is, you
17 keep up with the time. But when you send those
18 records, you send the bill.

19 And then, sir, if that bill is not
20 appropriate or not correct or if there's a problem
21 with it, then you-all let me know and we'll go
22 back and we'll visit that. Okay?

23 But, absolutely, I think you're entitled
24 to cost associated with that. This is a unique
25 situation and so I'm not going to award any cost

1 at this time, or any attorney's fees, or anything
2 else. But what I do say, you are entitled to your
3 cost, but I don't want him to have to wait. I
4 want him to get the documents and then we'll do
5 that. And the documents, if he's got a problem
6 with the cost, then we'll take that up.

7 All right. So I'll tell you what,
8 you-all probably need an official order for this
9 more than just a form 4. Okay? How about prepare
10 an order, get a copy of it to her ASAP, and then
11 I'll look at it and sign it.

12 Do you want to prepare something brief?

13 She'll do a form 4 today. She'll send it to
14 you, sir. You-all will have it. She'll have that
15 done today. She's like a wizard. Okay? And so then
16 you can use that to craft a more formal order for
17 everybody. Is that satisfactory from the plaintiff?

18 MR. BUTCHER: Yes, sir.

19 THE COURT: From the defense?

20 MS. MORRISON: Yes. Just to confirm that
21 this will fully resolve that action, correct? He
22 can file a complaint, there's this motion, but --

23 THE COURT: What it's going to fully
24 resolve is, it's going to fully resolve the record
25 issue as it presently exists. And I guess what

1 I'm saying is, you know, if this case gets filed
2 and some other judge hears this matter because
3 they think they need to get at the psychotherapy
4 notes because there's some special extra super
5 exception, things of this nature, I mean, I don't
6 think my ruling a necessarily binding on down the
7 road.

8 But for right now, I don't see why we
9 need to get into anything other than what my order
10 is reflecting. Does that answer your question?

11 MS. MORRISON: Yes, Your Honor.

12 THE COURT: You sure?

13 MS. MORRISON: Yes, sir.

14 THE COURT: All right, sir?

15 MR. BUTCHER: That's fine, sir.

16 THE COURT: All right. Great. Thank
17 you-all.

18 (Hearing concluded.)

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CERTIFICATE OF REPORTER

I, SHARON G. HARDOON, Official Circuit Court Reporter, III for the State of South Carolina at Large, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record, **WEBEX RECORDED** of the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Jasper County, South Carolina.

I do further certify that I am neither kin, counsel, nor interest to any party hereto.

June 12, 2022



Sharon G. Hardoon, CSR
Official Circuit Court Reporter, III

1 STATE OF SOUTH CAROLINA
2 IN THE COURT OF COMMON PLEAS
3 COUNTY OF HAMPTON

4 A.M.L., J.J.L., E.R.L., by and through
5 their Next of Friend, John Doe,
6 R.D.M., by and through his Next of Friend,
7 Jane Snow, J.J.G. and S.T.S,

8 vs. Transcript of Record
9 2022-CP-27-00109

10 Wright Directions Family Services, LLC.,
11 Defendant.

12 April 29, 2022
13 Hampton, South Carolina

14 B E F O R E:

15 The HONORABLE BENTLEY PRICE

16 A P P E A R A N C E S:

17 Deborah Butcher, Representing that plaintiff
18 Kathy R. Schillaci, Representing the defendant
19 Elizabeth Morrison, Representing the defendant

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SHARON G. HARDOON, CSR
Official Circuit Court Reporter, III

1 THE COURT: A.M.L. and J.J.L. vs. Wright
2 Directions, correct? This is a motion for an
3 emergency expedited relief on the -- and what
4 else? And Rule to Show Cause.

5 MS. SCHILLACI: Correct.

6 THE COURT: All right. Be happy to hear
7 from you.

8 MS. SCHILLACI: Your Honor, we have been
9 trying for quite sometime to get the medical
10 records of these seven children. What I'm going
11 to hand up is, basically, a cheat sheet of the
12 children's names and ages, and there's also an
13 article I've included as well from the American
14 Psychological Association.

15 There was a motion to compel and the
16 outcome of that motion to compel was that they
17 were to turn over the psychological notes,
18 including, but not limited to, statements of the
19 children. And it said they would deliver
20 plaintiff's counsel any and all records in their
21 possession or control that related to the care of
22 all of these children. So it included the
23 psychological notes, including, but not limited to
24 the statement of the children.

25 Then B stated that defendant

1 Wright Directions, LLC may redact the impressions
2 of the clinicians. I think, at the time, what the
3 definition of impressions is where the issue is,
4 Your Honor. The psychological notes include, of
5 course, the analysis.

6 In any medical malpractice case, if you
7 don't have the analysis of why the patient was
8 there, what the clinician knew and what the
9 clinician prescribed, well, you would never have a
10 medical malpractice because you could never do an
11 analysis of whether or not it fell below the
12 standard of care.

