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JUN 10 2015

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No. 2013-CP-42-3055  
Appellate Case No.:2015-000653

James Travis Singleton, ..... Appellant,

v.

John Davis and Jane Davis, ..... Respondents.

**APPELLANT JAMES TRAVIS SINGLETON'S PETITION  
FOR REHEARING OF ORDER DISMISSING HIS APPEAL**

James Travis Singleton (hereinafter Singleton), hereby petitions for rehearing of this Court's Order dismissing the above-captioned appeal. The Order was filed on May 28, 2015. This petition is made pursuant to Rule 221, SCACR.

This Court dismissed Singleton's appeal based upon the general rule that orders compelling discovery are interlocutory and not immediately appealable. Waddell v. Kahdy, 309 S.C. 1, 4, 419 S.E.2d 783, 785 (1992) (holding that an order requiring a party to submit to a deposition is not directly appealable); Patterson v. Specter Broadcasting Corp., 287 S.C. 249, 335 S.E.2d 803 (1985) (holding that an order compelling discovery is interlocutory and not directly appealable). However, there is an exception for

interlocutory orders that “involve the merits.” Wallace v. Interamerican Trust Co., 246 S.C. 563, 568, 144 S.E.2d 813, 816 (1965); S.C. Code Ann. § 14-3-330(1).

The matter before the Trial Court is a garden variety automobile accident case, involving only proximate cause and damages. Despite this, the Trial Court issued Orders requiring Singleton’s counsel to either give up his client’s right to the attorney-client and work product privilege (for which the result would be disciplinary proceedings associated with counsel’s failure to protect his client), or refuse to comply with the Court’s Order (for which the result would be financial sanctions, and/or imprisonment). (See attached Transcript of Record)

Previously, the Supreme Court construed the phrase “involve the merits” for purposes of appellate jurisdiction to embrace more than simply the questions of law or fact constituting the causes of action and defenses in the case. Blakely & Copeland v. Frazier, 11 S.C. 122, 134 (1878). “The word ‘merits’ naturally bears the sense of including all that the party may claim of right in reference to his case.” Id. The Court concluded that “whenever a substantial right of the party to an action material to obtaining a judgment in such action is denied, a right of appeal lies . . . .” Id. at 135.

In particular, courts have held that orders requiring disclosure of protected information involve the merits and, therefore, are immediately appealable. The Supreme Court recently held that an order unsealing a court record was immediately appealable under Section 14-3-330(1). Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 7-8, 630 S.E.2d 464, 467-68 (2006). The court recognized that the order compelling that disclosure finally determined the parties’ rights with respect to the protected information, even though the order was interlocutory in nature. Id. at 7-8, 630 S.E.2d at 468. This Court

has also held that an order denying a plaintiff's motion to proceed anonymously was immediately appealable. Doe v. Howe, 362 S.C. 212, 607 S.E.2d 354 (Ct. App. 2004).

In both cases, the court focused on the fact that denial of interlocutory review would prejudice the party seeking protection of the information by "letting the cat out of the bag." Ex parte Capital U-Drive-It, 369 S.C. at 8, 630 S.E.2d at 468; Doe, 362 S.C. at 217, 607 S.E.2d at 356. Once the protected information has been produced, there is no effective way of recapturing it. Id.

In Doe, this Court outlined the criteria for interlocutory appellate review when protected material is at stake. An order is appealable under Section 14-3-330(1) if: (a) The order conclusively determines the question at issue; (b) The question is independent of the merits of the litigation; and, (c) The order is effectively unreviewable on final appeal because the protected information would have already been revealed. Doe, 362 S.C. at 217, 607 S.E.2d at 356.

The subject Orders which demand appeal in this case meet all of these criteria. Specifically, the two Orders compelled the production of "any and all joint defense agreements that exist between the law offices of Marcus K. McGarr and Murphy & Grantland, P.A." (See Singleton's Notice of Appeal.) The Trial Court's Orders compelled production of documents protected by the attorney-client privilege and work product privilege with regard to Singleton, and the work product privilege with regard to USAA. As such, the Trial Court's Orders "involve the merits" for purposes of Section 14-3-330(1), because they finally determine Singleton and USAA's substantial rights by compelling production of protected documents. See Blakely & Copeland, 11 S.C. at 134-35.

