

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2014-CP-23-04140
Appellate Case No. 2016-000919

RECEIVED
JUL 05 2016
SC Court of Appeals

John Roe, Respondent,
v.
South Carolina Department of Social Services, Appellant.

APPELLANT'S AMENDED RETURN TO
RESPONDENT'S MOTION TO DISMISS

Appellant South Carolina Department of Social Services (SCDSS) submits this Return to Respondent's Motion to Dismiss the instant appeal. Appellant has appealed the lower court Order which requires Appellant to disclose confidential information¹ regarding alleged sexual abuse of other minor children not a party to this action in a manner that violates the express language of S.C. Code Ann. §63-7-1990. Recognizing the extraordinarily sensitive nature of information concerning alleged sexual abuse of minors, the South Carolina Legislature has very clearly stated that appellant can only release this information "if before the disclosure the judge has reviewed the records in camera, has determined the relevancy and necessity of the disclosure, and has limited disclosure to legally relevant information under a protective order." S.C. Code Ann. §63-7-1990(B)(11). (Emphasis added). Furthermore, the Legislature has taken the drastic measure of

¹ §63-7-1990(A) provides that "all reports made and information collected pursuant to this article maintained by the Department of Social Services and the Central Registry of Child Abuse and Neglect are confidential."

attaching potential criminal penalties to the improper disclosure of confidential information by providing that any person who discloses this information “except as authorized by statute” is guilty of a misdemeanor and subject to fines, imprisonment, or both. §63-7-1990(A). The subject lower court Order violates the procedure set forth in §63-7-1990 by requiring disclosure of confidential information before an in camera review and before the Court has examined the material to limit disclosure to legally relevant and necessary information. The lower court Order has placed Appellant in the untenable position of (a) choosing to follow the lower court’s ruling and in turn violating the clear language of §63-7-1990 while subjecting its employees to fines and/or imprisonment or (b) choosing to disregard the Order and being held in contempt of court. Appellant respectfully submits that the subject Order is immediately appealable pursuant to S.C. Code Ann. §14-3-330 and South Carolina caselaw.

1. The lower court’s Order is a final determination of Appellant’s rights and liabilities under §63-7-1990 and is, therefore, immediately appealable.

As set forth above, §63-7-1990(B)(11) provides that Appellant can only disclose confidential information regarding the alleged sexual abuse of minors “if before the disclosure the judge has reviewed the records in camera, has determined the relevancy and necessity of the disclosure, and has limited disclosure to legally relevant information under a protective order.”² Failure to comply with this statutory scheme of disclosure subjects Appellant’s employees to criminal prosecution and, if convicted, to fines and/or imprisonment. In violation of §63-7-1990, the lower court Order requires Appellant to disclose confidential information prior to an in camera review. If Appellant complies with the court’s Order, the risk of criminal prosecution immediately attaches upon the disclosure of confidential information and the ability to appeal at a later time is

² Appellant respectfully submits that the lower court erred in first ordering the disclosure of this confidential information and then providing for a later in camera review to determine the relevancy or admissibility of this information at trial. §63-7-1990 requires an in camera review before any disclosure whatsoever.

an absolutely meaningless remedy. The right of appeal after the payment of fines and/or service of a prison sentence is nonsensical. Thus, in terms of Appellant's rights and liabilities pursuant to §63-7-1990, the lower court's Order is a final determination and is immediately appealable.

In *U-Drive-It, Inc., v. Beaver*, 369 S.C. 1, 630 S.E. 2d 464 (2006), the South Carolina Supreme Court determined that an order requiring the production of certain sealed records was immediately appealable. In that case, the Supreme Court concluded that once these records were improperly disclosed there was no way to undo the damage if an immediate appeal was not allowed. More specifically, the Court provided that:

Moreover, we agree with courts which have been inclined to find such an order immediately appealable because, after a court file is unsealed and the information released, no appellate remedy is likely to repair any damage done by improper disclosure. "Compelling a party that disputes an unsealing order to forego an appeal until the conclusion of the underlying litigation would let the cat out of the bag, without any effective way of recapturing it if the district court's directive was ultimately found to be erroneous." *Siedly v. Putnam Investments, Inc.*, 147 F. 3d 7, 9 (1st Cir. 1998)(quoting *Irons v. FBI*, 811 F. 2d 681, 683, (1st Cir. 1987)).

As set forth in Justice Toal's treatise on appellate practice in South Carolina, "if an order requires a party to turn over documents, which the party feels are privileged or contain proprietary or confidential matters, compliance with the order without the ability to seek immediate appeal renders the protections afforded by the privilege or confidentiality a nullity." Appellate Practice in South Carolina, Justice Toal, Chapter 4: Appealability of Judgments & Orders, Page 101. In our case, there will be no way to undo the damage of an improper disclosure of confidential information regarding allegations of sexual abuse of other unrelated minors if there is no right to an immediate appeal.

2. The lower court's Order is immediately appealable pursuant to S.C. Code Ann. §14-3-330.

The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by S.C. Code Ann. §14-3-330. An order “involves the merits” of a case as that term is used in §14-3-330(1) and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense. *Peterkin v. Brigman*, 319 S.C. 367, 461 S.E. 2d 809 (1995); *Knowles v. Standard Savings & Loan Assn.*, 274 S.C. 58, 261 S.E. 2d 49 (1979). S.C. Code Ann. §14-3-330(2) also permits an immediate appeal from an order that affects a substantial right of the parties.

