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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

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

Appellate Case No. 2019-000064

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.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Pursuant to Rule 242(f) SCACR, Counsel for Respondent certifies that this Return complies with the South Carolina Appellant Court Rules.

QUESTIONS PRESENTED

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

STATEMENT OF THE CASE

This matter does not present a novel question of law, rather it is a continuation of dilatory conduct by the Petitioners who failed to meet the burden necessary in seeking an order of protection for basic discovery, relevant to the case.

This litigation involves 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 timely filed pursuant to S.C. Code §15-79-125.

The factual allegations supporting the Respondent's causes of action deal with the acts/omissions of the Petitioners 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 Mr. Locklear was actually in custody at MCDC before his attempted suicide and

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.

subsequent transport to the hospital, the allegations against the Petitioners arise primarily from the role they play as the "Responsible Physician" for MCDC pursuant to the *Minimum Standards for Local Detention Facilities in South Carolina.*

The order for which Petitioners have sought certiorari is an order granting the Respondent's motion to dismiss the Petitioners appeal to the South Carolina Court of Appeals. That appeal by the Petitioners was from an order granting the Respondent's motion compel discovery for the Petitioners' failure to adequately respond to the Respondent's initial discovery requests.

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

Subsequent to serving those discovery requests Respondent's counsel had to contact all of the Defendants due to not timely receiving responses. Ultimately, Respondent'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. Petitioners 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, Petitioners' counsel contacted Respondent'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, Respondent's counsel reminded Petitioners' counsel that the Respondent was owed supplemental discovery responses and that he needed that material prior to upcoming depositions scheduled for the week of June 11, 2018. Petitioners' 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 prior), Petitioners' counsel sent an email that included a table of contents for Petitioners' policies and procedures manual asking Respondent's counsel to call to "discuss which items are necessary for this case" and informing Respondent's counsel for the first time that Petitioner would require a confidentiality agreement, which was in the process of being drafted.

That same day, Respondent'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 Petitioner'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 Respondent 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, Petitioners 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, Petitioners' counsel sent Respondent'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 Respondent's counsel would reconsider a confidentiality agreement in light of the affidavit and also asked if Interrogatory #18 could be resolved if Petitioner provided a list of suicide/suicide attempts at MCDC.

On July 12, 2018, Respondent's counsel informed Petitioners' counsel via email that his position on neither issue had changed.

On July 13, 2018, a hearing was held before the trial court on Respondent's motion to compel. Both parties appeared at that hearing through counsel and made argument to the trial court. The trial court took the matter under advisement.

By order signed July 31, 2018, the trial court granted Respondent's motion to compel discovery, sanctioning the Petitioners for their abusive discovery conduct and setting a deadline of August 17, 2018 by which time the Petitioners had to respond fully to Respondent's discovery requests or face further sanction at the rate of $200/day.

The day before that deadline, August 16, 2018, Petitioners filed their Notice of Appeal with the South Caroline Court of Appeals.

On August 28, 2018, Respondent filed a Motion to Dismiss and Memorandum in Support of the Motion to Dismiss, specifically noting the Petitioners had failed to follow the proper procedure required to appeal a discovery order as laid out in Tucker v. Honda of S.C. Mfg., 354 S.C. 574, 582 S.E.2d 405 (2003).

On September 6, 2018, Petitioners filed a Return to Respondent's Motion to Dismiss Appeal. On September 17, 2018, Respondents filed a Reply to that Return. On September 20, 2018, Petitioners filed a Sur-Reply to Respondent's Reply.

On October 4, 2018, the Court of Appeals issued the order granting Respondent's motion to dismiss the appeal finding that the underlying discovery order was not immediately appealable.

On October 12, 2018, the Petitioners filed a Petition for Rehearing.

On October 16, 2018, Respondent filed a Return to the Petition for Rehearing.

On October 22, 2018, the Petitioners filed a Reply to Respondent's Return to Petition for Rehearing wherein, for the first time, they address their failure to follow Tucker, claiming to do so would place them in "great jeopardy."