13 You have the exhibits attached to the
14 motion. That was just a small excerpt. I have
15 brought in the actual documents in three binders
16 that I'll be more than happy to hand to the court.
17 I'd ask that they be kept under seal showing
18 exactly what was redacted.

19 And what they've done in this, they've
20 even redacted the purpose of the contact. So I
21 don't even know how that would fall into an
22 impression in and of itself, but it is far
23 greater -- I'm not sure what they meant by
24 impression. When I first read it, I was thinking,
25 since Wright Directions, the company, was going to

1 be allowed to redact, it was maybe their
2 impressions of their clinicians. I don't know.
3 But it certainly should not have redacted these
4 progress notes.

5 The notes, they belong to the client.
6 The privilege of confidentiality does not belong
7 in any way to the therapist or Wright Directions.
8 It only belongs to the client.

9 Two of the clients are here today. There
10 is one -- three, two of which are adults now, Your
11 Honor. They are asking for their records. And
12 these records are to be turned over to another
13 doctor. If there's any redaction that needs to be
14 done, it should be by that doctor, our expert.

15 The only reason to ever redact
16 psychological notes when they are -- psychotherapy
17 notes when they are given to a client is if there
18 is something in there that is going to hurt the
19 client. You often see it, at least me in family
20 court, if they're statements of a child that you
21 wouldn't want the parents to hear, then they would
22 redact that. In situations like that.

23 The article, I think, explains it very
24 straightforward. This should include their
25 analysis. I don't think their position is going

1 to be there was no analysis. I think that would
2 lead straight to medical malpractice.

3 But our position is, nothing should have
4 been redacted from this, Your Honor. It's
5 basically rendered everything useless. It's put
6 it in a position where you can never say if there
7 is or is not any malpractice, if they followed the
8 standard of care, because we don't know what
9 happened. We don't know why they were there. We
10 don't know what treatments were prescribed. We
11 know nothing.

12 I have never seen this, Your Honor. I've
13 never seen redactions like this. I think it was a
14 great liberty that was taken.

15 Your Honor, would you like me to hand up
16 these three notebooks?

17 THE COURT: No, that's fine.

18 MS. SCHILLACI: Okay. Just, you know, at
19 the appropriate time, Your Honor, if you would
20 like to hear -- if you need to hear from our --
21 you know, the actual clients to say they would
22 like their records, we've obviously signed HIPAA
23 releases and everything. I don't think that's
24 been a mention with the motion to compel. I think
25 the only issue truly is, why was all of this

1 redacted.

2 And if that was some kind of a
3 misunderstanding, I don't know. But we're here at
4 the twilight hour of the statute of limitations.

5 And, Your Honor, if you look to hear from
6 my expert about what is typical, what they are
7 allowed to redact -- and my concern is that I
8 don't think it was the therapist that was
9 redacting these. I think it was Wright
10 Directions, and they are not the appropriate
11 person, if there was anything that needed to be
12 redacted.

13 And, in this case, Your Honor, these
14 notes are going to another physician. If there is
15 something that needs to be kept from your client,
16 which I honestly couldn't imagine that there is,
17 our expert would have a duty to keep that from
18 them for their own protection. Honestly, Your
19 Honor, in this case, I don't think that was that
20 type of situation.

21 THE COURT: Thank you very much.

22 Yes, ma'am.

23 MS. MORRISON: Good Morning, Your Honor.
24 Liz Morrison from Hall Booth Smith for Wright
25 Directions.

1 If I may, I would like to hand up the
2 order from April 12th. I don't know if you have
3 this. Because this is what we're talking about
4 today, is Judge Bonds's ruling on this issue.

5 It's now very clear to me, this is not a
6 motion to show cause. This is a motion for
7 reconsideration. These are the exact same
8 arguments that her partner made to Judge Bonds on
9 April 7th. So let me walk through it again and
10 explain what has happened.

11 Right Directions provided mental health
12 counseling to these five plaintiffs. They are seeking
13 psychotherapy -- actually, they're seeking all
14 records. The very first medical record release
15 request that Wright Directions received was on
16 February 25th. On March 10th, they produced all the
17 non-privilege records that consist in the medical
18 file. I have attached to my brief a privilege log
19 that, kind of, details what has been produced and what
20 has been redacted.

21 We went through this with Judge Bonds
22 because, yeah, we are bound by the rules of HIPAA
23 on what we can produce. And HIPAA makes it very
24 clear that, yes, an individual or a patient is
25 entitled to their medical record, except for

1 psychotherapy records. It is black letter law.
2 It is in Judge Bonds's order. He acknowledged
3 that.

4 And so in an attempt to find an equitable
5 decision or an equitable way to, kind of, address
6 this issue he said, all right, let me look at what
7 the definition of psychotherapy notes is. And
8 then anything that does not fall under that
9 definition, you can pride, which, in this case,
10 would be what the children were reporting to the
11 counselors on separate occasions.

