THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Kristi L. Harrington

C.A. No. 2014-CP-10-01900
Appellate Case No. 2016-001223

Sheryll Washington, Individually, and as Next Friend of Scarlett W., a minor, ... Appellants,

v.

Medical University of South Carolina, ... Respondent.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS APPEAL

The Appellants, Sheryll Washington, Individually, and as Next Friend of Scarlett W., a minor, by and through their undersigned counsel, files the following Memorandum in Opposition to Respondent's Motion to Dismiss. In summary, Appellants file this appeal because the trial court's order affects a substantial right of the Appellants, and if the trial court's ruling was in error, there will be no way to remedy this error at the end of trial.

The order being appealed threatens the sanctity of a physician-patient relationship, the mutual trust integral to such a relationship, the fiduciary nature thereof and the personal privacy interests at stake therein. The order on appeal, if not appealed and corrected now, would authorize defense counsel to undermine the sanctity of the physician-patient relationship, destroy the mutual trust integral thereto, breach the fiduciary duties of the physician and destroy the personal privacy interests at stake.

Once defense counsel has met privately with the physician treaters of the minor plaintiff, without the presence or consent of the patient, the integrity of the fiduciary doctor-patient relationship between the clinicians and Sheryll's four-year old daughter will be forever damaged and the patient's confidence in the clinicians destroyed. If this secret meeting occurs, HIPAA rules and regulations will have been violated, the physicians will have violated their own rules of ethics, and the patient's right to privacy will have been invaded in a manner that cannot be remedied through appeal at the end of trial. Clearly defense counsel has interests in conflict with the clinicians' patient, and the physicians should not be subjected to unbridled influences of an advocate for a party whose interest is contrary to the legal rights and best current and future medical treatment of the clinicians' patient. For the reasons explained in detail below, if this appeal is not taken now, the substantial rights in question will be forever and irreparably damaged in a manner that cannot be remedied at a later date.

FACTS AND PROCEDURAL HISTORY

This birth injury medical malpractice case involves allegations of negligence against an attending obstetrician and the two obstetrical resident physicians the attending was supervising during the vaginal delivery of Sheryll Washington's child, Scarlett. The medical records reflect these three physicians as the delivering physicians and attending physician responsible for the delivery of Scarlett. The only acts of negligence alleged in Plaintiffs' Complaint relate to obstetrical negligence which caused permanent brachial plexus nerve damage. Specifically, Plaintiffs allege that a complication known as "shoulder dystocia" was mismanaged and inadequately supervised at the time of delivery. This complication, during which the infant's shoulder becomes lodged behind the mother's pubic bone immediately prior to when complete delivery of the infant is to occur, is supposed to be resolved by ancillary safety maneuvers and

gentle guidance by the physician to get the shoulder unstuck without nerve damage. Plaintiffs allege that one or more of these delivering physicians used excessive pulling force and downward traction to pry the infant out during the shoulder dystocia, thereby causing a permanent injury to the infant's brachial plexus nerves.

There are no allegations of negligence related to any actions by anyone at any time after Scarlett W. was delivered. There is no assertion by Plaintiffs that the nerve damage was improperly evaluated or treated by those physicians whose doctor-patient relationship is threatened by the subject order on appeal. However, the injury has required and continues to require extensive medical treatment to repair and mediate the damage caused to the brachial plexus nerves. The closest physicians and facility capable of treating Sheryll's child are physicians and facilities that fall under the umbrella of the extensive medical network and subsidiaries owned, governed, or affiliated with MUSC.

After delivery, a pediatrician affiliated with and making rounds at MUSC evaluated Scarlett and referred her to an occupational therapist and neurosurgeon, both of whom were also affiliated with MUSC. On June 25, 2012, Scarlett underwent surgery on her brachial plexus at MUSC. Her follow-up care, including occupational therapy, was provided by physicians and facilities affiliated with MUSC. Scarlett continues to need medical care and treatment, and MUSC remains the closest and most convenient facility to provide the care she needs. Moreover, continuing to treat with MUSC provides a continuum of care that would be lost if the Sheryll had to seek out new treating physicians for Scarlett.