On December 18, 2018, the Court of Appeals issued an order denying the Petition for rehearing.

Via receipt of USPS correspondence on January 22, 2019, the Respondent was served with a copy of the Petitioners' petition for a writ of certiorari to the this Court. This Return follows.

ARGUMENT

I. The Petition for Writ should be denied as the Court of Appeals did not err in dismissing the Petitioners appeal of the discovery order as the order appealed did not involve the merits of the case nor did the Petitioners meet the burden required of them under the law and rules of civil procedure for protection.

The Respondent moved for dismissal of the Petitioners' appeal on the grounds that Petitioners were seeking to appeal an interlocutory order which did not involve the merits of the case and was not immediately appealable. Specifically, Petitioner was seeking to appeal an order compelling discovery.

The Court of Appeals agreed.

> Respondent's motion to dismiss the appeal is granted because the underlying order is not immediately appealable. *See Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008) ("[T]he fact remains that discovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute, involve the merits of the action or effect a substantial right." *Hamm v. S.C. Pub. Serv. Comm'n.*, 312 S.C. 238, 241; 439 S.E.2d 852, 853 (1994) ("Discovery orders...are interlocutory and are not immediately appealable.").

(Appendix p. 174).

As Respondent noted in his motion to dismiss:

> 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., 354 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)...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.

(Appendix p.117, emphasis in original motion).

Respondent would note that despite the explicit instructions from this court in Tucker of the proper procedure by which a party can appeal a discovery order, Petitioners seek to argue theirs is of a class of cases for which the Court should create a "another procedural option for the appeal of a discovery order." This class are cases where a trial court orders "the unprotected disclosure of confidential, proprietary business documents." (Petition, p.7).

Petitioners' argument fails for two reasons.

A. The trial court's order compelling discovery did not involve the merits of the case.

The Petitioners seek to take a suggestion from a treatise, concerning a particular kind of discovery order different from the one they seek to appeal, and elevate it to a new rule that would result in South Carolina's appellate courts being asked to referee basic discovery requests, causing unnecessary and unjust delay. Specifically, Petitioners take the suggestion offered by former Chief Justice Toal, in her book, Appellate Practice in South Carolina, that "where an appealed order has the effect of revealing the very thing the appellant was claiming should remain confidential, an immediate appeal **may** well be warranted and permitted by the appellate court," and mischaracterizes this suggestion as

an "assertion that discovery orders like this which compel the production of confidential and proprietary matter are immediately appealable." (Appendix, p. 129-130, citing Toal, *et al.*, Appellate Practice in South Carolina, 154 (2016, 3d ed), emphasis added.

However, that suggestion that some discovery orders **may** warrant an immediate appeal speaks only to a unique case where the production of confidential material was precisely why the litigation had been commenced and was the entirety of the matter in controversy. City of Columbia v. A.C.L.U. of South Carolina, Inc., 323 S.C. 384, 388, 475 S.E.2d 747, 849 (1996). Contrary to Petitioners' argument to the Court of Appeals, City of Columbia does not "address the very issue here – disclosure of proprietary and confidential information pursuant to a discovery request." (Appendix, p.131). Instead, City of Columbia addresses a party's attempts to prevail on the actual merits of a certain type of case (declaratory judgment actions involving FOIA exemptions) through a discovery request during litigation.

In City of Columbia, after the City of Columbia received a FOIA request seeking an internal police report. The City refused to provide the contents of the internal police report and instead sought a declaratory judgment from the trial court that the report 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 City of Columbia court noted that the production of police report **was 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 Respondent's discovery

requests sought production of documents that were the subject matter of the lawsuit), emphasis added.

Here, the production of Petitioners' policies and procedures is not the subject matter of the case. It is merely basic responsive discovery material. By asking this court to create a new procedure allowing such an order to be immediately appealable, Petitioners are asking this court to become the referee of the type of basic discovery dispute that comes up routinely in civil litigation. Refereeing such discovery disputes is not the design or purpose of appellate courts.

