

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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
Court of Appeals Order filed January 13, 2017

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SC Court of Appeals

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

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 13, 2017.

QUESTION PRESENTED

1. Did the Court of Appeals err in ruling that the disclosure of confidential information regarding the alleged sexual conduct/abuse of minors not a party to this action prior to an in camera review, as required by statute, was interlocutory and did not warrant an immediate appeal?

STATEMENT OF THE CASE

The Respondent, John Roe, alleges that he was sexually assaulted by an employee of Boys Home of the South after being placed there by Petitioner South Carolina Department of Social Services. In a 30(b)(6) deposition of Petitioner, the Respondent requested information regarding the alleged sexual conduct/abuse of other unrelated minors. Petitioner objected on the grounds that this information is confidential and protected from disclosure pursuant to S.C. Code Ann. §63-7-1990. Respondent filed a motion to compel. The lower court granted the motion to compel and ordered Petitioner to disclose this confidential information prior to conducting an in camera review as referenced in §63-7-1990. Petitioner filed a motion to reconsider which the lower court denied.

Petitioner subsequently filed a Notice of Appeal with the South Carolina Court of Appeals. In response, Respondent filed a motion to dismiss the appeal on the grounds that the lower court's order was interlocutory and not immediately appealable. Petitioner opposed the motion to dismiss on the basis that the lower court's order to produce confidential information concerning the alleged sexual abuse of minors without the protections mandated by §63-7-1990 was, in fact, a final determination of the Petitioner's rights and constituted exceptional circumstances for which an immediate appeal provided the only meaningful remedy. The Court of Appeals granted Respondent's motion to dismiss and denied a petition for rehearing. Petitioner seeks a Writ of Certiorari to review that decision.

ARGUMENT

Petitioner South Carolina Department of Social Services (“SCDSS”) files this Petition for Writ of Certiorari in response to the Court of Appeals’ Order dismissing its appeal as interlocutory. Petitioner 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 of the rights of non-party minors and petitioners under §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 extraordinarily sensitive and 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 Petitioner to criminal penalties.

I. **The Court of Appeals erred in failing to conclude that the lower court’s Order is a final determination of the rights and liabilities of non-party minors and Petitioner under §63-7-1990 and is, therefore, immediately appealable¹.**

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 Petitioner. More importantly for purposes of this writ, 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 forth the procedure to be followed by litigants and the court before any disclosure of this

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

information can be made. S.C. Code Ann. §63-7-1990(B)(11) expressly provides that the Petitioner 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). Petitioner 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 Petitioner 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 Petitioner’s employees to criminal prosecution and, if convicted, to fines and/or imprisonment. In violation of §63-7-1990, the lower court Order requires Petitioner to disclose confidential information prior to an in camera review. If Petitioner 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 Petitioner’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 this matter, 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 failing to conclude that the lower court’s Order is immediately appealable as it “involves the merits” of the case and affects a substantial right of the parties.

The determination of whether a party may immediately appeal an order issued before or during trial is addressed 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.

It is difficult to imagine an order that affects the substantial rights of the Petitioner more than the subject order which requires the Petitioner to violate a confidentiality statute and subjects Petitioner to criminal penalties for said violation. In addition, Respondent's claims and Petitioner'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.

III. The Court of Appeals erred in failing to conclude that the lower court's Order is immediately appealable because the improper disclosure of confidential information regarding the alleged sexual conduct/abuse of minors and the criminal penalties imposed upon Petitioner for such a disclosure constitute "exceptional circumstances."

As recognized by the Court of Appeal's Order of August 8, 2016, an immediate appeal is permitted in instances when "exceptional circumstances exist." The Court of Appeals concluded, however, that the disclosure of confidential information involving alleged sexual conduct/abuse of non-party minors did not constitute an "exceptional circumstance." 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. Petitioner respectfully submits that the matter before the Court is far from an

ordinary discovery issue. 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 Petitioner 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. In *Laffitte v. Bridgestone Corporation*, 381 S.C. 460, 674 S.E. 2d 154 (2009), this 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.

Petitioner 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. If an order pertaining to trade secrets of a business is immediately appealable, it is hard to imagine that an order concerning the disclosure of alleged

sexual conduct/abuse of minors does not rise to the same level of appealability. This also 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.

Respondent erroneously maintains 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 Petitioner to potential criminal penalties.

Finally, Respondent's prior 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 §63-7-1990 in the instant matter.


CONCLUSION

It is imperative that this Court avoid the knee jerk reaction of classifying this appeal as merely involving a discovery issue. To the contrary, this appeal involves the improper disclosure of confidential information regarding the alleged sexual conduct/abuse of minors in violation of the Legislature's clear directives set forth in §63-7-1990. In an effort to protect children from the unauthorized disclosure of this confidential information, the Legislature has mandated an in camera review of these confidential documents prior to any disclosure whatsoever and imposed criminal penalties on individuals that improperly release this information. Once the information is disclosed, it is impossible to put the cat back in the bag and an immediate appeal provides the only meaningful remedy in this instance. At the hearing before the lower court, the Respondent also requested that the court perform an in camera review of these documents (Hearing transcript, p. 47, l. 24 – p. 48, l. 13). It is ironic that Respondent urges the court to now ignore these Legislative safeguards and to violate the privacy rights of other children while advocating for the protection of his own.

Based upon the foregoing, Petitioner respectfully requests that the Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

February 10, 2017


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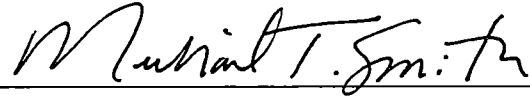
John Roe,Respondent,
v.
South Carolina Department of Social Services,Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Petitioner's Writ for Certiorari and Appendix was served by first class mail, postage prepaid this 10th day of February, 2017, upon the following:

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SC Court of Appeals

Honorable Daniel E. Shearouse
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Re: John Roe v. South Carolina Department of Social Services
Civil Action No.: 2014-CP-23-04140
Appellate Case No.: 2016-000919

Dear Mr. Shearouse:

Please find enclosed for filing the following:

- (1) One original and six copies of the Petition For a Writ of Certiorari;
- (2) One bound and one unbound copy of the Appendix; and,
- (3) Certificate of Service.

Thank you for your assistance. With kind regards, I remain,

Yours very truly,

Logan, Jolly & Smith, LLP

Michael T. Smith

MTS:krm
Enclosure(s)

cc: Honorable Jenny Abbott Kitchings (with enclosures)
Heather Hite Stone, Esquire (with enclosures)
Robert J. Butcher, Esquire (with enclosures)

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