The Trial Court Orders also satisfy the Doe factors. The question as to whether or not Singleton must produce the requested documents is independent of the merits. Indeed, no questions of law or fact at trial will hinge upon whether or not privileged documents are produced. As a result, the Trial Court's Orders conclusively determine the question, and the Orders have the result of "letting the cat out of the bag," because irreparable damage will have already been done by the time an appeal is filed after judgment.

This case is distinguishable from the discovery orders in the line of cases cited in this Court's Order. In Wallace, the court emphasized that the discovery order related to pre-trial production of books and records deemed necessary to a proper and expeditious trial on the merits. Wallace, 246 S.C. at 568, 144 S.E.2d at 816; see also Lowndes Prods., Inc. v. Brower, 262 S.C. 431, 433-34, 205 S.E.2d 184, 185 (1974) (explaining that the discovery order related only to the evidence that might be elicited at trial); Waddell, 309 S.C. at 4, 419 S.E.2d at 785 (holding that an order requiring a party to submit to a deposition is not immediately appealable).

Again, Singleton will demonstrate in his brief of this appeal that the discovery subject to the Trial Court's Orders has and will have no bearing on the issues at trial. Singleton's good faith in handling the claim is not at issue. To reiterate, this case is the result of an automobile accident, for which the issues to be argued are proximate cause and damages, only. Moreover, Singleton has produced documents sufficient for Respondents to evaluate the credibility and bias of the defense expert. Respondents have cited no authority for their contention that they are entitled to defense work product and/or attorney-client privileged material in order to evaluate the credibility and bias of

defense experts. Such an exception would swallow the rule that privileged material is protected.

As a result, the Trial Court's Orders were final with respect to the issues at stake in this appeal. Ex parte Capital U-Drive-It, 369 S.C. at 7-8, 630 S.E.2d at 468 ("No further action is required in the family court to determine the parties' rights; therefore, the order is immediately appealable."). Furthermore, there is no danger of piecemeal litigation where the rights of the parties have not been substantially impacted. See Watson v. Underwood, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014) (explaining the basic policy behind the general prohibition of interlocutory appeals). Substantial rights of both Singleton and USAA are at stake, and these rights will be irreparably lost if an interlocutory appeal is not allowed. Singleton must contest the Trial Court's ruling at this juncture. If he does not, all other work product protected material, and potentially additional attorney-client privileged material, could be subject to production through the waiver doctrine. By implication, the Trial Court's ruling could ultimately pierce the shield of attorney-client privilege and work product privilege, and set a dangerous precedent in the process.

Indeed, a direct appeal, with regard to disclosure of confidential information, is anticipated by our Court's rules. Rule 407 (1.6 (a)) of the South Carolina Rules of Professional Conduct specifically states, in pertinent part, "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." Comment [14] of the above Rule states, in pertinent part, "A lawyer may be ordered to reveal information relating to the representation of a client by a court ... claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the clients to do otherwise, the lawyer should assert on behalf of the client all

non-frivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. **In the event of an adverse ruling the lawyer must consult with the client about the possibility of appeal...**” (emphasis added).

Courts in other jurisdictions have already recognized the need for immediate review of orders compelling production of joint defense agreements, and other work product protected documents. North Carolina courts have held that orders compelling production of documents protected by the attorney-client privilege affect a substantial right, and are therefore subject to interlocutory review. Evans v. USAA, 541 S.E.2d 782, 786 (N.C. Ct. App. 2001). Moreover, the Supreme Court of Connecticut has held that orders compelling production of material protected by the “common interest” or “joint defense” privileges are immediately appealable. Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co., 730 A.2d 51 (Conn. 1999). Tennessee courts have also allowed interlocutory appeals on this basis. Boyd v. Comdata Network, Inc., 88 S.W.3d 203, 211 (Tenn. Ct. App. 2002). In each case, the courts recognized the important concern that delaying review of orders compelling production of protected material would prejudice the interests of the party seeking protection.

Finally, the Supreme Court has indicated that the presentation of a novel question of law, and the opportunity therewith to provide guidance to the bench and bar in the interest of judicial economy, are factors weighing in favor of allowing interlocutory appeals. Salmonsens v. CGD, Inc., 377 S.C. 442, 452, 661 S.E.2d 81, 87 (2008). Indeed, both of these factors are present in this appeal. This Court has held that counsel appearing and defending in the name of the underinsured motorist carrier does not have an attorney-client relationship with the defendant in motor vehicle accident cases.