Plaintiffs sought to depose the non-obstetrical treating medical care providers, including an occupational therapist, a pediatrician, and a neurosurgeon. To date, Scarlett remains under the care and treatment of these clinicians. There are no allegations of negligence which remotely or

even indirectly relate to the conduct or treatment provided by these non-obstetrical treating medical care providers. Nevertheless, as these physicians continue to care for Scarlett, their testimony regarding causation of the injuries, treatment received and treatment needed in the future is important to this case. As these clinicians were and continue to be Scarlett's treating physicians, it is vital that they, in accordance with their fiduciary relationship and ethics requirements of confidentiality to their patient, remain honest and independent in their medical judgment regarding all issues related to the care and treatment of their patient.

Counsel hired to defend the acts of medical malpractice alleged against the obstetricians made it known that they intended to meet privately with Scarlett's treaters, outside the presence of Sheryll or her counsel, and without her consent. Recognizing this as a conflict not only with state and federal law but also with the medical providers' ethical and fiduciary obligations to their patient, Plaintiffs objected and filed a motion for a protective order.

The trial court heard oral argument on the issue and requested proposed orders. After proposed orders were submitted, the trial court signed the proposed order submitted by the defense, denying Plaintiff's motion for a protective order. Thereafter, Plaintiffs filed this notice of appeal. Respondent then filed a Motion to Dismiss the Appeal.

STANDARD OF REVIEW

The determination of whether a party may immediately appeal an order issued before final judgment is governed by S.C. Code Ann. § 14-3-330, which enumerates categories under which an order may be appealed prior to final judgment. *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). "By its nature, the question of whether an order is immediately appealable is determined on a case-by-case basis." *Morrow v. Fundamental Long-Term Care Holdings, LLC*,

412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015). "[A]n appellate court should look to the effect of an interlocutory order to determine its appealability." *Id.*

ARGUMENT

A. S.C. Code Ann. § 14-3-330(2) Provides Appellate Jurisdiction

Respondent argues generally that Appellants' appeal is interlocutory and therefore not appealable. The Order that is the subject of this appeal falls under appellate jurisdiction conferred by S.C. Code Ann. § 14-3-330(2). This Section reads:

> The Supreme Court Shall have appellate jurisdiction for correction of errors of law in cases, and shall review upon appeal:
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.
>
> S.C. Code Ann. § 14-3-330(2).

Respondent argues that Section 14-3-330(2) in inapplicable because the Order from which this appeal is taken does not affect a substantial right because "it does not . . . prevent an appeal . . . ." As explained below the Order that is the subject of this appeal both affects a substantial right and prevents an appeal.

B. The Trial Court's Order Concerns "Substantial Rights"

Respondents cannot credibly argue that Appellants do not have a substantial right in maintaining the sanctity of the doctor-patient relationship and preventing it from coming under the influence of interests contrary to the best treatment of the patient. Appellants have a substantial right to continued medical treatment untainted by the influences of adversarial parties, to medical privacy, and in sustaining the sanctity of the fiduciary and confidential relationship between physician and patient. Moreover, Appellants have a substantial right in preventing Scarlett's

clinicians from committing ethical violations and HIPAA violations through the disclosure of private confidential patient information in a private meeting with adverse counsel.

South Carolina Courts have highlighted the importance of these rights in various contexts. In *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 581 S.E.2d 836 (2003), the South Carolina Supreme Court addressed the question of whether Defendant Employer was permitted to have ex parte communications with Plaintiff's treating physicians. The Supreme Court held Defendant Employer was not authorized to make ex parte communications, *despite* the existence of worker's compensation statutes which permitted disclosure of "medical records." *Id.* at 440, 581 S.E.2d at 838. In reaching its decision, the court referenced "policy considerations of patient privacy, physician-patient confidence, and the adequacy of formal discovery methods." *Id.* at 441, 581 S.E.2d at 838 n.4.

In *McCormick v. England,* 328 S.C. 627, 643-644 494 S.E.2d 431, 439 (Ct. App. 1997) the Court held that a private cause of action exists when a physician breaches her duty of confidentiality. In reaching this decision, the Court explained that "it is expected that the physician will keep such information confidential." *Id.* at 635, 494 S.E.2d at 435. The Court noted further, "'Being a fiduciary relationship, mutual trust and confidence are essential.'" *Id.* quoting 61 Am. Jur. 2d *Physicians, Surgeons, and Other Healers* § 169 (1981). The Court in *McCormick* explained, "the modern trend recognizes that the confidentiality of the physician-patient relationship is an interest worth protecting." *Id.* at 636, 494 S.E.2d at 435. (citing decisions).

