THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

Roger E. Henderson, Circuit Court Judge

Order denying Appellants' Petition for Rehearing (S.C. Ct. App. filed Dec. 18, 2018)

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

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SC Court of Appeals

v.

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 which, Southern Health Partners and Dr. Charles Bush are Petitioners.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on December 18, 2018.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in issuing an Order dismissing Petitioners' appeal?

STATEMENT OF THE CASE

As outlined under the argument portion below, this is a matter involving a novel question of law—whether a litigant has appropriate appellate rights when the lower court compels

production of confidential material yet refuses to issue an order protecting the confidentiality of the materials. Furthermore, it involves substantial rights of business owners and has implications important to South Carolina's economy. Petitioners, and all entities doing business or considering to do business in South Carolina, have a reasonable and legitimate interest in protecting confidential, proprietary information and/or trade secrets. This legitimate interest must be protected by South Carolina courts.

This litigation involves a professional negligence claim against Petitioners related to the death of Mr. Roy Locklear, who committed suicide while an inmate at the Marlboro County Detention Center where Petitioner Southern Health Partners provides medical services via contract with Marlboro County. Petitioner Dr. Bush is a physician contracting with Southern Health Partners. Respondent served discovery requests on Petitioners seeking the production of a significant amount of confidential information, including the medical policies and procedures in place at the subject facility, among other information. Petitioners agreed to produce the policies and procedures in question, but requested that there be a confidentiality order or a confidentiality agreement in place to protect their disclosure.

Respondent filed a motion to compel discovery and would not agree to a confidentiality order. In response to the discovery motion, Petitioners supplemented discovery responses, provided a privilege log, and requested that counsel for Respondent consent to a confidentiality agreement to protect the policies and procedures from disclosure. Petitioners also provided the affidavit of the chief executive officer of Southern Health Partners establishing that some of the documents sought by Respondent are confidential and proprietary, and that they have been damaged in the past by former vendors, employees, and at least one opposing litigation expert

attempting to use the policies and procedures to obtain business from existing or potential clients. The affidavit provides:

1. I am Jennifer I. Hairsine. I am over the age of eighteen and competent to give this testimony.

2. I am, and was at all times relevant to the allegations made in the above-captioned lawsuit, the President and Chief Executive Officer of Southern Health Partners, Inc. ("SHP").

3. SHP was founded in 1994 to initially provide health care services to inmates in jails classified as either small or medium size by the American Correctional Association (ACA). 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 along with utilizing the National Commission on Correctional Health Care (NCCHC), along with the American Correctional Association (ACA) standards, as a basis for our policies, procedures, and operations.

4. The provision of jail health care services is a highly competitive business with new companies trying to enter into the market and gain market share.

5. SHP currently provides services at 237 detention facilities in fifteen states.

6. I have reviewed the discovery requests of the Plaintiff.

7. For the period of time in question, SHP maintains a document titled "Policy and Procedure Manual for Health Services in Jails."

8. This policy manual is confidential and contains proprietary information. SHP has expended significant time and resources in creating and updating its Policy and Procedure Manual to best address the needs of our unique patient population. Therefore, SHP has taken the following measures to protect its confidentiality:

    a. All employees of SHP are required to sign a non-disclosure agreement;
    b. The counties with which we contract do not gain access to the policy manual, and, therefore, do not produce the manual in response to requests under FOIA;
    c. All pages of the policy manual are marked and labeled "Confidential Work Product of Southern Health Partners, Inc.;"
    d. In cases where the policy manual might be at issue, our course of dealing is to request confidentiality agreements with all counsel which limit the use of the policy manual to the litigation in question and

which require any expert who reviews the policy manual to destroy it upon completion of the litigation.

9. 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.

Appendix pp. 79-81 [1]

Counsel for Respondent, however, refused to consent to a confidentiality agreement or order, and sought the court to compel production without any confidentiality protection for these documents.

At the hearing on Respondent's Motion to Compel, counsel for Petitioners instructed the court that they will fully produce the material in question, but simply asked the court to issue a confidentiality order.

Mr. Tyler:	Yes, Your Honor, we're happy to provide the whole thing [the requested documents].
The Court:	Why haven't you already provided the whole thing?
My Tyler:	You Honor, because we've requested a confidentiality order.

Appendix p. 46, lines 4-9.

Without reviewing the documents in question to evaluate their confidential and proprietary nature, the lower court granted Respondents' motion to compel, refusing to protect the material deemed confidential and proprietary by Petitioners.