Petitioners attempt to distinguish Tucker from the present case by arguing that the Tucker trial court enacted some measures to protect the "confidential information." Petitioners complain that "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" before arguing that "the trial court should have examined the Petitioners' documents *in camera* in order to assess the claims of confidential, proprietary and/or trade secret information." (Petition p. 8).

Respondent addresses Petitioners' contention that the trial court "simply rejected" their arguments as to confidentiality in section "B" below. However, in addressing the argument about *in camera* review, the Petitioners neglect to inform the Court that they never asked the trial court to review the alleged "confidential" and "proprietary" material *in camera*. In short, Petitioners are complaining that the trial court did not do something that they never once requested.

It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. Wilder Corp v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). "The issue must be

sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." Malloy v. Thompson, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014). "South Carolina courts 'have adhered to the rule that where an issue has not been ruled upon by the trial judge nor raised in a post-trial motion, such issue may not be considered on appeal.'" In re Timmerman, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998), quoting Pelican Bldg. Ctrs. v. Dutton, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993). "When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move pursuant to Rule 59(e), SCRCP to alter or amend the judgment in order to preserve the issue for appeal." Id.

In finding the Petitioners' conduct "abusive," the trial court specifically noted that the Petitioners "ignored their duty under the rules to either adequately respond to the [Respondent's] discovery requests or to move for protection. Despite discussion in this order about the protection sought by [Petitioners], the court notes **they never actually moved for such protection**." (Appendix p.106), emphasis added.

As such there was never any filing by the Petitioners where they presented the trial court with material under seal for an *in camera* review, nor where they asked the trial court to perform an *in camera* review. Not once within the forty-six (46) pages of the hearing transcript (Appendix p. 1-46) do the Petitioners ask the trial court to perform an *in camera* review or offer to provide the trial court with any of the alleged "confidential" and "proprietary" material for an *in camera* review.

Nowhere within the July 20, 2018 email submitted by the Petitioners to the trial court in objection to the Respondent's proposed order was there a request for an *in*

camera review or an offer to provide the material to the trial court for an *in camera* review. (Appendix p.48).

Petitioners never filed a motion pursuant to Rule 59 SCRCP seeking to amend the order to address any *in camera* review issue.

Respondent was unable to locate a single mention of the Petitioners' request for an *in camera* review within any of the Court of Appeals filings.

Instead, the first mention of *in camera* review by the Petitioners comes in the Petitioners' petition for cert to this Court, when the Petitioners argue "the trial court should have examined the Petitioners' documents *in camera* in order to assess the claims of confidential, proprietary and/or trade secret information." (Petition p. 8).

In Wilson v. Preston, this Court addressed raising the issue of *in camera* review for the first time on appeal:

> Initially, Wilson argues the lower court erred by not reviewing the legal bill narratives *in camera* when making its decision. However, Wilson did not request that they be reviewed *in camera* below and she did not raise this argument until appeal. In any event, the trial court was not required to actually review the legal bill narratives to determine if privilege existed. We have held that the trial court must determine the question of privilege without first requiring disclosure of the substance of the communication. State v. Doster, 276 S.C. 647, 284 S.E.2d 218 (1981). *See also* Tucker v. Honda of South Carolina Mfg. Inc., 354 S.C. 574, 582 S.E.2d 405 (2003) (trial court should not require disclosure of attorney client communications to other parties without first determining whether the communications are privileged by inquiring into all the facts and circumstances of the communication; **if** necessary to determine the application of the privilege, the trial judge **may** consider, *in camera*, the material). State v. Love, 275 S.C. 55, 271 S.E.2d 110 (1980) (whether a communication is privileged is for the trial judge to decide in the light of a preliminary inquiry into all of the facts and circumstances; and this determination is conclusive in the absence of an abuse of discretion). In the instant case, in light of the fact that Wilson never requested such an **in camera review**, the trail court did not abuse his discretion by determining the existence of the privilege without reviewing the narratives in the legal bills.