Crawford v. Henderson, 356 S.C. 389, 589 S.E.2d 204 (Ct. App. 2003). However, Crawford does not address the attorney-client privilege afforded Singleton, the work product privilege afforded Singleton, or the effect of the common interest doctrine. See Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 692 S.E.2d 526 (2010).

Respondents have raised a novel question of law by demanding production of the joint defense agreement and any related documents between Singleton's counsel, and counsel appearing and defending in the name of the underinsured motorist carrier. This question, again, is independent from the issues at trial, which involve only proximate cause and damages arising from a motor vehicle accident. Moreover, the need for guidance for the bench and bar as to the contours of attorney-client and work product protection in cases involving Singleton and underinsured motorist (UIM) coverage is great. These types of cases are very common, and crucial issues are at stake.

Accordingly, this Court has jurisdiction to hear this appeal pursuant to Section 14-3-330(1) of the South Carolina Code. Appellant respectfully implores this Court to allow the parties to brief the issues at hand, prior to issuing a final ruling on this basis. As such, Appellant Singleton therefore requests that this Court grant his petition for rehearing, and reinstate his appeal.

June 9, 2015

Respectfully submitted,

MARCUS K. MCGARR, P.A.



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19 MR. WICKER: Okay. Uh, we have a motion, the plaintiffs  
20 have a motion to compel the joint defense agreement of the  
21 defendant. Uh, in this case we we served a third set of  
22 interrogatories on September the 14th two thousand -- S -- I'm  
23 sorry, September 19th 2014, uh, to date there's been no  
24 response. Uh, I have sent no less than seven written  
25 communications requesting a response, no, not only has a joint

1 defense agreement not been divulged, uh, the existence or  
2 non-existence of one hasn't been confirmed or denied, my  
3 communications have gone without response completely. At this  
4 point, uh, the plaintiff has been stripped bare of all of her  
5 privacy and she -- we've gone back to medical records fifteen  
6 years ago, very sensitive psychological records, we only ask  
7 that the same transparency be offered to us. We think it's  
8 critical to the case who is actually defending against us, is  
9 it in fact State Farm represented by Mr. McGarr or is it in  
10 fact USAA who is our own insurance company. I think we have a  
11 right to know if there's a joint defense agreement so that we  
12 can know where our premiums are being paid to the extent that  
13 there may be some bad faith element to the case thus, Your  
14 Honor, I believe we've properly filed the request, it's gone  
15 completely unresponded to for several months and we think it's  
16 a proper request, we would ask that you compel them to  
17 disclose it or at least to put on the record that one does not  
18 exist.

19 THE COURT: Who wants to address that, both of ya ---

20 (Cough.)

21 MR. MCGARR: Um, I need to address that first and  
22 foremost, Your Honor. Uh, the reason we have not responded to  
23 this and I'm gonna be careful when I, when I address it, uh,  
24 this i -- this is the equivalent, uh, let's say that, uh, you  
25 have, uh, two co-defendant, two criminal co-defendants and,

1     uh, one lawyer is representing one co-defendant, one lawyer is  
2     representing the other co-defendant and they decide to wor --  
3     uh, en -- engage in a joint defense agreement or joint defense  
4     doctrine, um, um, uh, they can do that and that is a part of  
5     their work product, it is covered by the attorney-client  
6     privilege and more important it's completely irrelevant to the  
7     case, uh, what does it matter, uh, what the two defendants  
8     were doing among their lawyers? Uh, it's perfectly acceptable  
9     for co-defendants to work together to defend against a, uh,  
10    uh, the State, for example, uh, uh, and it's done every day  
11    but you've probably never seen a request by the State saying,  
12    We wanna see your agreement as to how you're working together  
13    because (a) it would violate the work product of, uh,  
14    privilege, (b) it would violate the ac -- attorney-client  
15    privilege and (c) it's totally irrelevant, what does that have  
16    to do with the case? Who is defending this case is obvious  
17    and apparent, it's being defended by Marc McGarr, um, because  
18    I represent Mr. Singleton and it's being defended by Murphy &  
19    Grantland because they represent USAA as the underinsured  
20    carriers, that's obvious from the pleadings are in the file  
21    and that's obvious from what has been sent to, uh,  
22    Mr. Wicker, uh, so with regard to the specifics of what we  
23    discussed among one another, uh, what does that have to do  
24    with this case in any way, shape or form? What I'm just  
25    saying to co-counsel today, uh, it pursuant to a joint defense

