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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge,
and
Grace Gilchrist Knie, Circuit Court Judge,

Case No. 2017-CP-32-2813
Appellate Case No. 2019-000547

Tommy Taylor, ... Respondent,

v.

Novant Health, Inc., ... Appellant.

MOTION TO DISMISS APPEAL

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Pursuant to South Carolina Appellate Court Rules 240(a) and 260(a), Respondent Tommy Taylor hereby moves the Court for an order dismissing the appeal filed by Appellant Novant Health, Inc. ("Novant"). The appeal is properly dismissed out-of-hand as the Court lacks jurisdiction over the interlocutory discovery orders which, while inconvenient to Defendant, are not immediately appealable under South Carolina Code Ann. Section 14-3-330 and controlling holdings of this Court and the South Carolina Supreme Court.

FACTUAL BACKGROUND/PROCEDURAL HISTORY

Respondent Tommy Taylor filed the underlying putative class action on August 4, 2017, alleging that Defendant Novant unlawfully required him and other similarly situated Novant patients to pay out-of-pocket for medical treatment actually covered by Medicare, which was not only unfair to the Medicare covered patients, but contrary to applicable Medicare rules. The matter is currently pending in Circuit Court where Novant has refused to comply with the considered orders of *two* Circuit Court Judges compelling responses to specific discovery requests from Mr. Taylor. Novant's appeal, therefore, arises from multiple failed attempts to avoid compliance with discovery orders in an ongoing litigation—a situation which controlling law explicitly seeks to avoid.

Indeed, Novant currently seeks to appeal *three* non-final, discovery-related orders from *two* different judges. First, Novant appeals the Honorable Alex Kinlaw, Jr.'s July 18, 2018 Order, granting Plaintiff's Motion to Compel in part and denying the Motion to Compel in part ("July 2018 Order"). (See Ex. A at 2-6). In that order, which arose from Mr. Taylor's March 27, 2018, Motion to Compel, the Court determined that Novant, after already being afforded an extension of time to respond to interrogatories and requests for production, had only "objected to essentially every interrogatory and request for production with boilerplate objections." (Ex. A at 3, ¶ 5). As

a result, the Order compelled Novant to produce the information sought by Mr. Taylor within forty-five days of the Order's entry, subject only to Court's specified geographic and time period limitations. (Ex. A at 4, ¶ 3).

On September 4, 2018, Novant requested an additional fourteen days to comply with certain provisions of the July 2018 Order but simultaneously filed a Motion for Relief pursuant to Rule 60(b)(5), SCRCP, requesting that the court vacate the July 2018 Order on the grounds that its enforcement was "no longer equitable." (Ex. B at 8). Novant's motion indicated that it had attempted to comply with the July 2018 Order, and in doing so, determined that full compliance would cost approximately $1 million. (Ex. B at 11). Novant argued that relief from the July 2018 Order was warranted to protect it from incurring "such an undue burden and expense" because Plaintiff's requests were "baseless" despite the Court's considered contrary judgment. Id. Novant did not seek further extension of time to respond to the July 2018 Order, however, but opted to instead violate the order by refusing to produce the information requested by Mr. Taylor.

Accordingly, on September 17, 2018, Mr. Taylor filed a Rule 37, SCRCP Motion for Sanctions against Novant for failure to comply with the July 2018 Order. (See Ex. C at 23-24). The Honorable Grace Gilchrist Knie heard oral arguments on Novant's Motion for Relief and Mr. Taylor's Motion for Sanctions on December 19, 2018. After due consideration, on February 22, 2019, Judge Knie entered an Order granting Mr. Taylor's Motion for Sanctions and denying Novant's Rule 60 Motion for Relief ("February 2019 Order"). (See Ex. D at 26-31).

In the February 2019 Order, Judge Knie considered Mr. Taylor's position that Novant's refusal to provide responsive information violated discovery rules and the July 2018 Order, and that Novant's Rule 60 motion was untimely and an improper attempt to seek a stay, revision, or other relief from the previous order. (Ex. D at 29). Judge Knie further considered Novant's

position that the July 2018 Order was inequitable due to the asserted undue burden that compliance would place on Novant. Id. Judge Knie, however, disagreed with Novant's position, denied Novant's motion, and emphasized the lack of merit in Novant's delaying actions by awarding sanctions against Novant in the form of attorney's fees and costs in an amount to be determined by the trial judge, prior to the commencement of trial. (Ex. D at 30).