Wilson v. Preston, 378 S.C. 348, 358, 662 S.E.2d 580, 585, emphasis in original.

In short, the trial court did not abuse its discretion in not reviewing any material *in camera* because the Petitioners never asked the trial court to do so.

B. Petitioners failed to meet the burden required under the law and rules of civil procedure for protection.

Petitioners complain that "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." (Petition p. 8). This statement demonstrates Petitioners' belief that merely claiming material is "proprietary" or "confidential" is enough to make it so and invoke the extraordinary protection of Rule 26(c) of the South Carolina Rules of Civil Procedure.

The trial court recognized that the protection Petitioners claim to be entitled is not something that a party can invoke by mere incantation. Rather, a party must seek such protection under the rules and prove that they are entitled to it.

> "What transpires in the court room is public property." Craig v. Harney, 331 U.S. 367 (1947). Rule 26(c) contemplates that, unless compelling reasons exist for imposing restrictions, all discovery will take place in an open court. *See* e.g., Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 789 (1st Cir. 1998), Cert. denied, 488 U.S. 1030 (1989); In re Agent Orange Product Liability Litigation, 82 F.2d 139, 145-146 (2nd Cir. 1987), Cert. denied, 484 U.S. 953 (1987). As a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying access to the proceedings. AT&T v. Grady, 594 F.2d 594, 596 (7th Cir. 1978). "When parties 'call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials.'" Co. Doe v. Pub. Citizen, 749 F.3d 246, 271 (4th Cir. Apr. 16, 2014).
>
> "Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending...may make an order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense, including [...] (7) that a trade secret or other confidential research,

development, or commercial information not be disclosed or be disclosed only in a designated way." Rule 26(c) SCRCP, irrelevant portions omitted. Pursuant to the language of the rule, issuing any kind of protective order is within the Court's discretion and can only take place after a showing of good cause.

Bush/SHP bears the burden of showing good cause exists for protection under Rule 26(c). In order to meet that burden, a defendant must state particular and specific facts to justify its position. Gulf Oil Company v. Bernard 452 U.S. 89, 102 (1981); Rivera v. Nibco, Inc., 364 F.3d 1057, 1063 (9th Cir. 2004). Further, defendants must not only show that the documents at issue contain trade secrets, but must also show that the release of these documents would cause cognizable or commercial harm. United States v. Hooker Chemical and Plastic Corp., 90 F.R.D. 421 (W.D. N.Y. 1991); Grundberg v. Upjohn Company, 137 F.R.D. 372, 395 (D. Utah 1991); DDS, Inc. v. Lucas Aerospace Power Transmission Corp., 182 F.R.D. 1, 4 (1998). Defendants must demonstrate that any disclosure will work a "clearly defined and very serious injury" to the company. Waelde v. Merck, Sharp, and Dohme, 94 F.R.D. 27, 28 (E.D. Mich. 1981).

Particular and specific demonstrations of fact, as opposed to stereotypes or conclusory statements, must be demonstrated. General Dynamics Corp. v. Selb Manufacturing Corp., 41 F.2d 1204, 1212 (8th Cir. 1973), Cert. denied, 414 U.S. 1162 (1974).

The Court finds Bush/SHP fails to meet this burden.

(Appendix p.94-95, emphasis added).

As to Petitioners' argument that their confidentiality claims "were supported by the affidavit of Southern Health Partner's chief executive officer," the trial court considered that affidavit and did not find it persuasive:

> 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).
>
> 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 Petitioner 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 Petitioner'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.

(Appendix p. 95-96).

However, the trial court's decision to grant the Respondent's motion was not just based on the Petitioners' failures to meet their burden. It was also based on the fact that the Respondent successfully argued to the trial court that the requested material could not be confidential, as it was material required by the Minimum Standards For Local Detention Facilities in South Carolina ("MSSC"), which made it subject to public production under the South Carolina Freedom of Information Act ("FOIA"):

> The South Carolina Freedom of Information Act (S.C. Code §30-4-10 thru 30-4-165) mandates, upon request, the disclosure of records held by a "public body" unless the documents fall within enumerated exceptions. Burton v. York Co. Sheriff's Office, 358 S.C. 339, 347 (Ct. App. 2004). The Act goes on to enumerate matters exempt from disclosure in S.C.