Even the ethical duties imposed upon physicians highlight the substantial nature of this right. S.C. Reg. 81-60(D) reads, "A physician shall respect the rights of patients . . . and shall safeguard patient confidence within the constraints of the law." From this regulation, the Court in *S.C. State Bd. of Med. Exam'rs v. Hedgepath*, 325 S.C. 166, 169 480 S.E.2d 724, 726 (1997)

determined that a physician commits ethical misconduct when he reveals a patient's confidences without consent of the patient. Our Courts have even cited to the Hippocratic Oath as basis for the physician's ethical duty to keep secret a patient's confidences. *See. McCormick* at 635, 494 S.E.2d at 435 ("Whatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge as reckoning that all such should be kept secret.") (citations omitted).

Finally, state and federal law prohibiting unauthorized disclosure of medical information, written or oral, without the patient's consent, acknowledges that the trial court's Order affected a substantial right. S.C. Code Ann. § 44-115-40, "Physician not to release records without express written consent," explains, "Except as otherwise provided by law, a physician shall not honor a request for the release of copies of medical records without the receipt of express written consent of the patient or person authorized by law to act on behalf of the patient." Federal law further protects against disclosure pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). HIPAA protects health information in any form, whether oral or recorded. 42 C.F.R. §160.103. HIPAA precludes disclosure except as the HIPAA Privacy Rule permits or if authorized by the patient. 42 C.F.R. § 164.502(a). A treating physician must obtain the patient's authorization if he wishes to disclose health information that is not for treatment, payment, or healthcare operations or otherwise permitted by the Privacy Rule. 45 C.F.R. § 164.508. As no such permission has been given, oral disclosure of the patient's medical records to defense counsel is prohibited by this statute. *See State ex rel. Proctor v. Messina,* 2009 Mo. App. LEXIS 1578, at *42 (Nov. 10, 2009) ("A trial court cannot authorize a physician to violate his or her duty under HIPAA." "Lawyers are not permitted to attempt to convince a physician to violate his or her duty

under HIPAA and engage in informal ex parte communications with a litigant patient's physician absent express authorization from the litigant patient.").

Other jurisdictions are in agreement. For example, the Supreme Court of New Mexico in *Smith v. Ashby*, 106 N.M. 358, 359, 743 P.2d 114, 115 (1987) highlighted opinions from other jurisdictions addressing the importance of the physician-patient relationship. The Court stated, "the Illinois appellate court joined the 'growing number of courts which have found that public policy strongly favors the confidentiality of the physician-patient relationship and thereby prohibits, because of the threat posed to the sanctity of that relationship, extra-judicial ex parte discussion of a patient's medical confidences.'" *Smith v. Ashby*, 106 N.M. at 359, 743 P.2d at 115 (quoting *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill.App.2d 581, 499 N.E.2d 952 (1986). The Smith court also quoted with approval language stating, "We find it difficult to believe that a physician can engage in an ex parte conference with the legal adversary of his patient without endangering the trust and faith invested in him by his patient.'" *Id.* This Court ultimately held, "[P]ublic policy dictates that practices and procedures in litigation should not allow for unnecessary breakdown of the trust and confidentiality embodied in the physician-patient relationship." *Id.*

Sheryll has a substantial right in protecting her daughter's confidential fiduciary relationship with her treating clinicians to ensure her daughter's current and future treatment isn't tainted by outside influences and interests contrary to the well-being of her daughter, the patient. Malpractice defense counsel clearly has interests in conflict with this patient, namely, attempting to adversely affect testimony re causation of the child's nerve damage and minimizing lawsuit damages. A private meeting behind closed doors between malpractice defense counsel and the patient's treating physicians would destroy all trust and confidence the patient has in her healthcare

providers and would eviscerate the doctor-patient fiduciary relationship. For these reasons, this appeal involves a substantial right that cannot be remedied at a later date and must be immediately appealed to preserve Appellants' rights and prevent irreparable harm.

