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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Vernon F. Dunbar, Circuit Court Judge

Appellate Case No. 2025-000999

Ex Parte: Prisma Health,Appellant.

The State,Respondent,

v.

Francisco Lobos LobosDefendant,

AND

The State,Respondent,

v.

Emily Lanesha Jocquisha DawkinsDefendant.

**PRISMA HEALTH’S PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC**

Pursuant to Rules 219(b) and 221(a) of the South Carolina Appellate Court Rules and for the reasons below, Appellant Prisma Health (“Prisma”) petitions the Court for rehearing, and suggests rehearing *en banc*, of the Court’s Order, dated May 30, 2025, dismissing the above-captioned appeals as interlocutory because they are based on discovery orders. Prisma requests rehearing because, unlike the authorities relied upon by the Court as justification for dismissal, in this appeal, Prisma faces irrevocable legal injury if it complies with the lower court’s orders or if

it defies the orders and is held in contempt. This Hobson's choice exists because the orders of the lower court compel Prisma to produce medical records in violation of federal patient privacy laws. If the records are produced, Prisma will be subject to civil and potential criminal penalties under federal law; if the records are not produced, Prisma will be subject to contempt sanctions by the state court under state laws. Unlike the cases cited in the Court's May 30, 2025 order, Prisma will sustain legal injury no matter what choice it makes. Therefore, Prisma contends that the lower court's orders are final and are ripe for review by this Court.

BACKGROUND

This appeal arises out of the State's investigation and prosecution of Defendant Emily Lanesha Jocquisha Dawkins ("Defendant Dawkins") and Defendant Francisco Lobos Lobos ("Defendant Lobos"). In the course of its investigation and prosecution of those defendants, the State obtained *ex parte* orders from the Thirteenth Circuit General Sessions courts directing Prisma to produce medical records for a now-deceased victim of the Defendant Dawkins and for the Defendant Lobos and his four alleged victims.

In response to the orders and the accompanying requests for medical records, Prisma notified the State that no records could be produced "at this time" because a signed reproductive health attestation form ("Attestation") was not provided with the orders, as required by a newly enacted federal privacy regulation. Prisma's response included a model form Attestation, developed and sanctioned by the United States Department of Health and Human Services ("HHS") as being compliant with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. § 1320d *et al.*, and with 45 C.F.R. Parts 160 and 164 (1996) (the "HIPAA Privacy Rule"). After multiple conferences with Prisma to resolve the issue, the State refused to submit a required Attestation for any of its records requests and, instead, on March 13, 2025, filed Motions to Compel production of the records.

In response, Prisma filed a Motion for Protective Order and a Response opposing the State's Motions to Compel on the grounds that HIPAA and the Privacy Rule prohibit the use and disclosure of the protected health information ("PHI") of patients, except in limited circumstances and only when all the requirements for disclosure are met. 45 C.F.R. §164.502; 45 C.F.R. §164.508. Under the HIPAA Privacy Rule, Prisma is prohibited from disclosing records that potentially contain reproductive health care information. 45 C.F.R. §164.509. The only exception that would permit Prisma to disclose such records occurs when the records request is accompanied by a signed Attestation certifying that the records will not be used for a purpose prohibited by HIPAA and acknowledging that certain criminal penalties may apply if records are obtained knowingly in violation of HIPAA. 45 C.F.R. §164.509. Because the orders of the circuit court directing Prisma to produce medical records in the Dawkins and Lobos cases, standing alone, without the signed Attestations, do not satisfy all of the requirements of the HIPAA Privacy Rule, Prisma cannot disclose such records without violating federal law. Specifically, Prisma argued to the circuit court that, because HIPAA and the Privacy Rule explicitly preempt all contrary or conflicting state laws, except for those that provide *greater* protection for the privacy of patient information, Prisma cannot be compelled to disclose the records sought by the State. *See* 45 C.F.R. §160.203.

On May 7, 2025, the circuit court issued an order granting the State's March 13, 2025 Motions to Compel, and directing Prisma to produce the requested medical records. In its order, the circuit court sought to restrict the State's use of the records, but such restrictions cannot alter the requirements of the law, and, therefore, they afford no protection to Prisma against civil penalties and potential criminal sanctions arising from its failure to comply with the federal law.

Thus, on May 19, 2025, Prisma filed two (2) Notices of Appeal with the Court of Appeals and a Petition for Extraordinary Relief Including a Writ of Certiorari with the South Carolina

Supreme Court. On May 28, 2025, the State filed a Motion to Enlarge Time to File a Return to the Petition for Extraordinary Relief, which the Supreme Court granted, extending the deadline to file a Return until June 30, 2025.