12 So just to make clear, this is HIPAA.
13 This is federal law and this is what they define a
14 psychotherapy note as: "Notes recorded in any
15 medium by a healthcare provider who is a mental
16 health professional documenting or analyzing
17 contents of conversation during a private
18 counseling session or group, joint, or family
19 counseling session and that are separated from the
20 rest of the individual's medical record."

21 Plaintiff's were aware when -- the
22 records they received on March 10th were the
23 medical records. These progress notes, which are
24 psychotherapy notes, are kept separately, and
25 that's why they were not produced.

1 We came in front of Judge Bonds. He
2 heard the arguments. He recognized that HIPAA
3 says what it says and so he issued an order that
4 said you got 14 days to produce these records.
5 Wright Directions produced the records and they
6 redacted the impressions.

7 And, basically, the progress notes are
8 the notes from all of the counseling sessions.
9 They meet the definition of psychotherapy notes,
10 so, of course, that's why the bulk of it is
11 redacted because it is the mental impressions of
12 the counselor.

13 I can't -- I can't make it any more
14 clearer. And it's very clear to me that the
15 plaintiffs just didn't like what Judge Bonds
16 ordered. They don't like what HIPAA says. But
17 the rule is very clear that there is an extra
18 level of privacy or mental health professionals.
19 It's not the patient's record. It's their record.
20 And that's why there is a position that -- or a
21 section of HIPAA that says, you can have
22 everything except your psychotherapy notes.
23 There's no exception.

24 So we went through the records, and
25 what's not blacked out is the top which tells

1 start and stop time, the type of session, whether
2 it be behavioral modification, family counseling,
3 individual counseling, so they know what type of
4 visit it was. They know the modalities used.

5 To the extent one of the patients
6 reported something to the counselor, they have
7 that information. They also have other records
8 that are essentially -- are, sort of, the summary,
9 which is progress notes, treatment plans, crisis
10 plans, and that is something that is allowed and
11 can be produced because that's what the rest of
12 the psychotherapy notes definition says. It says:
13 "Psychotherapy notes excludes medication
14 prescription and monitoring, counseling sessions
15 start and stop times, the modalities and
16 frequencies of treatment furnished, results of
17 clinical tests, diagnosis, functional status, the
18 treatment plan, symptoms, prognosis, and progress
19 to date."

20 If you look at my privilege log, you will
21 see we provided that. That's the record that they
22 got. So they have all the information.

23 What they don't have is the counselor's
24 impressions, because, essentially, psychotherapy
25 notes are the mental health counselor's

1 impressions. Judge Bonds ordered that that stuff
2 could be redacted. That's what we did.

3 And we've already argued this before, so
4 I take offense that this is being called an
5 emergency hearing and a motion for rule to show
6 cause. They just didn't like what Judge Bonds
7 ordered, and they're also now asking for something
8 that HIPAA does not allow, which is the complete
9 records unredacted. You just can't do it. And
10 I'm sorry, and I feel for them, but we are bound
11 by HIPAA as mental health counselors.

12 THE COURT: Fair enough.

13 MS. SCHILLACI: Your Honor, if I may, I
14 find that -- I think that's a complete misreading
15 of the rules. And I will hand this up. They can
16 be disclosed with a valid authorization, except
17 for the purpose of billing and things of that
18 nature.

19 MS. MORRISON: I need a citation for
20 that.

21 MS. SCHILLACI: This is -- it's actually
22 on page 32 of our original motion.

23 We have sent, you know, HIPAA releases.
24 That's the valid authorization.

25 And, you know, I don't know what other

1 valid authorization there is. It does have to be
2 the separate one for medical notes, and we have
3 done everything that's HIPAA compliant with this,
4 Your Honor.

5 THE COURT: All right. I've read it.

6 MS. SCHILLACI: I would just like to say,
7 Your Honor, authorization comes from the patient
8 or the guardian.

9 THE COURT: All right.

10 MS. MORRISON: May I respond, Your Honor?

11 THE COURT: Sure.

12 MS. MORRISON: That was already
13 previously brought up to Judge Bonds. Judge Bonds
14 issued his order. Just so you can see what we're
15 talking about, these are the two sections of HIPAA
16 that say you cannot produce psychotherapy notes.

17 MS. SCHILLACI: May I see it, please?

18 MS. MORRISON: Yes. Which is also cited
19 in Judge Bonds's order that we are here to talk
20 about today.

21 THE COURT: All right.

22 MS. MORRISON: And if I can make one more
23 point, Your Honor, regarding Judge Bonds's order,
24 he acknowledged in the order -- so, again, we're
25 talking about whether or not Wright Directions

1 complied with this order -- and he says, "The
2 court finds that patients are entitled to their
3 medical records under HIPAA, but an exception
4 exists for psychotherapy notes."

5 THE COURT: All right. That's what it
6 says here. It says? "Right of access: Except as
7 otherwise provided in Paragraphs A(2) or A(3) of
8 this section: An individual has a right of access
9 to inspect and obtain a copy of protected health
10 information about the individual in an designated
11 record set for as long as the protected health
12 information is maintained in the designated record
13 set, except for psychotherapy notes."