C. The Trial Court's Order "Affected" a Substantial Right of the Appellants

Cases addressing appealability under Section 14-3-330(2) assess whether a substantial right has been affected by determining whether or not the order appealed from can be remedied at the end of the case. In *Breland v. Love Chevrolet Olds, Inc.,* 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000), the Court held that "the trial court's order did not 'affect' the Defendant's right to venue . . . because any error in the order can be corrected on appeal following the trial." *Id.* The Court noted further that "immediate appeals under subsection (2) have been allowed in situations where the substantial right could not be vindicated on appeal after the case." *Id.* Thus, the question to consider is whether the right affected may be corrected or vindicated on appeal following the trial.

In this case, the substantial rights affected by the trial court's Order cannot be vindicated on appeal after a final judgment. For this reason, the trial court's order "affected" Appellants' substantial rights concerning her confidential fiduciary relationship with her physician, her ability to prohibit "ex parte" communication between her physician and opposing counsel, and the safeguarding of her medical confidences by her physician, because these rights will be irreparably damaged and/or lost if not addressed through immediate appeal.

Appellants cannot otherwise protect their rights unless the trial court's order is immediately appealed and reversed. There is no way to "un-ring the bell" at a later date. Once defense counsel has met behind closed doors with Appellants' treating physicians, without the presence or consent of the patient, the doctor-patient fiduciary relationship will be forever damaged and the patient's confidences in the physician destroyed. Once this secret meeting has occurred, HIPAA rules and

regulations will have been violated, the physician will have violated his own rules of ethics, and the patient's right to privacy invaded. Therefore, this order must be appealed now, because if the trial court's decision was made in error, there will be no way to remedy the error at a later date.

Not only would the remedy be lost at the time of contact, it would be nearly impossible to show prejudice in a post-trial appeal. The damage sustained by the Court's ruling extends beyond compensable damages associated with a claim for medical negligence. The Court's ruling allows malpractice defense counsel and the clinicians to collectively destroy this patient's fiduciary relationship with her clinicians. There is no element of damages for the destruction of a patient-physician fiduciary relationship. There is no element of damages for forcing the patient to seek out new doctors who are located hours away from the patient's home to avoid treatment from physicians who fallen under the influences of a party with interests contrary to the patient. In a claim for medical malpractice, there is no direct element of damages related to the patient's right to medical privacy, a patient's rights to have confidentiality maintained by her physician with regards to her medical records and treatment, and there is no way to seek recompense for the violation of her HIPAA rights.

Secondly, in a post-trial appeal, it would be nearly impossible to prove the extent to which a verdict would have been different had the treating physicians not colluded with malpractice defense counsel. Future damages and the cost of current treatment are an aspect of damages in this case. However, there would be no meaningful way to (a) establish the extent to which the influences of malpractice defense counsel altered the clinician's testimony, and (b) how much this untoward influence reduced the expected future treatment and its associated costs. This issue is further exacerbated by the fact that the Order allows the private communications of malpractice defense counsel to be protected as attorney-client privileged communications. Accordingly, there

is no way for Appellants to protect their rights by challenging the errors in an appeal following a final judgment.[1]

An analogous situation concerning the inability of an Appellant to seek remedy at the end of the case because no appellate remedy would repair the damage is seen *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006). In this case, the Court had to determine whether an order unsealing a court file was immediately appealable. Although the Court determined it was immediately appealable under a different part of the subject statute, Section 14-3-330(1), the Court stated it agreed with other courts which determined such an order was immediately appealable because "no appellate remedy is likely to repair any damage done by an improper disclosure." *Id.* at 8, 630 S.E.2d 464, 468. The Court noted further that "'forgo[ing] 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.'" *Id.* quoting *Siedle v. Putnam Investments, Inc.*, 147 F.3d 7, 9 (1st Cir. 1998). This is precisely the situation that would occur if Appellants in this case RE not permitted to appeal. There is no way to undo the harm that would result if the trial court's Order was found to have been made in error.