1 agreement has no relevance to the case whatsoever. Uh, it's  
2 different if they were saying, We want you to produce, uh,  
3 documents that, uh, I'll make this up, uh, w -- uh, we think  
4 your client, uh, was talking on the phone, uh, on XYZ date, we  
5 want you to produce, uh, his, uh, the the name of his  
6 telephone company, uh, the account number and the telephone  
7 number and the address where he pays his bills so that we can  
8 subpoena his, uh, his phone records, uh, totally relevant to  
9 the case or maybe not, may be, may be totally irrelevant  
10 because we may know that our client was not talking on the  
11 phone but just because we know it doesn't mean they don't have  
12 the right to independently check to see if that's correct.  
13 Uh, when those types of things have been done in this case,  
14 we've given it to them, uh, we've given them releases to that  
15 effect, but I can't respond formally or otherwise to a motion  
16 requesting my privileged information because the moment I do  
17 that the next thing I'm gonna get is, We want everything you  
18 have that's work product and privileged, because I've now  
19 opened that door, uh, more important, why in the world do ya  
20 need it? Uh, what these two people are doing as co-defendants  
21 has no relevance to the case, it would never be anything that  
22 a jury could hear about and it would never be anything that is  
23 relevant in the sense that, okay, were you talkin' on the  
24 phone or not, I mean, what I'm saying to co-counsel is just  
25 that, what I'm saying to co-counsel. We're not gonna be on

1 the stand, uh, uh, testifying and so (a) it's irrelevant, (b)  
2 it violates the work product, uh, uh, it it violates our work  
3 product, uh, privilege and (c) it would invade into the  
4 attorney-client privileged area, uh, and open doors that  
5 shouldn't be opened, uh, that's why you probably never heard  
6 of a motion like this before because I've never seen one in my  
7 career, uh, where they're asking for communications between  
8 co-counsel. Uh, if they're curious as to who's defending the  
9 case, they shouldn't be because if you look in the file you  
10 saw there's an answer, uh, on behalf of me with my name signed  
11 on it and I'm signing as attorney for Mr. Singleton, uh,  
12 because I am his attorney, he has insurance through State Farm  
13 but he has personal liability, uh, and then you'll see in the,  
14 in the file an answer from USAA and their answer will say USAA  
15 the underinsured carrier, uh, answering the complaint of the  
16 defendant, I mean, answer the complaint of the plaintiff.  
17 They know who's defending this case: Marc McGarr and in this  
18 case Murphy & Grantland, I'm just, I'm by myself, uh, the  
19 lawyers from Murphy & Grantland, uh, so what else are they  
20 going to get other than to open doors that shouldn't be  
21 opened. Uh, if they wanna know who's defending, look at the  
22 answers 'cause that's who's defending.

23 MR. WICKER: Your Honor, very briefly. None of these  
24 objections have been brought up until today. We requested  
25 this information in September of last year. This is a far

1 different case than what Mr. McGarr describes 'cause these are  
2 not co-defendants, this is one defendant and this is our  
3 insurance company who has a right to deal with us and in a, an  
4 obligation good faith and fair dealing. We believe that  
5 certainly it is important because often motions are filed by  
6 the defendant himself, sometimes motions are filed by USA  
7 [sic] independently, sometimes they're filed together,  
8 sometimes they're hiring experts not jointly, it it's it's a  
9 very complex and arduous task to figure out who it is that  
10 we're against, that's why this is relevant in this case. It  
11 may very well be that there exists some bad faith in this case  
12 and to that extent this does lead to admissible evidence and  
13 therefore we would request, uh, that the Court grant our  
14 motion.