Additionally, the lower court ordered sanctions against Petitioners—one in the form of payment of attorney's fees and costs (in the amount of $3,750) by Petitioners to counsel for

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[1] While pending before the Court of Appeals, no Designations of Matter to be Included in the Record on Appeal were filed by any party due to the timing of the Order dismissing the appeal. Therefore, no Record on Appeal or briefs are available to include in the Appendix pursuant to Rule 242(e)(1), SCACR. However, the Appendix includes documents required by subsections (2), (3) and (4) of Rule 242(e), SCACR.

Respondent, and the other by way of a $200 fee per day in the event Petitioners did not comply by a set deadline with the discovery production required in the Order. Appendix pp. 105-110. Subsequent to the hearing and at the lower court's request, counsel for Respondent provided a proposed order. Counsel for Petitioners objected to Respondent's proposed order on numerous grounds and provided the basis for the objections. Appendix pp. 48-83.

When the lower court signed Respondent's version of the order, rather than disclosing the confidential and proprietary information, Petitioners filed a Notice of Appeal with the South Carolina Court of Appeals. While the order in question is a discovery order, Petitioners' appeal is primarily related to the lower court's refusal to protect confidential and proprietary information. Respondent filed a motion to dismiss this appeal, claiming that the discovery order is not immediately appealable, and the Court of Appeals issued an Order dismissing the appeal. The Court of Appeals' Order dismissing Petitioners' appeal states "the underlying order is not immediately appealable."

Petitioners filed a Petition for Rehearing which was denied pursuant to an Order of the Court of Appeals filed on December 18, 2018, and now file this Petition for a Writ of Certiorari.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN DISMISSING PETITIONERS' APPEAL, BECAUSE THE TRIAL COURT'S DISCOVERY ORDER REQUIRED UNREASONABLE DISCLOSURE OF CONFIDENTIAL MATERIAL WHICH WARRANTS AN IMMEDIATE APPEAL.

Ex parte Whetsone, 289 S.C. 580, 347 S.E.2d 881 (1986), *Tucker v. Honda of South Carolina Manufacturing*, 354 S.C. 574, 582 S.E.2d 405 (2005), and *Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535 (2014), all refer to what is considered the normal procedure of how to appeal a discovery order. In the Petitioners' case, the trial court found that Petitioners were "not entitled to a confidentiality or protective order" (Appendix p. 102), and

counsel for Respondents seemed baffled by Petitioners' "failure to follow the South Carolina Supreme Court's *explicit instructions* on how a party may properly appeal a discovery order as outlined in [the *Tucker* case]...." (Appendix p. 188; emphasis added). All the cases cited above, Petitioners' case included, serve as examples of the need for recognizing another procedural option for the appeal of a discovery order requiring the unprotected disclosure of confidential, proprietary business documents.

The recognition of the need for another procedural option is addressed in the treatise, APPELLATE PRACTICE IN SOUTH CAROLINA (3d ed. 2016), authored by former Chief Justice Jean Hoefer Toal, Amelia Waring Walker, and Margaret E. Baker, which includes an important section discussing the appealability of judgments and orders.[2] The treatise makes clear that immediate appeals may well be warranted and permitted for orders requiring a party to turn over certain types of confidential documents. Specifically, the treatise provides:

> **If an order requires a party to turn over documents that the party feels are privileged or contain proprietary or confidential matters, and the party does not have a right to an immediate appeal, compliance renders the protections afforded by the privilege or confidentiality a nullity**. *See Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881 (1986). **Hence, where the appealed order has the effect of revealing the very thing the appellant claims should remain confidential, an immediate appeal may well be warranted and permitted by the appellate courts.** *See City of Columbia v. ACLU of S.C., Inc.*, 323 S.C. 384, 475 S.E.2d 747 (1996).

JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA, 154 (3d ed. 2016)(emphasis added).

[2] This Court has cited to different editions of the treatise on numerous occasions to clarify its position on legal issues. *See, e.g., Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004); *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 533, 564 S.E.2d 322, 322, 323 (2001); *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007).

Thus, while an order compelling discovery "does not *ordinarily* involve the merits" and ordinarily such orders are not immediately appealable, *see Tucker v. Honda of South Carolina Manufacturing*, 354 S.C. 574, 577, 582 S.E.2d 405, 406 (2005) (emphasis added), the persuasive authority, APPELLATE PRACTICE IN SOUTH CAROLINA (3d ed. 2016), instructs that discovery orders requiring a party to turn over proprietary and confidential documents may not only be immediately appealable, but an immediate appeal may be warranted to protect the proprietary and confidential information sought by Respondent. Petitioners contend that this persuasive authority is directly on point in this case and that an immediate appeal is not only allowed but warranted.