Code §30-4-40, of which the relevant portion to this case would be subsection (a)(1) "Trade Secrets" which the act defines as:

> Trade secrets, which are defined as unpatented, secret, commercially valuable plans, appliances, formulas, or processes, which are used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities obtained from a person and which are generally recognized as confidential and work products, in whole or in part collected or produced for sale or resale, and paid subscriber information. Trade secrets also include, for those public bodies who market services or products in competition with others, feasibility, planning, and marketing studies, marine terminal service and nontariff agreements, and evaluations and other materials which contain references to potential customers, competitive information, or evaluation. S.C. Code §30-4-40(a)(1).

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

(Appendix p. 100-101).

The trial court did not arbitrarily make this finding. It did so after the Respondent produced to the court, and discussed in detail, a packet of supporting materials containing relevant sections of the MSSC (Appendix p.11-17), relevant sections of SC FOIA law (Appendix p.17-22), initial discovery responses that had been provided (Appendix p.23-25) and a deposition excerpt from another civil action involving the Petitioners (Appendix p.25-27), all of which supported the Respondent's argument.

The failure of the Petitioners to meet their burden or overcome the argument of the Respondents was evident during the hearing:

> THE COURT: Mr. Tyler, please try to explain to me how the policies and procedures manual fall within the feasibility, planning, marketing studies and evaluations and other material which contain references potential customers and petty information or evaluation?
>
> MR. TYLER: Yes, Your Honor. That is at the very core of what this competitive business is about. It's how they respond in various situations. How they provide healthcare services in various situations. And there are several model codes out there, this is not one of those facilities that requires a model code. This is a – this is a facility that it's not NCCHC accredited. It is – it's a facility where those policies and procedures are set by the company providing it. And –

THE COURT: You aren't answering my question. How does that have anything to do with planning, marketing studies and evaluations a references potential customers, there's nothing about that competitive information, evaluation. What's the policies and procedures manual, how does it deal with that?

MR. TYLER: You Honor, it's competitive information because it's exactly how they provide services at these facilities. The counties –

THE COURT: Aren't they all supposed to follow the procedures set forth by the State of South Carolina?

MR. TYLER: Well, that's the minimum standards, Your Honor. But these are in interpretations and their own internal operating of how they, not only comply with those minimum standards, but comply with their own aspirations as a company. That's separate and apart from those minimum standards which have been cited. And so, Your Honor, these are – these are this particular companies aspirations which they use in their process of gaining new contracts with other counties. That's been marketed.

THE COURT: I'm going to be honest with you, I'm having a hard time seeing that, quite frankly. No disrespect to you and your arguments though. I'm having a hard time seeing that.

(Appendix p.43, l.13 – p.45, l.1).

The trial court had a hard time seeing how the material at issue could be proprietary work product because it made no sense. All the policies and procedures the Petitioners create/review/approve/use in providing treatment to detainees in detention centers in South Carolina are required by the MSSC to be in writing and readily available to all personnel at each facility. Such policies and procedures are instructions to a public body's staff that affect members of the public. As such, 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).

II. The Petition for Writ should be denied because the Court of Appeals did not err in dismissing the Petitioners' appeal as it is not unreasonable or unfair to require a party to be held in contempt for failure to obey an order compelling discovery before such an order can be appealed.

The Petitioners argue the well-settled law from Tucker, that a party seeking to continue an unsuccessful argument that material is confidential may appeal an order compelling discovery only after the trial court holds them in contempt, is "unreasonable and unfair" because "it places the business in jeopardy should it not fully prevail in overturning the contempt citation." (Petition p. 9).