14 All right. Well, I do completely agree
15 that the access to the file is the client's, but
16 under this situation, under HIPAA, I'm just going
17 to deny the motion to compel. I believe
18 Judge Bonds already ruled on it and I don't want
19 to circumvent his ruling.

20 All right. You-all have a good day.

21 MS. SCHILLACI: Thank you, Your Honor.

22 MS. MORRISON: Thank you, Your Honor.

23 (Hearing concluded.)

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CERTIFICATE OF REPORTER

I, SHARON G. HARDOON, Official Circuit Court Reporter, III for the State of South Carolina at Large, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas, Hampton County, South Carolina.

I do further certify that I am neither kin, counsel, nor interest to any party hereto.

June 10, 2022



Sharon G. Hardoon, CSR
Official Circuit Court Reporter, III

1 THE COURT: All right. So that brings us to number one
2 on the motion roster, and that's case number 2022CP2700109.
3 A.M.L., and others v. Wright Directions Sub LLC. Do we have
4 people here for that matter?

5 MR. BUTCHER: Good morning, Your Honor.

6 THE COURT: Good morning. Mr. Butcher?

7 MR. BUTCHER: Yes, sir.

8 THE COURT: All right. And then we have Ms. Morrison?

9 MS. MORRISON: Yes, Your Honor. Good morning.

10 THE COURT: Good morning, how are you?

11 MS. MORRISON: I'm well, I have a little bit of pollen.
12 My apologies.

13 THE COURT: Well, no reason to apologize. I'm sorry. I
14 wish it would go away. Maybe we'll get the rain tomorrow.

15 MS. MORRISON: I hope so.

16 THE COURT: All right. So this is the defendant's motion
17 for costs, is what I see?

18 MS. MORRISON: Yes, Your Honor.

19 THE COURT: All right. I'll be happy to hear from you.

20 MS. MORRISON: All right. May it please the Court. This
21 is an action that originated by the plaintiffs bringing -- I
22 don't know if it was procedurally correct, but they were
23 seeking to obtain records from Wright Directions LLC, my
24 client. Wright Directions offers a variety of services,
25 including counseling to minors, sometimes in school settings,

1 sometimes in the home. Plaintiffs are accommodations. Some
2 are still minor, some are now adults who have subsequently
3 filed a lawsuit against Wright Directions and others alleging
4 various causes of action for gross negligence, abuse, fraud,
5 civil conspiracy, claiming that they were ignored and abused
6 and that no one helped them.

7 So prior to that, the plaintiffs sought to obtain their
8 records from Wright Directions. There's some issues about
9 when the original subpoena -- or excuse me, HIPAA
10 authorization was received, but Wright Directions first
11 received an authorization for records in February of 2022.
12 Some of the plaintiffs were going to turn 18 soon, so they
13 felt that time was of the essence to obtain their records.
14 Wright Directions produced records that were not protected by
15 HIPAA, specifically that were not psychotherapy records, which
16 can never be produced, regardless of who seeks them, because
17 they are owned by the therapist, not the patient.

18 So this lawsuit was initiated to essentially compel
19 production of the entire file that Wright Directions had on
20 these plaintiffs. In a very expedited fashion, we went in
21 front of Judge Bonds. He heard arguments from both parties
22 and issued an order stating that recognizing that these
23 record -- a portion of the records were psychotherapy records
24 and could not be produced. So what he asked Wright Directions
25 to do in a very tight turnaround -- fourteen days -- was to

1 redact all of the records that constituted psychotherapy
2 records and then produce everything that wasn't. And this is
3 controlled HIPAA; HIPAA makes very clear what you can produce
4 and what you can't. That was done in a very tight time frame.

5 HIPAA does allow the reimbursement of costs for complying
6 with a records request. And so as part of the order, Judge
7 Bonds did say, Wright Directions, you'll be entitled to your
8 costs. However, we don't want that to muck up or slow down
9 the production of records. So produce the records in fourteen
10 days, and then you can seek your costs.

11 So Wright Directions complied with the order, produced
12 the records within fourteen days. After their production,
13 plaintiff's counsel moved and filed something called -- I
14 believe it was like a rule to show cause or something. And
15 basically argued that we had violated the Court's order. We
16 had conducted bad faith redactions, filed an expedited motion
17 against Wright Directions, seeking, among other things,
18 sanctions and costs for what we did.

19 At their request, it was heard on an expedited basis -- I
20 was seven month pregnant at the time, we did it in Hampton
21 County. At that point it was hear by Judge Price. Judge
22 Price heard the arguments, again said, Judge Bonds' order was
23 proper, I see no need to set it aside, I find that Wright
24 Directions has complied with the order.

25 After that, we sent our invoice for the records. Because

1 of how many records there were that had to be reviewed -- it
2 was 4,576 pages, because there were four or five plaintiffs, I
3 can't remember at this point -- multiple Wright Directions
4 employees pulled the records, reviewed them, redacted them,
5 went back again to make sure the redactions were proper, had
6 them uploaded, had them ready to be produced, at which point
7 we then turned them over.