The *Tucker* case is distinguishable from the case at hand, because the *Tucker* trial court had already enacted measures to protect the confidential information. 354 S.C. at 576, 582 S.E.2d at 406. In this action, the trial court refused to allow for any protection of the argued confidential information. In *Tucker*, the appellant objected to several deposition questions based upon the attorney-client privilege. *Id.* The trial court took steps to protect the confidentiality of the proceeding, where the appellant raised "legitimate privilege concerns." *Id.* In particular, the trial court ordered that the court reporter would seal the deposition record and submit it to the trial court, the trial court would exclude any privileged information from the trial record, and attendance at the deposition would be limited. *Id.* In the Petitioners' case, the lower court offered no protective measures whatsoever, simply rejecting Petitioners' arguments as to confidentiality, which were supported by the affidavit of Southern Health Partner's chief executive officer.

Furthermore, the trial court also should have examined the Petitioners' documents in detail *in camera* in order to assess the claims of confidential, proprietary and/or trade secret information. *See City of Columbia v. ACLU of S.C., Inc.*, 323 S.C. 384, 388, 389, 475 S.E.2d

747, 750 (1996) (a FOIA discovery matter in which this Court ruled that "[b]efore Appellant becomes entitled to the report, the trial court must first examine the report in detail in order to determine whether the report's contents or portions thereof qualify for an exemption [from disclosure].")

Confidentiality orders and agreements are a staple of litigation discovery and serve as the most basic protection against the widespread and public dissemination of a business entity's work product that is confidential, proprietary, and/or a trade secret, as well as other private and sensitive business information such as financial statements or audits. Companies may expend many years, countless hours, and significant capital developing such work product. Such work product sets one entity apart from its competitors in the marketplace and is part of what may provide an entity with a competitive advantage over its rivals. Companies should not be coerced into a public disclosure of such work product by being commanded to produce it in litigation without the protection of a confidentiality order (and/or agreement) and without the right of immediate appellate review.

II. THE COURT OF APPEALS ERRED IN DISMISSING PETITIONERS' APPEAL, BECAUSE IT IS UNREASONABLE AND UNFAIR TO REQUIRE—AS THE BASIS FOR APPEALING THE ORDER COMPELLING DISCOVERY OF PROTECTED INFORMATION—THAT PETITIONER BE HELD IN CONTEMPT FOR FAILURE TO OBEY SUCH ORDER

Tucker also holds that a party may appeal an order compelling discovery only after being held in contempt for refusal to comply, because the contempt order is final in nature. *Tucker* at 577, S.E.2d at 406, 407. This procedure, when applied to claims of confidential material, is unreasonable and unfair to a business merely seeking to protect its work product that is confidential, proprietary, and/or a trade secret, because it places the business in jeopardy should it not fully prevail in overturning the contempt citation. This is an eminently unreasonable

predicament into which to place a business for the offense of seeking to protect its work product that is confidential, proprietary, and/or a trade secret, especially in this matter where Petitioners have always stated the willingness to produce all the requested documents pursuant to a confidentiality order and/or agreement. Furthermore, such a predicament is totally unnecessary where, as here, the entry of a common confidentiality order and/or agreement would not hinder *any* legitimate use by the Respondent of the documents in this litigation and would protect the legitimate protected business interests of the Petitioners.

Petitioners regularly do business in the State of South Carolina in multiple locations. Petitioners provide important health care services to an underserved population, prison and jail inmates and detainees. Petitioners are responsible corporate citizens and have only respect for the court system, judges, and orders. The requirement of being held in contempt as the basis for a final order being immediately appealable is an unreasonable option. Petitioners have no contempt for the courts' orders. They simply want to have a review of their claim that the requested documents are confidential, proprietary, and/or trade secrets and, therefore, merit the protection of a confidentiality order in litigation.

Furthermore, the Order's $200 per day sanction has the effect of being a preemptive or veiled contempt citation. Therefore, the court should find an appeal is available based on this reason also.

III. THE COURT OF APPEALS ERRED IN DISMISSING PETITIONERS' APPEAL, BECAUSE THIS ISSUE IS OF SIGNIFICANT IMPORANCE TO LITIGATION AND BUSINESS IN THE STATE OF SOUTH CAROLINA AND THE SUPREME COURT SHOULD GRANT CERTIORARI FOR THIS REASON.

