

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

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AUG 23 2016

SC Court of Appeals

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

APPELLANT'S PETITION FOR REHEARING

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APPELLANT’S PETITION FOR REHEARING

Appellant South Carolina Department of Social Services (“SCDSS”) files this Petition for Rehearing in response to the Court of Appeals’ Order dated August 8, 2016 dismissing the instant appeal as interlocutory. Appellant respectfully submits that the Court of Appeals erred in dismissing this appeal on the following grounds: (a) the subject lower court Order is appealable because it is a final determination requiring the disclosure of extraordinarily sensitive and confidential information involving sexual abuse allegations of non-party minors **prior** to an in camera review in direct violation of §63-7-1990 for which an immediate appeal is the only effective remedy, and (b) in the alternative, if not final, the subject lower court Order requiring the disclosure of confidential information involving sexual abuse allegations for non-party minors **prior** to an in camera review in violation of §63-7-1990 is immediately appealable because it presents “exceptional circumstances” of causing irreparable harm to the confidentiality rights of minors and of subjecting the Appellant to criminal penalties.

- I. **The Court of Appeals erred in not concluding that the lower court’s Order is a final determination of the rights and liabilities of non-party minors and Appellant under §63-7-1990 and is, therefore, immediately appealable<sup>1</sup>.**

The disclosure of information regarding the alleged sexual conduct or abuse of any child – especially children who have nothing to do with the subject litigation – is of paramount importance to Appellant. More importantly for purposes of this appeal, it is also of paramount concern to the South Carolina Legislature. Recognizing the extraordinarily sensitive nature of this information and the potential to “re-victimize” children, the South Carolina Legislature has very clearly set

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<sup>1</sup> In its Order, the Court of Appeals focused exclusively on the Appellant’s position that the disclosure of information regarding sexual conduct or abuse of non-party minors constitutes an “exceptional circumstance” and failed to address Appellant’s first argument that the lower court’s Order was a final ruling and, therefore, immediately appealable.

forth the procedure to be followed by litigants and the court before any disclosure of this information can be made. S.C. Code Ann. §63-7-1990(B)(11) expressly provides that the Appellant can only disclose confidential information regarding the alleged sexual conduct or 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.” (Emphasis added). Appellant respectfully submits that the lower court erred by first ordering the disclosure of this confidential information and then providing for a subsequent in camera review to determine the relevancy or admissibility of this information at trial. By its own terms, Section 63-7-1990 requires an in camera review before any disclosure whatsoever. By requiring an in camera review on the front end, the Legislature has attempted to curtail fishing expeditions by attorneys in the area of sexual abuse allegations involving minors and to ensure that the confidentiality rights of the most vulnerable members of our society are protected by the courts. If Appellant complies with the lower court Order, the confidentiality rights of non-party minors are instantly violated and this violation cannot be cured by a subsequent appeal.

Furthermore, 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 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 (1<sup>st</sup> Cir. 1998)(quoting *Irons v. FBI*, 811 F. 2d 681, 683, (1<sup>st</sup> 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.

II. **The Court of Appeals erred in concluding that requiring Appellant to disclose confidential information regarding the alleged sexual conduct/abuse of non-party minors prior to an in camera review and in violation of §63-7-1990 is not an “exceptional circumstance” warranting an immediate appeal.**

As recognized by this Court’s Order of August 8, 2016, an immediate appeal is permitted in instances when “exceptional circumstances exist.” This Court concluded, however, that the disclosure of confidential information involving alleged sexual conduct/abuse of non-party minors did not constitute an “exceptional circumstance.” Appellant respectfully submits that the matter before the Court is far from an ordinary discovery issue. Perhaps the best evidence that the disclosure of information regarding the alleged sexual conduct/abuse of non-party minors is “exceptional” is the fact that the Legislature has directed the court to review this information prior to any disclosure whatsoever. Even more extraordinary is the Legislature’s imposition of criminal penalties for any entity that discloses this type of information before the court reviews it, makes the determination that it is relevant, and then further limits the disclosure of this information under a protective order. The general rule that discovery orders are interlocutory and not immediately appealable simply does not apply here.