8 So we provided an invoice in May of 2022, after the
9 second hearing was heard, after, again, the court found that
10 Wright Directions had complied with the order, saying, hey,
11 pursuant to the order, pursuant to HIPAA, we're sending you
12 this invoice, which unfortunately was about \$15 wrong -- the
13 correct amount that we sought payment for is \$7,811.44. Four
14 employees spent 56 hours preparing these records. They're all
15 W-2 employees. They're all specialized in what they do, so
16 they knew what to look for, because again, we're talking about
17 psychotherapy records, we're not talking about just redacting
18 names. We're talking about very specific things that need to
19 be done.

20 In response, we got an email from plaintiff's counsel
21 basically saying, we will not pay for bad faith redactions,
22 we'll only pay what the state statute requires. So in
23 response to that, we knew we needed to file a motion. Again,
24 the court had already ruled twice -- or had already ruled once
25 that we had complied with the order. There was no bad faith

1 redactions, so essentially even though the court had said what
2 we were doing was proper, plaintiff's counsel still disagreed.

3 So we did not file the motion until October, which is
4 when I came back from maternity leave when they tried a case,
5 or whatever. The reason it has -- we're now here today on
6 March 9th because the plaintiff has pushed off this motion
7 three times, two due to illness, once due to vacation. The
8 last hearing was on -- I believe January 4th, 2023, at which
9 point I was not present for that; one of my colleagues was.
10 But the plaintiff represented to the Court that he was under
11 the influence of narcotics, and he could not proceed, so Judge
12 Clyburn Pope said, we will continue, you'll be number one
13 March 9th.

14 The actual notice of the hearing came through the courts
15 on February 16th, but yet, it wasn't until yesterday that
16 Plaintiffs filed this very long motion, attached an expert,
17 and is now seeking costs and sanctions and claiming that my
18 clients have submitted a perjurious or fraudulent affidavit,
19 and has now obtained an expert. And the only reason I bring
20 this up to the Court is I find it interesting that on January
21 4th, he said he could not go forward, but yet in the companion
22 case that has been filed in federal court, the very next day,
23 plaintiff's counsel filed a motion -- like, a petition for a
24 settlement under seal, had several exhibits, and then
25 subsequently emailed all counsel of record, including me and

1 my law firm. No mention of being under the influence of
2 drugs. No mention of being too sick to proceed, and he all
3 but admits in the amended memo that he filed yesterday that
4 he's now had enough time to now get an expert to rebut what my
5 clients have submitted.

6 So I just kind of say all of this because this is a very
7 straightforward motion, Your Honor. The court issued an order
8 saying we are entitled to costs under HIPAA. And what HIPAA
9 allows recovery for is included in my memo. I don't know if
10 you have it, but I can also kind of tell you what they are.
11 It's labor for copying, supplies for creating the paper copier
12 electronic media, postage, and the one that really applies
13 here is preparing an explanation or summary of the protected
14 health information. What the court ordered and even noting in
15 the hearing that this is a very interesting, very, kind of --
16 it's just a very odd situation because of the type of records
17 and because of what was said, because of the time crunch on
18 getting this done. So preparing an explanation or summary, I
19 think, is akin to doing this redaction and making sure that
20 the records satisfied HIPAA.

21 And so again, for Plaintiffs to attack how much time it
22 took my clients, I'll further represent not only is HIPAA very
23 serious, especially to covered entities like Wright
24 Directions, at every step of the way, Plaintiff's counsel has
25 in every rebuttal sought costs, sought fees, sought sanctions,

1 so could you imagine if we had missed something? You don't
2 think we'd be here again with him requesting some sort of
3 sanction on us? Fifty-six hours, I think, is plenty
4 reasonable when you think about it's not just reading records,
5 it's making sure that they're redacted, it's making sure that
6 it complies with HIPAA. Again, they're salaried employees,
7 they're W-2 employees, all they were focused on was getting
8 these records done, and so we've submitted an affidavit, we've
9 submitted an invoice. That's all the court has requested we
10 do.

11 So again, I'm not really sure why there's so much vitriol
12 involved in this motion. All we want to do is just get paid
13 what we're allowed under HIPAA and pursuant to the court's
14 order. So I'm happy to answer any question you may have or
15 provide you with any additional information.

16 THE COURT: Thank you, ma'am.

17 Mr. Butcher?

18 MR. BUTCHER: Yes, Your Honor. You would think since
19 we've made allegations and raised concerns that the defendants
20 have been dishonest, that the first thing they would do be
21 honest here in the hearing. And so first of all, my response
22 in the affidavit of our expert was filed on the 3rd --

23 THE COURT: Let me first -- let me first ask you, is that
24 before this Court?

25 MR. BUTCHER: The what?

1 THE COURT: Because the only motion I see before this
2 Court is a motion for their costs.

3 MR. BUTCHER: Yes, sir. So on the 3rd, I filed my
4 response, and I filed the affidavit of our expert witness, and
5 I also filed an affidavit for attorney's fees and costs.

