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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

Roger E. Henderson, Circuit Court Judge
Case No. 2017-CP-34-00064

RECEIVED
AUG 28 2018
SC Court of Appeals

Appellate Case No. 2018-001510

Gary Locklear, Individually and as Personal Representative of the Estate of Roy Locklear, ...Respondent,

vs.

Marlboro County, Marlboro County Sheriff's Office, Marlboro County Detention Center, Dr. Charles Bush, Southern Health Partners, And South Carolina law Enforcement Division, ... Defendants.

Of whom, Southern Health Partners and Dr. Charles Bush are ..... Appellants.

MOTION TO DISMISS AND
MEMORANDUM IN SUPPORT OF THE MOTION TO DISMISS

Patrick J. McLaughlin
Wukela Law Firm
PO Box 13057
Florence, SC 29504
T: 843-669-5634
Attorney for Respondent

This motion is made pursuant to Rule 240 of the South Carolina Appellate Court Rules, which governs motions and petitions generally. Respondents Gary Locklear, Individually and as Personal Representative of the Estate of Roy Locklear, move this Court to dismiss the appeal that was filed and served via United States Postal Service on August 16, 2018. The appeal is from an unappealable order and would serve no purpose other than to further unnecessary delay in this matter. For the reasons stated below, this Court should dismiss this appeal to avoid such delay.

BACKGROUND

This is a case involving wrongful death and survival claims arising from an attempted suicide incident involving Roy Locklear while he was in custody at the Marlboro County Detention Center (MCDC) on November 5th and 6th, 2014.1 A summons and complaint were filed in this matter on or about February 24, 2017, following a Notice of Intent to file suit in a medical malpractice case that had been filed pursuant to S.C. Code §15-79-125.

The factual allegations supporting the Plaintiff's causes of action deal with the acts/omissions of the Defendants in transporting, booking and screening the decedent and in failing to provide him the reasonable standard of care necessary for persons with substance abuse issues in a detention center setting. Given the relatively short amount of time Roy was actually in custody at MCDC before his attempted suicide and subsequent transport to the hospital, the allegations against the Appellants (Bush/SHP) arise from the role they play as the "Responsible Physician" for MCDC pursuant to the *Minimum Standards for Local Detention Facilities in South Carolina.*

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1 While Roy survived the initial suicide attempt, he never recovered, remaining hospitalized for severe hypoxic anoxic brain injury until his death on November 14, 2014.

The order for which Bush/SHP have noticed their intent to appeal is an order granting the Plaintiff's motion to compel discovery against Bush/SHP for their failure to adequately respond to the Plaintiff's initial discovery requests

On or about May 3, 2017, the Plaintiff served all defense counsels with initial discovery interrogatories and requests for production.

Subsequent to serving those discovery requests Plaintiff's counsel had to contact all of the Defendants due to not timely receiving responses. Ultimately, Plaintiff's counsel had to file a motion to compel against the other Defendants in this matter; said motion being filed on or about December 5, 2017. Bush/SHP were not included in that original motion to compel because they produced discovery responses on or about November 13, 2017. However, in acknowledgement that those initial responses were not adequate, Bush/SHP's counsel contacted Plaintiff's counsel to let him know that he was in the process of trying to get the information to more fully respond.

Via an email dated May 8, 2018, Plaintiff's counsel reminded Bush/SHP's counsel that the Plaintiff was owed supplemental discovery responses and that he needed that material prior to upcoming depositions scheduled for the week of June 11, 2018. Bush/SHP's counsel responded via email that he "should be able to supplement by Wednesday of next week."

On Friday May 18, 2018 (two days after the supplementation response that had been promised the week before), Bush/SHP's counsel sent an email that included a table of contents for Bush/SHP's policies and procedures manual asking Plaintiff's counsel to call to "discuss which items are necessary for this case" and informing Plaintiff's counsel for the first time that Bush/SHP would require a confidentiality agreement, which was in the process of being drafted.

That same day, Plaintiff's counsel responded to that email via a reply email that explained why such proposed responses were inadequate, his objections to a confidentiality agreement and

letting Bush/SHP's counsel know he would be available to discuss the issue during the first part of the following week. Receiving no further communication or any supplemental discovery response, the current motion to compel was filed on June 6, 2018. In that motion, the Plaintiff specifically identified thirteen (13) interrogatories (Nos. 3, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19 and 20) and five (5) requests to produce (Nos. 3, 4, 5, 9 and 11) as being inadequate/non-responsive.

On July 10, 2018, Bush/SHP supplemented their discovery responses and produced a privilege log asserting that a 101-page manual titled "Policy and Procedure Manual for Health Services in Jail" was the "Confidential Work Product of Southern Health Partners, Inc."