15 MR. MCGARR: Your Honor, this is a automobile accident  
16 case where my client bumped into the rear of the plaintiff,  
17 uh, and it is a suit for damages as a result of that, it is  
18 not a bad faith claim and to wonder who is defending when you  
19 have the complaints, you have a complaint that you served on  
20 the two different defendants and you have an answer that says  
21 I'm defending and I'm defending and you still don't know who's  
22 defending, uh, and you want to in -- invade the  
23 attorney-client privilege and go into irrelevant information,  
24 there's nothing relevant that can come from this, that's why I  
25 haven't responded to it and that's why I haven't even conceded

1 that there was anything other than what you've seen on the  
2 record which is that there are two answers out there, it's  
3 totally irrelevant, it has nothing to do with this case, it  
4 would not lead to relevant evidence because it's not going to  
5 be some situation where you have two lawyers getting on the  
6 witness stand and it's a little bit disingenuous to say that  
7 there's one defendant because on more than one occasion we've  
8 taken depositions and plaintiffs' counsel has co --  
9 specifically said that defense counsel being for USAA cannot  
10 ask questions independently because they were two separate and  
11 distinct parties, uh, and until I'm gone he can't speak so  
12 they know who we are and they know who's defending, they don't  
13 need anything beyond that, you file a bad faith claim then you  
14 may have that issue but until that happens this is totally  
15 irrelevant in this case.

16 THE COURT: Okay, gentlemen, watch your email.

17 MR. WICKER: Okay.

18 MR. MCGARR: Your Honor, we have, we hadn't finished, ---

19 THE COURT: Okay.

20 MR. MCGARR: --- I apologize. Uh, I and maybe we because  
21 again, there are two different law firms with, uh, that are  
22 defending two different entities, uh, I think maybe we have  
23 filed a motion, uh, for an independent medical evaluation, uh,  
24 the motion is pursuant to Rule 35 which is the IME, uh, uh,  
25 rule. Uh, the way we did this is we ask that, uh, the

1 CERTIFICATE OF REPORTER

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I, Margaret A. Woods, Court Reporter in and for the State of South Carolina at Large, hereby certify that I reported the preceding case on January 7, 2015 at the time and place heretofore set forth; and that the foregoing pages numbered from 2 through 21, inclusive, constitute a true and accurate transcription of my stenographic notes of the said proceeding.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties connected to the action, nor am I financially interested in the action.

February 8, 2015

*Margaret A. Woods*

\_\_\_\_\_  
Margaret A. Woods, Court Reporter

in and for the State of South Carolina at Large.

THE STATE OF SOUTH CAROLINA  
In the South Carolina Court of Appeals

**RECEIVED**

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

JUN 10 2015

Edward W. Miller, Circuit Court Judge

SC Court of Appeals

Appellate Case Nos. 2015-000653  
Case No. 2013-CP-42-3055

James Travis Singleton

Appellant,

v.

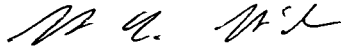
John Davis and Jane Davis

Respondents.

PROOF OF SERVICE

I certify the I have served Appellant James Travis Singleton's Petition for Rehearing of Order Dismissing his Appeal and corresponding Proof of Service, on John Davis and Jane Davis via United States Postal Service, on June 9, 2015, to their attorneys of record, E. Grey Wicker, Esq. and Michael Spears, Esq., Michael Spears, P.A., 122 South Liberty Street, 29306.

June 9, 2015

  
\_\_\_\_\_  
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June 9, 2015

The Honorable Jenny Abbot Kitchings  
Clerk of Court  
Attn: Amelia Smith  
South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

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JUN 10 2015

SC Court of Appeals

RE: Case Name: John Davis and Jane Davis v. James Travis Singleton  
CA No.: 2013-CP-42-3055  
Appellate Case No: 2015-000653  
Claim No.: 40-0D11-803  
MKM File No.: 200.1132

Dear Ms. Kitchings:

Please find enclosed, an original and seven copies of James Travis Singleton's Petition for Rehearing and corresponding certificate of service.

I would appreciate your filing the originals of these documents, clocking the copy, and returning the same to me in the enclosed, stamped, self-addressed envelope provided for your convenience.

Furthermore, please find enclosed, a check in the amount of \$25.00 which represents the filing fee with regard to this matter.

Also, please note, that by copy of this letter we are placing all counsel of record on notice that the originals of these documents have been filed with the court.

As always, we thank you and your staff for all your help and assistance you repeatedly provide with regard to these matters.

Sincerely,

MARCUS K. MCGARR, P.A.



Marcus K. McGarr

MKM/meg  
Enclosures

cc: E. Grey Wicker, Esq.  
Michael Spears, Esq.  
Ronald B. Diegel, Esq.  
Timothy J. Newton, Esq.  
James Travis Singleton  
Natalie Patz