6 Your Honor, so I'm just saying I filed --

7 THE COURT: But let me -- I understood -- I'm sorry, but
8 I understood Ms. Morrison to say that she filed a separate
9 motion with regards to your --

10 MR. BUTCHER: No, she took you through the whole case
11 history. And bottom line, I'm not going to sit there and
12 argue every point that she misrepresented about the whole case
13 history. And the other thing is everything she said, most of
14 it is not in sworn affidavit, and it's not before the Court.

15 We did have three -- well, we had two continuances, and
16 one was in December, when I had to go to the hospital because
17 of bronchitis, and that's part of the record. And then
18 December 16th, I had the pleasure of falling down my in-laws'
19 steps. I don't know if -- but anyways, I was on narcotics
20 for -- until the end of January, basically. And then we had
21 that hearing on January 3rd, and I was literally on narcotics.

22 We were able to -- I was able to pick a way and have
23 people in my office do certain work, which, a petition for
24 settlement is not overly difficult, since our practice is
25 representing foster children, all our settlements are minor

1 settlements. So from our perspective, of course I could do
2 certain legal work and my staff could do certain legal work
3 and send it out and file it for the next day.

4 But also, that's not in an affidavit, and that's not
5 admissible evidence before the Court, it's just the
6 defendant's gripes and attempts to bring me down, when what
7 they've done is they've submitted fraudulent affidavits and a
8 fraudulent request for costs, Your Honor.

9 I understand that in any circumstance I'm asking for
10 records, I'm going to have to pay costs. But here is the
11 problem. They're alleging that four individuals all spent
12 fifty-six hours -- I mean, what's the chance of people
13 spending the same amount of time on the same project? So a
14 total of 224 hours to review the 456 pages. Your Honor, that
15 equals out to -- if you extrapolate that to sixty minutes
16 times 224 hours, it's a total of three minutes per page, is
17 what they claim each individual -- or what they spent on each
18 page. And it's -- you know, we represent foster kids, and
19 I'll tell you one thing that comes with every foster kid's
20 lawsuit is a bunch of paperwork and a bunch of redactions, and
21 if maybe they were ten or twenty percent over, I wouldn't even
22 waste the time, because why fight that? But Your Honor,
23 they're 150, 200 percent over what it would take.

24 And so that's why I actually spent the money to hire this
25 expert from the citadel who's actually an expert in reading,

1 and it was filed -- the affidavit was filed on the 3rd of
2 March. It's not that big of a surprise that I would challenge
3 that, and he said it should've taken thirty to ninety seconds
4 per page to review it. So let's say he's off by fifty
5 percent. Even if he's off by fifty percent, we're looking at
6 120 seconds; we're not looking at 172 seconds, Your Honor.
7 These folks, they basically knew that there was an order that
8 I had to pay costs, and they just racked up the fees.

9 Here's the other thing. They say they had to do 5,000 --
10 4,576 pages. Not every page actually had materials on it. In
11 fact, I actually went through all 4,500 pages in a four-hour
12 period, which is in my affidavit for fees and costs, and 1,200
13 pages either had nothing, or a signature block, or the date of
14 the next appointment. You think they had to spend a minute or
15 three minutes reading that? I mean, Your Honor, this is an
16 absolute clown show and these people know better. Not only do
17 these people, but the lawyers, they absolutely know better.

18 Your Honor, so the other thing is the amount of documents
19 that were submitted yesterday, those were actually -- we went
20 and redacted all our clients' names from every page, so in
21 case you wanted to look at what the expert did, it's their
22 documents. So I don't know why they're crying that it's a
23 sudden surprise. I mean, do they have to review their
24 documents again, and are they going to try to charge me \$56 an
25 hour again to -- or \$50 an hour to look at that? I mean, I

1 don't know what to say about this, but Your Honor, I would be
2 embarrassed if I tried to submit this to a court.

3 And the other thing is when you're getting medical
4 records, even if a physician or someone has to review the
5 medical records, you're not paying their hourly rate for them
6 to review records. It's a far less amount. And these aren't
7 even -- I mean, these -- they tried to charge me \$50 for one
8 person, \$31 for another, and \$28 an hour for two other people,
9 and each of those were for fifty-six hours in total of
10 whatever, \$7,000.

11 So I think it's not a dispute over they might've doubled
12 up work or anything. These people, they came forward to
13 commit fraud -- fraud on the Court and fraud on me and my
14 clients. These are six kids who were chronically starved and
15 beaten over a six-year period. The defendants provided mental
16 health services during a two-year period, and these -- and we
17 asked for their records, and they wouldn't give us these
18 records.

19 The order that we got is only limited to this case, so it
20 did not -- it was so we could submit the documents to an
21 expert so we could file a malpractice case, and they had
22 refused for over a year to give us our clients' records --
23 well, some of the clients, and then others, it was over a
24 several months period.

