80994

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
Appellant Case No. 2016-001223

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

v.

Medical University of South Carolina, ... Respondent.

PETITION FOR REHEARING

Edward L. Graham
J. Layton Ruffin
Diane Rodriguez
GRAHAM LAW FIRM, P.A.
383 W. Cheves St.
Florence, SC 29501
(843) 662-3281-T
(843) 665-0254-F

ATTORNEYS FOR PLAINTIFF

RECEIVED
SEP 19 2016
SC Court of Appeals

QUESTIONS PRESENTED

I. **DID THE COURT OVERLOOK OR MISAPPREHEND THE LAW WHEN IT DETERMINED THAT THE UNDERLYING ORDER OF JUDGE HARRINGTON WAS NOT IMMEDIATELY APPEALABLE PURSUANT TO SECTION 14-3-300?**

STATEMENT OF THE CASE

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 that 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, should be resolved by ancillary safety maneuvers and gentle guidance by the physician to relieve the shoulder 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 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 received June 24, 2016. Appellants filed a memorandum in opposition to the motion to dismiss that was received July 21, 2016. This Court filed an Order granting Respondent's motion to dismiss on September 2, 2016.[1]

ARGUMENT

I. THE COURT OVERLOOKED OR MISAPPREHENDED THE LAW WHEN IT DETERMINED THAT THE UNDERLYING ORDER OF JUDGE HARRINGTON WAS NOT IMMEDIATELY APPEALABLE PURSUANT TO SECTION 14-3-300?

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

Appellants respectfully submit that this court overlooked or misapprehended that 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).

[1] Appellants note that although the Order dismissing this appeal states that Appellant appealed the "family court's" order, this appeal is in fact an appeal from an order entered by the court of common pleas, Circuit Court Judge Kristi L. Harrington.

Appellants submit that this Court misapprehended that the Order from which this appeal is taken affects a substantial right because 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.[2]

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

[2] 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.

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 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. Accordingly, Appellants

respectfully submit that this Court erred in its determination that the circuit court's order was not immediately appealable.

CONCLUSION

For the foregoing reasons, Appellants respectfully pray that this Court reconsider its prior opinion filed in this case, or in the alternative have re-argument of the questions presented in this Petition.

GRAHAM LAW FIRM, P.A.

BY: Diane M Rodriguez for

Edward L. Graham, Esquire
J. Layton Ruffin, Esquire
Diane Rodriguez, Esquire
383 W. Cheves St.
Florence, SC 29501
843-662-3281-T
800-859-7028-F

ATTORNEYS FOR APPELLANT

September 19, 2016

The South Carolina Court of Appeals

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

v.

Medical University of South Carolina, Respondent.

Appellate Case No. 2016-001223

ORDER

Appellant appeals the family court's order denying Appellant's motion for protection, which sought to prevent Respondent's litigation counsel from speaking with and representing physicians and medical personnel employed by Respondent prior to their scheduled depositions in the underlying case. Respondent filed a motion to dismiss the appeal, and Appellant filed a return. After careful consideration, Respondents' motion to dismiss is granted because the underlying order is not immediately appealable pursuant to section 14-3-330 (1976 & Supp. 2015). The remittitur will be sent as provided in Rule 221, SCACR.

FOR THE COURT

Columbia, South Carolina

FILED

September 2, 2016

cc:
Edward L. Graham, Esquire
Diane M. Rodriguez, Esquire
Barbara Wynne Showers, Esquire
A. Walker Barnes, Esquire
Christina M. Dickinson, Esquire

Deborah Harrison Sheffield, Esquire
John Layton Ruffin, Esquire

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
Appellant Case No. 2016-001223

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

v.

Medical University of South Carolina, ... Respondent.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellants, certifies that I have this 19th day of September, 2016 served copies of the Petition for Rehearing upon counsel for the Respondents by depositing them in the United States mail, first-class postage prepaid, addressed to:

BARBARA W SHOWERS ESQ
A WALKER BARNES ESQ
CHRISTINA M. DICKINSON
DEBORAH H. SHEFFIELD

HOOD LAW FIRM LLC
PO BOX 1508
CHARLESTON SC 29402

BY: Diane M Rodriguez, for

J. Layton Ruffin
Edward L. Graham
Diane Rodriguez
GRAHAM LAW FIRM, P.A.
P.O. Box 550
Florence, SC 29501
843-662-3281-T
843-662-0254-F

GRAHAM LAW
Shining a Light on Safety, Guiding the Way to Justice.

Edward L. Graham
Diane M. Rodriguez
J. Layton Ruffin

September 19, 2016

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Sheryll Washington, Individually, and as Next Friend of Scarlett W., a minor, v. Medical University of South Carolina

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

Dear Ms. Kitchings:

Enclosed for filing, please find the original and seven (7) copies of Petition for Rehearing of Appellants Sheryll Washington, Individually, and as Next Friend of Scarlett W., a minor, in the above referenced matter along with my firm's check for $25.00 for filing fee. Once clocked-in, please return mail one copy with our courier. By copy of this letter, I am serving attorneys for Respondent, with a copy of the same.

With kindest personal regards, I am

Yours Very Truly,

J. Layton Ruffin

JLR/bh
Enclosures as cited above.

cc: Barbara W. Showers, Esq.
A. Walker Barnes, Esq.
Christina M. Dickinson
Deborah H. Sheffield

GRAHAM LAW FIRM, P.A.
383 West Cheves Street, Florence, SC 29501

MAIN OFFICE
P.O. Box 550, Florence, SC 29503
Phone 843.662.3281

SATELLITE OFFICE
P.O. Box 604, Sumter, SC 29151
Phone 803.774.4444

EFax 1.800.859.7028

EGraham@GrahamLawFirm.net • DianeR@GrahamLawFirm.net • JLRuffin@GrahamLawFirm.net