The Court in *Ex Parte Capital U-Drive-It*, also agreed with analysis of other courts that "the usual method of reaching an appellate court - being held in contempt for refusal to comply - is not available to a litigant when the court chooses to unseal its own records." *Id.* This is precisely the situation in the case at hand. Appellants do not have the option of "being held in contempt for refusal to comply." Appellants have no control or way to prevent the malpractice defense team

[1] Indeed, until the right at issue in this case is known by case precedent not to be a substantial right, a failure to attempt immediate appeal could result in waiver of the ability to appeal. *See Creed v. Stokes*, 285 S.C. 542, 543, 331 S.E.2d 351, 352 (1985) (noting that appellant waived his objection because the order "should have been appealed immediately because it affected . . . a substantial right." As there is no clear indication from case precedent that the issue appealed does not involve a substantial right, Appellant must appeal it to avoid having their objection deemed waived.

from influencing the minor's treating physicians and destroying the patient-physician fiduciary relationship and her rights to confidentiality and privacy. Accordingly, if Appellants do not seek this appeal now, Appellants' rights will be irreversibly damaged in a manner that cannot be remedied through appeal at the close of the case.

D. The "Discovery Order" Opinions are Inapposite to the Facts of This Case

Respondents attempt to characterize this case as one falling under the line of cases precluding appeal from "discovery orders." However, these cases are distinguishable for several reasons. First, the purpose of this appeal is to protect and preserve Appellants' fiduciary relationship with her physician and maintain the doctor-patient privilege and her right to privacy concerning her medical records. This is not an issue of a person or party seeking discovery or trying to prevent it. In fact, Appellants wish for discovery to be had from the treating physicians, and the order under appeal does not foreclose that discovery. What Sheryll seeks to prevent is ex parte intrusion into the confidential, fiduciary, physician-patient relationship between her daughter and her healthcare providers and the violation of her rights to medical privacy under state and federal laws, including HIPAA.

Second, the "discovery order" cases involved orders either directing a person or party to produce certain documents or attend a deposition. In these cases, the party wishing to challenge the order has a remedy; he may still refuse to produce the documents or attend the deposition. If the person or party refuses to attend or produce the documents, then the order becomes immediately appealable.

Ex Parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986) addressed this issue. In *Whetstone*, a non-party witness appealed an order directing him to attend a deposition and produce certain documents. *Id.* The Court explained that the person challenging the order to compel "may

either comply with the discovery order and waive any right to challenge it on appeal, or refuse to comply with the order and appeal after he is held in contempt for his failure to comply." *Id.* at 580, 347 S.E.2d at 881-882. Thus, if the person against whom discovery had been compelled wished to challenge the order, he had a means by which to do so.

The current situation is analogous to *Ex Parte Capital U-Drive-It.* As previously discussed, the Court highlighted the importance of the fact that "no appellate remedy is likely to repair any damage done by an improper disclosure." *Ex Parte Capital U-Drive-It*, 369 S.C. at 8, 630 S.E.2d at 468. The Court noted further that, unlike "discovery order" case, "[T]he usual method of reaching an appellate court - being held in contempt for refusal to comply - is not available to a litigant when the court chooses to unseal its own records." *Id.* Similarly, unlike cases concerning discovery orders, Appellants do not have the option of "being held in contempt for refusal to comply." For these reasons the "discovery order" cases are inapposite.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court deny Respondent's motion to dismiss.

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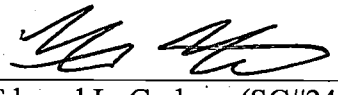
BY: 

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July 20, 2016

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The Honorable Kristi L. Harrington

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v.

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PROOF OF SERVICE

I hereby certify that one copy of Appellants' Memorandum in Opposition to Motion to Dismiss Appeal in the above-referenced matter was served by U.S. Mail, postage prepaid, on July 20, 2016, addressed to the following counsel of record:

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July 20, 2016

HONORABLE JENNY ABBOTT KITCHINGS
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Re: ***Sheryll Washington, Individually, and as Next Friend of Scarlett W., a Minor v. Medical University of South Carolina***
C/A No.: 2014-CP-10-1900
Appellant Case No. 2016-001223

Dear Ms. Kitchings:

Enclosed for filing is the original and seven copies of Appellants' Memorandum in Opposition to Motion to Dismiss Appeal, along with a Proof of Service. Please file the original and return a clocked copy to us in the envelope provided for your convenience. As per the attached Proof of Service, we are serving all counsel of record with a copy of same.

With kindest personal regards, I am

Yours very truly,

J. Layton Ruffin
Graham Law Firm, P.A.

JLR/ddb
Enclosure
cc: BARBARA W SHOWERS ESQ
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