There does not appear to be a bright line test for determining when “exceptional circumstances exist.” While Appellant strongly believes that information involving alleged sexual conduct/abuse of minors is exceptional by its very nature, this case also presents exceptional circumstances because of the trial court’s failure to follow the procedure outlined by the Legislature and to protect the statutory confidentiality rights of minors. The confidentiality rights for children who disclose alleged sexual conduct/abuse must be maintained to encourage the initial disclosure and cooperation of all individuals involved in these traumatic events. Failure to safeguard this information via an in camera review sets a dangerous precedent and subjects minors to an unwarranted and unwanted disclosure of alleged sexual conduct/abuse information and

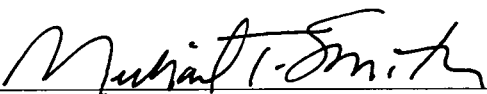
jeopardizes the entire investigative process which is designed to prevent future occurrences of abuse. It is instructive that the South Carolina Supreme Court has determined that a discovery order pertaining to trade secrets is immediately appealable. *Laffitte v. Bridgestone Corporation*, 381 S.C. 460, 674 S.E. 2d 154 (2009). Certainly, an in camera review of documentation regarding an alleged rape of a minor stands on at least equal footing to a corporation's trade secret.

#### CONCLUSION

The South Carolina Legislature has directed that records involving alleged sexual conduct/abuse of minors must be reviewed by the court before disclosure. The lower court Order disregards this statutory procedure and, as a result, causes immediate harm to the confidentiality rights of non-party minors and subjects Appellant to criminal penalties. Accordingly, Appellant requests that this Court deny the Respondent's Motion to Dismiss. In the alternative, Appellant requests that this Court order the lower court to conduct an in camera review of information regarding alleged sexual conduct/abuse of minors prior to disclosure as required by S. C. Code Ann. §63-7-1990.

Respectfully submitted,

August 22, 2016



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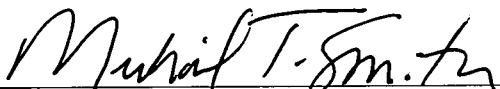
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Appellant's Petition for Rehearing was served by first class mail, postage prepaid this 22<sup>d</sup> day of August, 2016, upon the following:

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August 22, 2016

*(Via Federal Express – Overnight Delivery)*

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

Re: John Roe v. South Carolina Department of Social Services  
Civil Action No.: 2014-CP-23-04140

Dear Ms. Kitchings:

Please find enclosed for filing an original and seven (7) copies of the Appellant's Petition for Rehearing in the above referenced matter along with the Certificate of Service. Please return a clocked in copy of the same to me in the enclosed self-addressed stamped envelope.

If you have any questions, please do not hesitate to contact me.

With kind regards, I remain,

Yours very truly,

Logan, Jolly & Smith, LLP

Michael T. Smith

MTS:krm  
Enclosure(s)

cc: Heather Hite Stone, Esquire (with enclosures)  
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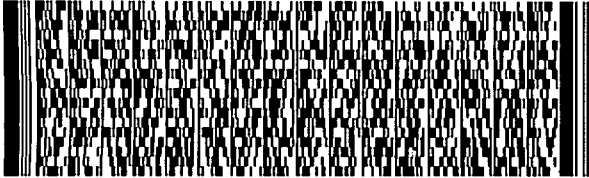
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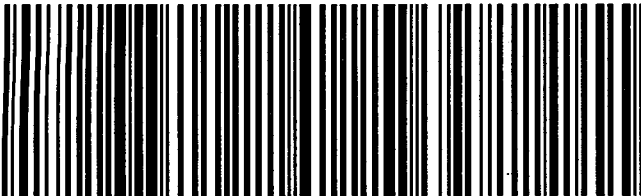
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