In his Motion to Dismiss, Respondent has provided no factual or evidentiary basis for this Court to determine if the Order affects the merits of the case or any substantial rights of the parties. However, it is difficult to imagine an order that affects the substantial rights of Appellant more than the instant order which requires the Appellant to violate a confidentiality statute and subjects Appellant to criminal penalties for said violation. In addition, Respondent's claims and Appellant's defenses are substantially impacted by a ruling which opens the door to unfettered discovery on issues of alleged sexual abuse involving other minors who are not parties to this action prior to an in camera review and a threshold determination of relevancy. Appellant submits that these issues should be fully briefed and the record on appeal fully developed in order for this Court to determine the appealability of the subject Order.

In *Laffitte v. Bridgestone Corporation*, 381 S.C. 460, 674 S.E. 2d 154 (2009), the South Carolina Supreme Court held that a discovery order pertaining to trade secrets was immediately appealable. In *Laffitte*, the Court held that:

The instant case presents such exceptional circumstances as it involves a novel question of law in a matter that has been the subject of numerous claims in state and federal courts. A decision by this Court at this time best serves the interest of judicial economy by eliminating the numerous inevitable appeals raising this novel issue of significant public interest.

Appellant submits that the potential improper disclosure of confidential information regarding alleged sexual abuse of minors not parties to this litigation constitutes an “exceptional circumstance” warranting an immediate appeal. This appears to be a novel issue of law as there is no case law interpreting the proper procedure of disclosure of confidential information pursuant to § 63-7-1990. Further, the disclosure of confidential records of minors who are not parties to litigation is an issue in other cases currently pending involving Respondent’s counsel and will also arise in future litigation. The interests of judicial economy would be served by avoiding the numerous appeals in other cases which would most likely occur if this Court does not provide an immediate appellate review of this extraordinarily sensitive matter. Finally, the criminal penalties which may result from the Appellant’s violation of § 63-7-1990, is further evidence of the exceptional circumstances which necessitate an immediate appeal.

Respondent erroneously argues in his Motion to Dismiss that the redaction of the minor’s names and other identifying information satisfies confidentiality concerns and the mandates of §63-7-1990. However, §63-7-1990(A) expressly provides that “**all** reports made and information collected...are confidential.” (Emphasis added). Thus, redaction of the minor’s name while still disclosing other confidential information violates §63-7-1990 and subjects Appellant to potential criminal penalties.

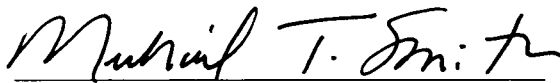
Finally, Respondent’s reliance upon the case of *Wieters v. Bon-Secours – St. Francis Xavier Hospital, Inc.*, 378 S.C. 160, 662 S.E. 2d 430 (Ct. App. 2008), 381 S.C. 332, 673 S.E. 2d 417(S.C. 2009) is misplaced as the underlying factual scenario and associated statutes are distinguishable. First, doctor’s records are a far cry from records regarding alleged sexual abuse of minors and the increased level of scrutiny applicable to minor’s records is self-evident. Second, the statute protecting doctor’s records does not subject the disclosing party to criminal penalties as does §63-7-1190 in the instant matter.

CONCLUSION

Based upon the foregoing, Appellant respectfully requests that Respondent's Motion to Dismiss be denied. The subject lower court Order is immediately appealable pursuant to §14-3-330 as the merits of the case and the substantial rights of the Appellant are impacted. Furthermore, the subject lower court Order is a final determination of the Appellant's rights and liabilities pursuant to §63-7-1990. Thus, this final Order is appealable. In addition, the imposition of criminal penalties for disclosure of confidential information regarding allegations of sexual abuse for minors who are not parties to this action in violation of §63-7-1990 presents an exceptional circumstance for which an immediate appeal provides the only effective remedy.

Respectfully submitted,

June 30, 2016



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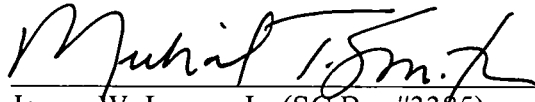
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Appellant's Amended Return to Respondent's Motion to Dismiss was served by electronic mail and first class mail, postage prepaid this 30th day of June, 2016, upon the following:

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June 30, 2016

A handwritten signature in black ink, appearing to read "Michael T. Smith". The signature is written in a cursive style with a horizontal line underneath it.

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Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Re: John Roe v. South Carolina Department of Social Services
Appellate Case No.: 2016-000919

Dear Ms. Kitchings:

In response to the Court's letter dated June 24, 2016 regarding the appealability of the subject lower court's Order, we enclose for filing Appellant's Amended Return to Respondent's Motion to Dismiss. The issue of the Order's appealability has been raised and briefed by the parties in the context of the Respondent's Motion to Dismiss and Appellant's Return. Appellant's Amended Return includes additional authority from Justice Toal in support of its position that the instant appeal is properly before this Court.

If the Court has any questions or requires any additional information, please do not hesitate to contact me. With kind regards, I remain

Yours Very Truly,

LOGAN, JOLLY & SMITH, LLP

Michael T. Smith

MTS:krm
Enclosures

cc: Heather Stone, Esquire (with enclosures)
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