On July 11, 2018, Bush/SHP's counsel sent Plaintiff's counsel an email that had attached an affidavit from Jennifer I. Hairsine, identified as the President and Chief Executive Officer of SHP. The email asked if Plaintiff's counsel would reconsider a confidentiality agreement in light of the affidavit and also asked if Interrogatory #18 could be resolved if Bush/SHP provided a list of suicide/suicide attempts at MCDC.

On July 12, 2018, Plaintiff's counsel informed Bush/SHP's counsel via email that his position on neither issue had changed.

On July 13, 2018, a hearing was held before the Honorable Roger E. Henderson on the Plaintiff's motion. Both parties appeared at that hearing through counsel and made argument to the court. Judge Henderson took the matter under advisement and ultimately issued an order which Bush/SHP has noticed an intent to appeal.

ARGUMENT

The Plaintiff moves for dismissal of this appeal on the grounds that Bush/SHP is seeking to appeal an interlocutory order which is not immediately appealable. Specifically, Bush/SHP is seeking to appeal an order compelling discovery.

An order compelling discovery does not ordinarily involve the merits of the case and may not be appealed. Tucker v. Honda of S.C. Mfg., 353 S.C. 574, 577, 582 S.E.2d 405, 406 (2003), citing Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986). Discovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statutes, involve the merits of the action or effect a substantial right.2 Grosshuesch v. Cramer, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008), citing Hamm v. S.C. Pub. Serv. Comm'n, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994); Wallace v. Interamerican Trust Co., 246 S.C. 563, 568-69, 144 S.E.2d 813, 816 (1965).

Since a contempt order is final in nature, an order compelling discovery may be appealed **only** after the trial court holds a party in contempt. Tucker at 577, 406-407, citing Hooper v. Rockwell, 334 S.C. 281, 513 S.E.2d 358 (1999), emphasis added. Thus, a party may comply with the order and waive any right to challenge it on appeal or refuse to comply with the order, be cited for contempt, and appeal. Tucker at 577, 407, citing Ex parte Whetstone.

In the present case, Bush/SHP has failed to obtain any such final contempt order and, as such, their appeal should be dismissed.

In their *Notice of Intent*, Bush/SHP cites to the City of Columbia v. A.C.L.U. of South Carolina, Inc., 323 S.C. 384, 388, 475 S.E.2d 747, 849 (1996). However, this case does not support their appeal. In City of Columbia, after they received a FOIA request seeking an internal police report, the City brought a declaratory judgment action seeking clarification under the South Carolina Freedom of Information Act (FOIA). The City had refused to provide the contents of the internal police report and instead sought a declaratory judgment from the trial court that the report

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2 A "substantial right" is when "such order would discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense." Mid-State Distribs. v. Century Imps., 310 S.C. 330, 334 n.4, 426 S.E.2d 777, 780 n.4 (1993). That is not the case with the present order.

was exempt from disclosure. As part of their discovery requests, the ACLU asked for the very report that was the subject of the action. City of Columbia at 386, 748.

When the City did not produce the report in response to the ACLU's requests for production, the ACLU filed a motion to compel the report to be provided, which the trial court denied. The ACLU appealed. In denying that appeal, the Court noted that the production of police report was very the subject matter of the case itself. City of Columbia at 388, 749, citing Knight Publishing Co. v. University of South Carolina, 295 S.C. 31, 367 S.E.2d 20 (1988) (a FOIA action in which the plaintiff's discovery requests sought production of documents which were the subject matter of the lawsuit).

Bush/SHP's purpose for citing to the City of Columbia case in support of their right to appeal Judge Henderson's order would appear to arise from the fact that the order at issue discusses FOIA. This reliance is misguided, as the discussion of FOIA in the order at bar arises merely in support of the argument that Bush/SHP are not entitled to any protection for the documents responsive to the Plaintiff's discovery requests because such documents are public records that would be subject to production under FOIA. In other words, whether or not those documents are subject to FOIA is not the subject matter of this case (as they were in City of Columbia and Knight Publishing).3

In the present case, the discussion of FOIA and the production requirements for documents subject to FOIA merely serve as grounds for why the trial court granted the Plaintiff's motion to compel. As Judge Henderson explained in his order:

During the hearing, the Court specifically asked Bush/SHP to explain how the

3 Just because FOIA is mentioned in a case does not make *City of Columbia* controlling. *See* Evening Post Publ. Co. v. Berkeley County Sch. Dist., 392 S.C. 76 (2011).

policies and procedures they were required to have, pursuant to the MSSC, fell within the definition of trade secrets pursuant to S.C. Code §30-4-40(a)(1). Bush/SHP could not offer any response other than a conclusory statement that the material was their proprietary work product.