On May 30, 2025, the Court of Appeals issued an order dismissing Prisma’s appeal on the grounds that the circuit court’s orders are not immediately appealable. In support of its decision, the Court relied upon the following authorities:

1. *Ex parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986) (“An order directing a party to participate in discovery is interlocutory and not directly appealable under S.C. Code Ann. §14-3-330 [2017].”);
2. *Ex parte Whetstone*, 289 S.C. at 581, 347 S.E.2d at 882 (“A non-party suffers no legal injury when he is ordered to participate in discovery. The necessary legal injury does not arise until he is held in contempt.”); and
3. *State v. Looper*, 421 S.C. 384, 390, 807 S.E.2d 203, 206 (2017) (dismissing appeal as premature because there is no final judgment in a criminal matter until the sentence is imposed unless there is an exception to the requirement of a final judgment).

As set forth below, the Court’s order dismissing Prisma’s appeal misapprehends the applicability of the referenced authorities to this matter, and Prisma respectfully petitions for rehearing and rehearing *en banc*.

ARGUMENTS

I. Prisma will suffer a legal injury by complying with the circuit court’s order.

The Court erred in dismissing Prisma’s appeal on the grounds that it will not suffer a legal injury by complying with the circuit court’s discovery order. The Court relied upon *Ex parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986) for the proposition that an interlocutory discovery order directing a non-party to participate in discovery is not immediately appealable because the non-party does not suffer a legal injury when ordered to participate in discovery.

In this case, Prisma appealed the circuit court’s order(s) compelling it to produce certain medical records without receiving either the necessary patient authorization or the required Attestations because the production of the requested medical records would violate HIPAA and the Privacy Rule. Under the law, a covered entity—such as Prisma—may not use or disclose PHI, except (a) as required or permitted by the Privacy Rule; or (b) as authorized in writing by the individual (or the individual’s personal representative) who is the subject of the information. 45 C.F.R. § 164.502(a). The Privacy Rule *requires* the disclosure of PHI in only two instances: (1) when the information is being disclosed to the patient (or the patient’s designated representative) upon request or authorization of the patient; and (2) when the information is being disclosed to HHS in connection with a compliance investigation or enforcement action. All other disclosures allowed by the Privacy Rule are either *permitted, but not required*, or are prohibited. 45 C.F.R. § 164.502(a)(2) and (4).

After the United States Supreme Court issued its opinion in *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215, 259 (2022), HHS proposed to modify the existing Privacy Rule to provide additional protections against the disclosure of PHI related to reproductive health care for certain unlawful uses. *See HIPAA Privacy Rule to Support Reproductive Health Care Privacy*, 88 Fed. Reg. 23,506, 23,521 (Apr. 17, 2023). After a year-long rulemaking process, HHS issued its final rule governing the disclosure of reproductive health PHI (“Reproductive Health Care Privacy Rule”). *See* 89 Fed. Reg. 32976 (April 26, 2024). Under the Reproductive Health Care Privacy Rule, a covered entity (such as Prisma) is prohibited from disclosing PHI, which is to be used:

1. To conduct a criminal, civil, or administrative investigation into any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care;

2. To impose criminal, civil, or administrative liability on any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care.
3. To identify any person for any purpose described above.

45 C.F.R. §164.502(a)(5)(iii)(A).

To implement compliance with the prohibition against the use or disclosure of reproductive health care information for an improper purpose, the Reproductive Health Care Privacy Rule establishes an exception that permits, but does not require, disclosure of protected health information when a requesting person or entity meets the exception. 89 Fed. Reg. 33027. Essentially, the exception allows disclosure when the requesting individual or entity attests that it does not seek the records for any purpose prohibited by the Reproductive Health Care Rule. The exception allowing disclosure upon attestation of no improper purpose applies when: (a) the request for PHI *potentially* relates to reproductive health care and (b) when the request relates to health oversight activities, and/or judicial and administrative proceedings, and/or law enforcement purposes, and/or disclosures to coroners and medical examiners regarding decedents. *See* 45 CFR §164.509(a)(1) and 45 CFR §164.512(d)–(g)(1). Compliance with the Reproductive Health Care Privacy Rule became mandatory on December 23, 2024. 89 Fed. Reg. at 32,976.

If Prisma were to produce records in violation of HIPAA or the Privacy Rule, it or its employees could be considered to have committed a federal crime. The South Carolina Attorney General acknowledged as much in the Complaint it filed, along with other state attorneys general, in *State of Tennessee, et al. v. U.S. Department of Health and Human Services, et. al.*, 3:25:cv-00025-JEM, (E.D. Tenn. 2025), challenging the authority of HHS to issue the Reproductive Health Care Privacy Rule. In that pleading, the South Carolina Attorney General and the other plaintiffs asserted that:

Under HIPAA, a person commits a federal crime if he, ‘knowingly and in violation of’ HIPAA, either (1) ‘uses or causes to be used a unique health identifier,’ (2) ‘obtains individually identifiable health information relating to an individual’; or (3) ‘discloses individually identifiable health information to another person’ without the ‘authorization’ mandated by the statute and implementing regulations. 42 U.S.C § 1320d-6(a).