This issue is of significant importance to litigation and business throughout the State of South Carolina. Within days of its issuance, the subject order had already been disseminated and is being used on the opposite side of the State in an attempt to force the Petitioners to produce

similar confidential information in a matter where Petitioners are not even a party. It is foreseeable that the subject order eventually will be used across the State and in every type of litigation to compel not only parties, but also non-parties, doing business in South Carolina to disclose information that is confidential, proprietary and/or trade secrets, with no protections whatsoever. This unreasonable, unnecessary, and unprecedented compelled dissemination of confidential, proprietary and/or trade secret information, without the benefit of review by a higher court, can only have the foreseeable result of chilling competitive business in South Carolina. If this order is allowed to stand without immediate appellate review, it will have the foreseeable effect of chilling business interests in South Carolina because of the uncertainty of protecting confidential, proprietary, and/or trade secret information during litigation. This is a matter of significant importance to litigation and business in South Carolina and the South Carolina Supreme Court should grant the Petition for a Writ of Certiorari on this issue.

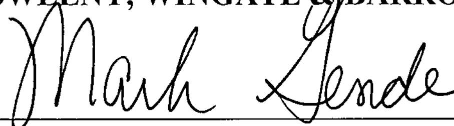
CONCLUSION

The immediate appeal of a discovery order that refuses to provide any protection for what Petitioners have argued is confidential, proprietary business information, is a novel legal issue in South Carolina. The leading South Carolina appellate practice treatise indicates that an appeal in such instances is warranted. That reasoning is sound and merits specific consideration by this Court in order to clearly establish that businesses operating in this state have the protection of an immediate appeal when compelled to produce, without any protections, confidential, proprietary, and/or trade secret information, and should be able to do so without the unreasonable and unfair predicament of first having to be held in contempt.

For the reasons stated, Petitioners ask the Court to grant this Petition for a Writ of Certiorari, reverse the decision of the Court of Appeals to dismiss Petitioner's Notice of Appeal, and reverse the Order of the trial court.

Respectfully submitted,

SWEENY, WINGATE & BARROW, P.A.



January 17, 2019

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Roger E. Henderson, Circuit Court Judge

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v.

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Of which, Southern Health Partners and Dr. Charles Bush are Petitioners.

PROOF OF SERVICE

I certify that I have served the Petition for a Writ of Certiorari and the Appendix on Gary Locklear, individually and as Personal Representative of the Estate of Roy Locklear, by depositing a copy of the same in the United States Mail, postage prepaid, on January 17, 2019, addressed to his attorney of record, Patrick J. McLaughlin, Wukela Law Firm, Post Office Box 13057, Florence, South Carolina 29504; and to the following attorneys who are representing various Defendants in the trial court but who are not directly involved in this Petition for a Writ of Certiorari: William H. Davison, II, as attorney for South Carolina Law Enforcement Division, P.O. Box 8568, Columbia, South Carolina; and Samuel F. Arthur, III, as attorney for the Marlboro County Defendants, P.O. Drawer 1931, Florence, South Carolina 29503.

January 17, 2018

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January 17, 2019

Reply to: Main Office

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VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
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RECEIVED
JAN 17 2019
SC Court of Appeals

RE: Gary Locklear v. Marlboro County, et al.
Appellate Case No. 2018-001510
Civil Action No. 2017-CP-34-00064
Our File: 5480-10735

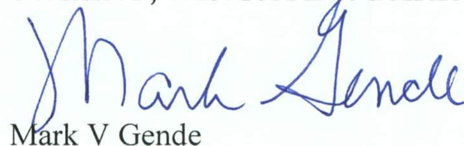
Dear Ms. Kitchings:

Pursuant to Rule 242(c), SCACR, enclosed for filing is the original and copies of the Petition for a Writ of Certiorari and the original and one (1) copy of the Proof of Service in the above-referenced action.

Please return to the courier who delivers these, a filed copy of the Petition for a Writ of Certiorari and a filed copy of the Proof of Service. Should you have any questions or concerns, please do not hesitate to contact me.

Yours truly,

SWEENY, WINGATE & BARROW, P.A.



Mark V Gende

MVG/nrc
Enclosures
cc: Patrick J. McLaughlin, Esquire, Wukela Law Firm
Samuel F. Arthur III, Esquire, Aiken, Bridges, Nunn, Elliott and Tyler
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