25 But that's been the problem. We've been dealing with

1 this bad faith stuff. I mean, the lies started in the
2 beginning. First phone call with Ms. Morrison, she said that
3 I didn't name her client correctly, and I asked her the name
4 of her client on the phone call, and she's told me to look it
5 up. I mean, it's -- you can see why there's a little bit of
6 frustration, anger, and disgust in everything I've had to deal
7 with this, and it start with first phone call.

8 So from that perspective, Your Honor, I would ask you --
9 the majority in the most relevant exhibits to my response were
10 filed on March 3rd, and those include the affidavit of our
11 reading expert, who we had to spend \$1,000 for him to do; the
12 other thing is our affidavit for attorney's fees and costs.
13 Now, I did file a supplemental affidavit of attorney's fees
14 and costs, and that's because the person I paid to redact the
15 -- I think I only redacted, like, 7- or 800 pages, but that
16 person who redacted -- I think she spent forty-seven hours or
17 something. So I updated that.

18 I mean, it's -- so the other thing is the defendants have
19 brought this on themselves, and I think under Rule 11, they
20 violated this whole thing of submitting factual and true and
21 realistic documents. I think the attorneys had a duty to
22 investigate if their clients were submitting 224-hour bill for
23 4,000 pages. And I think although it's -- and the reason I
24 got an expert is because it wasn't enough for me to just say,
25 we spent fifty hours redacting every page to submit to the

1 Court; we needed an expert. And I think it's relevant, Your
2 Honor.

3 And I think when someone comes in with such unclean
4 hands, and with an attempt to defraud, they shouldn't get
5 anything. And we would ask for attorney's fees and costs
6 under Rule 11. And we've submitted attorney's fees and costs
7 related to that. I've also submitted copies of my retainer
8 agreements, which are redacted, to show that not only is it a
9 contingency fee case, but we also have a set rate of
10 attorney's fees and costs -- or attorney billing rate in that
11 information. I think that's everything, Your Honor.

12 THE COURT: All right. Ms. Morrison, I'll be happy to
13 hear from you on rebuttal briefly.

14 MS. MORRISON: Thank you, Your Honor. I will represent
15 to the Court that Mr. Butcher is correct. These say they were
16 electronically filed on March 3rd, but I did not receive
17 notice of them until yesterday. I don't know what happened
18 with the Jasper County, but that's when all of the filings
19 came through. So I did not see this affidavit or full filing
20 yesterday.

21 Briefly, the court found that we were entitled to costs
22 and fees under HIPAA. We sent our bill. Plaintiff refused to
23 file it. We had no other recourse but to file a motion.
24 Plaintiff is -- again, my clients swore under oath that this
25 is how much time they took. I don't understand why he keeps

1 calling it fraudulent. I'll further -- candidly, I contacted
2 my own reading expert, the former chair of the English
3 department at College of Charleston happens to be my mother-
4 in-law. So no affidavit, no hearing --

5 MR. BUTCHER: Your Honor, I'd object to this. I mean,
6 it's not before the Court.

7 MS. MORRISON: -- but if I could just point out something
8 that I didn't notice in this professor's affidavit versus what
9 we sent, reading may take one amount of time, but they didn't
10 just read. As they set forth in their affidavit, they had to
11 review, redact, and compile, so it's not just simply reading
12 something only one time and sending it on. So he may disagree
13 with what they took, I recognize that, but this is what my
14 client has sworn in an affidavit. That is what they have
15 said, that this is how much time it took.

16 The fees are recoverable under HIPAA, so again, I
17 honestly don't understand why we're having to get into Rule 11
18 here. The court said we're entitled to it, so I just -- you
19 have the evidence in front of you, and we just will rely on
20 your judgement. Thank you, Your Honor.

21 THE COURT: I appreciate everybody's argument. Certainly
22 want to take a look at what's been filed. And I'll make a
23 ruling. Is there anything further from any side before we
24 adjourn this hearing?

25 MS. MORRISON: No, Your Honor.

1 MR. BUTCHER: No, Your Honor.

2 THE COURT: Thank you all. If you'll all have a good
3 day.

4 MS. MORRISON: Thank you. You too.

5 (End of Transcript of Record)

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The South Carolina Court of Appeals

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June 02, 2023

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Re: A.M.L. v. Wright Directions Family Services, LLC.
Appellate Case No. 2023-000791

Dear Counsel:

A preliminary review of the orders challenged on appeal indicates they might not be appealable.

Accordingly, it is requested that each party serve and file a memoranda addressing the issue of appealability within ten (10) days of the date of this letter. The time limits for perfecting the appeal are held in abeyance pending the Court's consideration of the memoranda.