[Complaint ¶ 27].

The pleading recognizes that “[v]iolating HIPAA carries serious criminal consequences, including hefty fines and prison time.” [Complaint ¶ 29] (citing 42 USCA § 1320d-6(b)); *see also* 42 U.S.C.A. § 1320d-5 (setting forth the penalties for violating HIPAA and the procedures through which a state attorneys’ general may bring an action against entities that violate HIPAA).

In this case, Prisma is in a position where (1) the circuit court has issued an order directing Prisma to produce medical records without the required patient authorization or an attestation; (2) Prisma knows the production of the requested records would violate HIPAA; and (3) as the South Carolina Attorney General has acknowledged, violating HIPAA can carry serious criminal consequences. Therefore, Prisma cannot both comply with the circuit court’s orders and remain in compliance with HIPAA.

In *Ex Parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881, (1986), a non-party appealed an order directing him to attend a deposition and produce certain documents. The court in *Whetstone* dismissed the appeal on the grounds that the discovery order at issue was an interlocutory order that was not immediately appealable. The court reasoned that instead of appealing immediately, the appellant had two options: (1) comply with the discovery order; or (2) refuse to comply with the discovery order and be held in contempt. The court concluded that this rule was consistent with S.C. CODE ANN. § 18-1-30, which limits appellate review to parties aggrieved by an order below. The Court recognized that an “aggrieved party” is one who is “injured in a legal sense or

one who has suffered an injury to person or property.” Based on this definition, the court stated that “[a] non-party suffers no legal injury when he is ordered to participate in discovery.”

Unlike the nonparty in *Whetstone*, Prisma—a nonparty to the instant criminal cases—is faced with choosing between two legal injuries. Prisma may either comply with the circuit court’s order and violate federal law, or refuse to comply with the circuit court’s order and be held in contempt. In other words, Prisma has been ordered to choose whether to violate federal law or violate a state court order. Either choice causes Prisma to suffer a legal injury. If Prisma were to produce the requested medical records and disclose the protected health information of its patients, it would violate federal law and it cannot unring that bell on appeal. *See State Record Co. v. State*, 332 S.C. 346, 356 n.19, 504 S.E.2d 592, 597 n.19 (1998) (recognizing that “it is difficult, if not impossible, to unring a bell”). The Court’s opinion in *Whetstone* does not address an appellant who is being asked to choose between legal harms. Instead—as is typical in many appeals from discovery orders—the nonparty appellant in *Whetstone* had a choice to comply, which, although inconvenient, would not have resulted in a legal injury.

This case is distinguishable from *Whetstone* and the other cases finding interlocutory discovery orders are not immediately appealable until a party suffers a legal harm (*i.e.* being held in contempt) because Prisma has no option for responding to the orders of the circuit court that does not cause it to suffer a legal injury. As a party faced with legal process (the order compelling production) and with no option for response that does not result in a legal injury, Prisma is an aggrieved party now. Therefore, Prisma respectfully requests that the Court grant Prisma’s Petition for Rehearing and reinstate its appeal.

II. This appeal is not an appeal of a criminal proceeding to which Prisma is a party and subject to a criminal sentence.

The Court’s order dismissing Prisma’s appeal errs in relying upon *State v. Looper*, 421 S.C. 384, 390, 807 S.E.2d 203, 206 (2017) as a basis for dismissing the appeal. In *Looper*, the court affirmed the dismissal of a criminal defendant’s appeal on the grounds that the circuit court’s order reversing the magistrate judge’s decision to grant the defendant’s motion to suppress was not a final appealable judgment. In *Looper*, the court relied upon the general proposition that a criminal defendant may not appeal except from the final sentence imposed by the court. *Looper*, 421 S.C. at 387, 807 S.E.2d at 204.

Prisma is not a criminal defendant, or any other kind of party, to the State’s prosecution of the Defendants Dawkins or Lobos. Rather, Prisma is a nonparty ordered to violate federal law and produce medical records in two criminal cases. Thus, Prisma cannot be subject to a “final sentence imposed by the court,” as required for a criminal defendant to appeal the trial court’s orders. Accordingly, reliance on *Looper* as a basis for dismissing Prisma’s appeal is misplaced.

CONCLUSION

For the reasons stated above, Prisma respectfully requests that the Court vacate its May 30, 2025 Order and reinstate Prisma’s appeal.

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PROOF OF SERVICE

The undersigned hereby certifies that on June 13, 2025, he has caused a copy of Prisma Health’s Petition for Rehearing and Suggestion for Rehearing En Banc to be served upon all parties of record by electronic mail and United States mail, postage prepaid, addressed as follows:

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