Petitioners claim these explicit instructions on how such a discovery order can be appealed from Tucker create 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 were Petitioners have **always** stated the willingness to produce all the requested documents pursuant to a confidentiality order and/or agreement." (Petition p.10, emphasis added).

This statement is false. In its order, the trial court provided a timeline of the Petitioners dilatory conduct preceding the hearing on the motion to compel. (Appendix p.90-91). The Petitioners did not raise the issue of needing a confidentiality agreement or order in place before they would agree to produce the requested material in this matter until over a year after being served with the initial discovery requests. As the trial court noted:

> Instead of seeking the protection they admittedly seek in all cases where similar discovery is requested, Bush/SHP engaged in dilatory conduct. Specifically, after acknowledging the inadequacy of their initial discovery responses, Bush/SHP made representations to the Plaintiff that more adequate responses would be forthcoming.
>
> Some six (6) months later, after being reminded of the promised supplementation and noticed that the Plaintiff needed those supplemental

> responses before the depositions scheduled for the week of June 11, 2018, Bush/SHP again represented to the Plaintiff that they would be supplementing their responses the following week. Rather than supplementing as promised, Bush/SHP instead attempted to avoid actually answering interrogatories and **for the first time informed the Plaintiff that that he would have to enter in to a confidentiality agreement to obtain his requested discovery**. The Court notes Bush/SHP offered no 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.

(Appendix p.107, emphasis added).

Petitioners' attempt to cast themselves as imminently reasonable in this dispute is not supported by the facts. Take for instance the assertion from the petition that the Petitioners requested that there be a confidentiality order or a confidentiality agreement in place to protect their disclosure but that Respondent filed a motion to compel discovery and would not agree to a confidentiality order. (Petition p.3).

Not only does that assertion ignore the significant delay the Petitioners engaged in before making such a request, but it also ignores the fact that Respondent did not originally refuse this request. As explained to the trial court at the motions hearing, after Petitioners' counsel for the first time raised the confidentiality issue via a May 18, 2018 email, Respondent's counsel sent a reply email that same day responding:

> I said as of this confidentiality thing, and I'm opposed to that in general just a confidentiality order with no support. I said the motion I'd be willing to do is, is if you want to do like a form federal order where you turn everything over to me and then you tell me what you think, what you want protection on. And then I'll look at it and if I don't agree with you, I'll tell you what I disagree shouldn't be protected and then the burden is on you guys to go get that protection from the court. I said, if you want to do that, that's fine. You know, feel free to call me if we need to discuss it. Well, I didn't get any response to that which leads to me filing the current motion to compel on June 4, 2018.

(Appendix p.8, l.9 – p.9, l.21).

In short, the problem the Petitioners really have is that they want protection they are not entitled to. They want opposing parties to just agree that whatever they claim is confidential, proprietary work product actually is. If opposing parties will not so agree, the Petitioners want the courts to force them to, without actually making the petitioners meet the burden the law requires. Then, if all that does not work, the Petitioners now want this court to create a new rule, saying the Petitioners can continue to try to abuse the discovery process with no penalty. As Respondent noted to the Court of Appeals:

> In what is now their third (3rd) filing since the Respondent's motion to dismiss pointed out the Appellants' failure to follow the South Carolina Supreme Court's explicit instructions on how a party may properly appeal a discovery order as outlined in Tucker v. Honda of South Carolina Manuf., 354 S.C. 574, 582 S.E.2d 405 (2003), the Appellants have yet to explain to this court why their failure to follow those instructions should be excused ("an order compelling discovery may be appealed **only** after the trial court holds a party in contempt." Tucker at 577, 406, 407, emphasis added).

(Appendix p.188).

As the Respondent noted, not for the first time, this was clearly an attempt by the Petitioners "to continue to delay responding to discovery while avoiding penalty for doing so." (Appendix p.189)

It was not until their reply to that return that Petitioners finally addressed **why** they were not following Tucker in this case and the reason was exactly what Respondent had predicted: they are attempting to avoid the fees and sanctions of the trial court's order to compel, describing such as "unreasonable coercion" and trying to portray their failure to prevail in this basic discovery dispute as a seminal event that could chill business throughout the state. (Appendix p. 198-199).