The Court finds that policies and procedures required under the MSSC do not fall into the above definition. While Bush/SHP may not themselves be a "public body," the policies and procedures they developed and approved (as required by the MSSC for medical screening, care and classification at the Marlboro County Detention Center) are required by the MSSC to be in "the written manual of all policies and procedures for the operation of the facility" and "shall be made readily available to all personnel." MSSC, §1021, p.13.

The purpose of the MSSC requiring these policies and procedures to be in place is obvious: the policies and procedures used to screen, classify and care for persons under the control of the State are clearly a matter of great public concern and interest. If they so desire, the people of Marlboro County have the right to use FOIA to view the policies and procedures for healthcare that will applicable to those individuals providing care for the inmates being held at the County's detention center. The Court finds that this type of material fits squarely within the definition of information that is specifically designated as public information subject to FOIA as "administrative staff manuals and instructions to staff that affect a member of the public." S.C. Code §30-4-50(A)(2).

The Court notes that in her affidavit, Ms. Hairsine testifies that "SHP's sole business is jail health care services – we do not get pulled into other business lines. This allows SHP to be very familiar with state jail standards...as a basis for our policies, procedures, and operations." *Affidavit of Jennifer Hairsine*, ¶3. If that is true, then there is no excuse for Bush/SHP to not realize that the MSSC require that the policies and procedures they create/review/approve for use in South Carolina detention centers and jails must be readily available to all personnel of each facility. MSSC §1021. As such policies and procedures are used by a public body and are instructions to staff that affect a member of the public, they are public information subject to production under the South Carolina Freedom of Information Act. S.C. Code §30-4-20(c) and §30-4-50(A)(2).

Order, p.14-15.

In addition to the grounds explained above, Judge Henderson also found additional grounds for granting the Plaintiff's motion:

The Court finds Bush/SHP fails to meet this burden. Specifically, the only support Bush/SHP offered the Court in support of their argument was the affidavit of Jennifer I. Hairsine, the President and Chief Executive Officer of Southern Health

> Partners, Inc. That affidavit offers only self-serving, conclusory statements such as "this policy manual is confidential and contains proprietary information." *Affidavit of Jennifer Hairsine*, ¶8. There is no attempt to explain to the Court what makes this material proprietary information; just a conclusory assertion that it is. The affidavit contains no specific demonstrations of fact regarding any clearly defined and very serious injury Bush/SHP would suffer if not afforded the protection they seek. Rather, there is only an anecdotal assertion that "SHP has been damaged in the past by former vendors and employees, as well as a former opposing expert witness attempting to access and use SHP's policy and Procedure Manual and other proprietary information to obtain business from SHP's existing and potential clients." *Affidavit of Jennifer Hairsine*, ¶9.
>
> Bush/SHP did not identify to the Court any specific instance of such harm occurring and ignores the fact that the affidavit itself discredits their argument. Simply put, if former vendors, employees and opposing expert witnesses already have access to this alleged proprietary material, how can it be "secret"? "Unlike other assets, the value of a trade secret hinges on its secrecy." Laffite v. Bridgestone Corp., 381 S.C. 160, 674 S.E.2d 154 (2009).
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> The Plaintiff effectively drove home this point during the hearing by showing the Court that he had obtained forty-nine (49) pages of the 101-page "Policy and Procedure Manual for Health Services in Jails," the alleged proprietary material for which Bush/SHP argues it needs protection. Plaintiff's counsel was able to obtain this material as it had previously been produced in other litigation without any protection. That combined with the admissions in Ms. Hairsine's own affidavit support the fact that the ship has sailed on Bush/SHP's ability to claim this material is secret. "In order to be protected, a trade secret must be the subject of reasonable efforts 'to maintain its secrecy.'" Hartstock v. Goodyear Dunlop Tires N. Am. Ltd., 2018 S.C. Lexis 44, 7-8 (S. Ct. 2018), citing S.C. Code §39-8-20(5)(a)(ii). The protection Bush/SHP asks this Court to grant now is merely an attempt to shut the barn door after the proverbial horse has already left.

Order, p.8-9.

In vacating an opinion from the Court of Appeals that reversed an order compelling discovery, the South Carolina Supreme Court described Tucker as "holding **an order compelling discovery is not immediately appealable** even if it is challenged as violating the attorney-client privilege." Wieters v. Bon-Secours St. Francis Xavier Hosp., Inc., 381 S.C. 332, 333, 673 S.E.2d 417, 418 (2009), emphasis added.

If the Wieters court was not willing to immediately review a discovery order that was

alleged to violate attorney-client privilege, the Plaintiff fails to see how the present discovery order is appealable. Bush/SHP's actions appear to be more of the same dilatory conduct which led to the appealed order. As Judge Henderson noted in finding Bush/SHP's discovery conduct to be abusive, Bush/SHP never actually moved for protection. Order p.20. Nor did Bush/SHP ever offer any "explanation for their delay in failing to supplement their responses as they originally represented to the Plaintiff they would do when they submitted their initial response." Order, p.21.