Very truly yours

CLERK

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Jun 12 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Family Court

H. Steven DeBerry, IV, Circuit Court Judge

Common Pleas Case Number 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,

**MEMORANDUM OF LAW IN RESPONSE TO THE COURT’S INTERROGATORY
REGARDING APPEALABILITY OF THE MATTER**

Appellants A.M.L., J.J.L., R.D.M., J.J.G., and S.T.S. submit the following memorandum of law in response to the Court’s interrogatory regarding the appealability of the disputed issues and assert the following:

I. Procedural background.

From November 2013 through January 2020, WDFS provided mental health and behavioral services to Plaintiffs A.M.L., J.J.L., R.D.M., J.J.G., and S.T.S.¹ Summons and Complaint, *5 (March 9, 2022). From 2010 through November 2016, the Children were chronically physically abused and starved

¹ Plaintiffs A.M.L., J.J.L., R.D.M., J.J.G., and S.T.S. are collectively referred to as the

by their adoptive parents in Bluffton, South Carolina. Plaintiffs' Memorandum of Law in Support of Their Motion to Show Cause, *9-29 (April 1, 2022).

From May 2, 2019, through February 25, 2022, Plaintiffs attempted to obtain their treatment records from Wright Directions, LLC. Plaintiffs' Memorandum of Law in Support of Their Motion to Show Cause, *2 (April 1, 2022).

Statute of limitations for any malpractice action against the Defendant were set to run on May 10 and May 15, 2022, for S.T.S. and J.J.G., respectively.

The Plaintiffs were forced to file a summons and complaint asking for specific performance, i.e., a court order requiring the production of the Children's treatment records, on March 9, 2022. Summons and Complaint, *5 (March 9, 2022). An amended complaint was filed on March 10, 2022. Amended Complaint for Specific Performance (March 10, 2022). In the amended complaint, the Children asked for the following relief:

WHEREFORE, Plaintiffs request the Court to issue an Order and Rule to Show Cause requiring Wright Directions Sub, LLC, doing business as Wright Direction Family Services, LLC ("WDFS") to appear before the Court with all of Plaintiffs' medical records and any other documentation related to the children.

The Plaintiff's request a complete mirror of each child's file to include all case files from 2010 to the present, all assessments, intake documents, treatment plans, referrals, plans of care, therapeutic notes, progress notes, summaries, discharge summaries, correspondence parents and third parties, billing records, and any other documents related to the children.

Additionally, Plaintiffs' counsel requests an award of all fees and costs associated with having to file this action.

Amended Complaint for Specific Performance, *5-6 (March 10, 2022).

A hearing was held by the Jasper County Court of Common Pleas on April 8, 2022 and the Court issued the following Order, in 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

"Children".

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), but the records must be delivered to the Plaintiffs before Defendant can calculate and bill Plaintiffs for such costs.
4. This order should not be construed to have any bearing on any future discovery dispute between the parties in any follow-up litigation as it relates to these records.

Order (April 12, 2022).

The Defendant submitted records to Plaintiffs on April 22, 2022. The Children argued that the Defendants redaction of the documents were meritless and the Court of Common Pleas disagreed. Order Denying Plaintiffs' Motion to Show Cause and for Emergency Hearing (December 29, 2022).

On March 28, 2023, the Court of Common Pleas issued an order awarding costs for the redaction of the documents to be paid to the Defendants.

II. Argument.

The production of the Children's records has already been performed by the Defendants. The Order issued on April 12, 2022 was essentially an order on the merits and there is no need for further litigation.

Should the Court need a formal order dismissing this matter, Plaintiffs are fine with the Court remanding this matter, but at this point in time, nothing substantive would have to be performed by either party or the Court of Common Pleas.

The Children's only concern is the lower court's decision to award an extraordinary amount in costs to the Defendant.

III. Conclusion.

Plaintiffs will follow the Court's instructions on appealability of the matter.

Respectfully submitted,

FOSTER CARE ABUSE LAW FIRM, PA

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Camden, South Carolina
June 12, 2023

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Jun 12 2023

SC Court of Appeals

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

Common Pleas Case Number 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,

CERTIFICATE OF SERVICE

I certify that I have served the following documents:

- 1. Notice Regarding Production of Transcript with the attached exhibit:
 - a. Memorandum of law in response to the Court’s interrogatory regarding the appealability of the matter

upon Elizabeth F. Morrison, counsel for Wright Directions Family Services, LLC, via email at:

Elizabeth F. Morrison -emorrison@hallboothsmith.com

Respectfully submitted,

FOSTER CARE ABUSE LAW FIRM, PA

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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

June 22, 2023

RECEIVED

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.

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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COUNSEL FOR RESPONDENT

June 22, 2023

The South Carolina Court of Appeals

A.M.L., and J.J.L., by and through their Next 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.

Appellate Case No. 2023-000791

ORDER

Appellant appeals from an order of the circuit court requiring it to pay the costs associated with the redaction of records ordered to be disclosed by Respondent. Upon receiving the notice of appeal, this Court requested memoranda from the parties regarding the appealability of the order. After considering both parties' memoranda, it appears the order finally adjudicated all claims pending before the Court and is subject to immediate appeal. However, this order merely allows the appeal to proceed at this time and does not finally determine whether the underlying order is subject to immediate review.



FOR THE COURT

Columbia, South Carolina

FILED
Jul 17 2023

cc:

Deborah J Butcher, Esquire
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Elizabeth Fulton Morrison, Esquire