The Petitioners' argument ignores the fact that they are placed in this position not because of the rule from Tucker, but because they are trying to have material protected as

"confidential" which is not. They have a procedure by which they could continue to argue their position, but they do not want to follow that procedure because they are trying to avoid the penalty for continuing to abuse the discovery process.

The selection of a sanction for discovery violations is within the trial court's discretion. The sanction should be aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits of the case. Griffin Grading & Clearing, Inc. v. Tire Service Equip. Manufacturing Co., Inc., 334 S.C. 193,198 511 S.E.2d 716, 718 (Ct. App. 1999) In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice. Griffin at 199, 719.

An appellate court will not interfere with a trial court's decision on discovery sanctions unless the trial court abused its discretion. Clark v. Ross, 284 S.C. 543, 328 S.E.2d 91 (Ct. App. 1985. An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of the appellant, thereby amounting to an error of law. Dunn v. Dunn, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989).

The trial court did not abuse its discretion in the sanctions it awarded. The trial court specifically found Petitioners' conduct in this dispute "abusive" and "dilatory" and prejudicial, laying out the factual support for those findings within the order. (Appendix p.106-108). The trial court's order explains why it found the $3,750.00 in sanctions for attorney's fees and costs reasonable.

Further, the imposition of the $200/day penalty after August 17, 2018 was a reasonable sanction aimed at the specific conduct of the Petitioners in this dispute and did

not go beyond the necessities of the situation to foreclose a decision on the merits of the case. Instead, it was an attempt by the trial court to force the Petitioners to stop their abusive and dilatory conduct in this matter.

Unfortunately, instead of complying with the trial court's order, the Petitioners have tried to circumvent it, by instituting an appeal in clear violation of the proper procedure laid out by this court in Tucker.[2] The reason is obvious. The Petitioners do not want to be held accountable for their abusive and dilatory conduct, nor for their failure to meet the burden for the protection they seek. For these reasons, the petition should be denied.

III. The Petition for Writ should be denied because the Court of Appeals did not err in dismissing Petitioners' appeal as the failure of a particular party to follow the Rules of Civil procedure or meet the burden required for an order of protection will not chill competitive business in South Carolina.

Petitioners attempt to cast their own failings in arguing a basic discovery dispute and portray it to this court as a watershed event that "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." (Petition p.11).

Not all businesses contract to take over the responsibilities of governmental agencies. Not all businesses who do so are taking over responsibilities for which there are minimum standards imposed by South Carolina law. Not all businesses would try to

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2 To the extent Petitioners attempt to assure this court that they "have only respect for the court system, judges, and orders" and "have no contempt for the courts' orders" (Petition p.10), Respondent would merely note that the Petitioners have refused to supplement **any** discovery responses since the trial court's July 31, 2018, despite that order clearly requiring the Petitioners to produce more than the alleged confidential work product material Petitioners' have been attempting to appeal. (Appendix p.102-105).

claim that the policies and procedures required by that South Carolina law to be in writing and readily available to all personnel are confidential. Not all businesses would engage in abusive and dilatory conduct which would result in them being sanctioned by a trial court and subject to increasing penalties if they do not timely comply with a discovery order.

The trial court's order in this case is a reasonable attempt to force the Petitioners to comply with discovery as mandated by the South Carolina Rules of Civil Procedure and both statutory and case law.

CONCLUSION

Based on the above, the Respondent respectfully requests that the Court not grant the petition for writ of certiorari.

Respectfully submitted,

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January 28, 2019

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

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

Appellate Case No. 2018-000064

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 Return to Petition For Writ of Certiorari by depositing a copy of the Return to Petition For Writ of Certiorari and a Certificate of Service in the United States Mail, postage prepaid, on January 28, 2019, addressed to their attorneys of record. Said envelopes being addressed to the following person(s):

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