This Court should not allow Bush/SHP to continue to delay this matter by refusing to produce basic discovery.

CONCLUSION

Based on the above, the Plaintiff respectfully requests that the Court dismiss Bush/SHP's appeal on the grounds that it seeks to appeal a discovery order, which is interlocutory in nature and not immediately appealable.

Respectfully submitted,

August 27, 2018

Patrick J. McLaughlin
Wukela Law Firm
PO Box 13057
Florence, SC 29504
T: 843-669-5634
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

Roger E. Henderson, Circuit Court Judge
Case No. 2017-CP-34-00064

Appellate Case No. 2018-001510

Gary Locklear, Individually and as Personal Representative of the Estate of Roy Locklear, Respondent,

vs.

Marlboro County, Marlboro County Sheriff's Office, Marlboro County Detention Center, Dr. Charles Bush, Southern Health Partners, And South Carolina law Enforcement Division, Defendants.

Of whom, Southern Health Partners and Dr. Charles Bush are Appellants.

CERTIFICATE OF SERVICE

I, Kathleen Sue Cox, of the Wukela Law Firm, certify that she did serve copies of the Respondent's Motion to Dismiss and Memorandum In Support of the Motion to Dismiss on the Appellants and Defendants by depositing a copy of it and a Certificate of Service in the United States Mail, postage prepaid, on August 27, 2018, addressed to their attorneys of record. Said envelopes being addressed to the following person(s):

Mark V. Gerde
John E. Tyler
Sweeny, Wingate & Barrow, P.A.
1515 Lady Street
Columbia, SC 29201
T: 803-256-2233
Attorneys for Southern Health Partners and Dr. Charles Bush, Appellants

Other Counsel of Record:
William H. Davidson, II
Davidson & Lindemann, P.A.
P.O. Box 8568
Columbia, SC 29202
Attorney for South Carolina law Enforcement Division

Samuel F. Arthur, III
Aiken Bridges
P.O. Box 1931
Florence, SC 29503-1931
Attorney for Marlboro County, Marlboro County Sheriff's Office,
Marlboro County Detention Center

Kathleen Sue Cox

Kathleen Sue Cox

WUKELA LAW FIRM

Steve Wukela, Jr.
Benjamin D. Moore
Christi B. McDaniel
Stephen J. Wukela
Patrick J. McLaughlin
Pheobe A. Clark
Frank C. Swaggard

403 Second Loop Road
P.O. Box 13057
Florence, SC 29504-3057

(843) 669-5634
FAX (843) 669-5150

August 27, 2018

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia SC 29211

Re: Appellate Case No. 2018-001510
Common Pleas Case No. 2017-CP-34-00064
Gary Locklear, Individually and as Personal Representative of the Estate of Roy Locklear, Respondent,
vs.
Marlboro County, Marlboro County Sheriff's Office, Marlboro County Detention Center, Dr. Charles Bush, Southern Health Partners, And South Carolina law Enforcement Division, Defendants.
Of whom, Southern Health Partners and Dr. Charles Bush are Appellants.

Dear Ms. Kitchings:

Enclosed please find for filing the following:

1. Original and six (6) copies of Motion To Dismiss and Memorandum In Support of the Motion to Dismiss;
2. Certificate of Service on the Appellant and Defendants;
3. A filing fee of Twenty-Five ($25.00) Dollars.

Yours truly,

WUKELA LAW FIRM

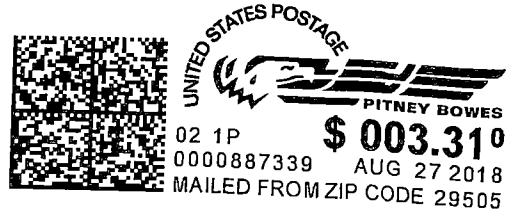
PATRICK J. MCLAUGHLIN

PJM:ksc
Enclosures

cc:
Mark V. Gerde
John E. Tyler
Sweeny, Wingate & Barrow, P.A.
1515 Lady Street
Columbia, SC 29201
Attorneys for Southern Health Partners and Dr. Charles Bush, Appellants

William H. Davidson, II
Davidson & Lindemann, P.A.
P.O. Box 8568
Columbia, SC 29202
Attorney for South Carolina law Enforcement Division

Samuel F. Arthur, III
Aiken Bridges
P.O. Box 1931
Florence, SC 29503-1931
Attorney for Marlboro County, Marlboro County Sheriff's Office,
Marlboro County Detention Center



First Class Mail

WUKELA LAW FIRM
403 SECOND LOOP ROAD
P.O. BOX 13057
FLORENCE, SC 29504

To:

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia SC 29211