Undeterred, Novant filed a Motion for Reconsideration of the February 2019 Order on March 4, 2019. (See Ex. E at 34-47). Novant's support for this motion regurgitated the same arguments that it had already twice presented (in its Rule 60 Motion for Relief and at the motion hearing) – and already twice had rejected. See id. Judge Knie entered an Order denying Novant's reconsideration motion on March 21, 2019 ("March 2019 Order"). (See Ex. F at 61-63).

Unrepentant after three orders by two judges, instead of complying, Novant has stuck to its strategy of discovery delay and obstruction by filing a Notice of Appeal of the July 2018 Order, the February 2019 Order, and the March 2019 Order on April 1, 2019.[1] As there is no basis or jurisdiction for this Court's intervention in a run-of-the-mill discovery spat, especially one already repeatedly adjudicated by the judges in the court below, Mr. Taylor hereby seeks dismissal of Novant's appeal.

ARGUMENT

This Court lacks jurisdiction to consider the merits of Novant's appeal because the challenged decisions are non-final discovery orders that neither involve the merits of the underlying action nor affect a substantial right of a party. The right of appeal arises from and is governed by statutory law, and generally a party may only immediately appeal an order that falls

[1] Not satisfied with merely appealing these unappealable discovery orders, Novant also quickly piled on by filing a Petition For Extraordinary Relief Including A Writ Of Certiorari in the Supreme Court on April 4, 2019.

within the scope of South Carolina Code Ann. Section 14-3-330. Pocisk v. Sea Coast Const. of Beaufort, 380 S.C. 584, 587, 671 S.E.2d 98, 100 (Ct. App. 2008). Here, Novant cannot establish that even one of the three contested orders satisfies the requirements of section 14-3-330, nor can it show why it is it not subject to the same statutory restrictions on appeals as any other party in this state.

As a general rule, an interlocutory order is immediately appealable under section 14-3-330 only if it involves the merits of the case or affects a substantial right of a party. See, e.g., Burkey v. Noce, 398 S.C. 35, 37, 726 S.E.2d 229, 230 (Ct. App. 2012). "Any intermediate judgment, order or decree in a law case *involving the merits*" may be appealed. S.C. Code Ann. § 14-3-330(1) (1976) (emphasis supplied). Our courts have interpreted the statutory language "involving the merits" to apply to an order that finally determines some substantial matter forming the whole or part of some cause of action or defense. See, e.g., Tucker v. Honda of S.C. Mfg., Inc., 354 S.C. 574, 576, 582 S.E.2d 405, 406 (2003); Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 333, 426 S.E.2d 777, 780 (1993); Tillman v. Tillman, 420 S.C. 246, 249, 801 S.E.2d 757, 759 (Ct. App. 2017); Watson v. Underwood, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014). If an interlocutory order does not involve the merits, it may be appealable if it is one "affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action." S.C. Code Ann. § 14-3-330(2) (1976). As none of the orders for which Novant seeks interlocutory review satisfy section 14-4-330 or the controlling case law, this Court does not have jurisdiction to review any of the challenged orders and this appeal is properly dismissed without further consideration.

Indeed, as Novant's intentional strategy of delay and defiance of discovery rules has been repeatedly rejected by the lower court, for this Court to review the merits under these circumstances – whatever the outcome – would validate such misbehavior, undermine the lower court, and invite an appeal of every unfavorable discovery order. Any result other than dismissal for want of jurisdiction, therefore, would cause as much harm to this Court, the rules of discovery, and authority of the lower courts, as it would to Mr. Taylor.

I. The Appeal Is Inexcusably Late.

This Court lacks jurisdiction over this matter because the appeal of discovery orders is explicitly prohibited, as discussed below. The appeal is also inexcusably late because a notice of appeal shall be served on all respondents within thirty days after receipt of written notice of entry of the order or judgment. Rule 203(b)(1), SCACR. The underlying discovery order at the core of Novant's appeal was issued on July 18, 2018. (See Ex. A). Thus, even assuming, *arguendo*, that orders compelling discovery are immediately appealable, which they are not, Novant failed to timely appeal the July 18, 2018, discovery order within the thirty-day window proscribed by Rule 203, SCACR, thereby depriving this Court of jurisdiction to hear an appeal of it or other orders seeking to revise it. The Court, therefore, need not invest much effort in rejecting Novant's attempt to circumvent the discovery rules and controlling law.

II. Routine Discovery Orders Are Not Appealable.

It is beyond reasonable argument that the Court does not have jurisdiction to review the discovery orders which Novant has appealed.[2] South Carolina has long held that an order

[2] Significantly, in its memorandum in support of its Motion for Reconsideration, Novant discusses, at length, the case Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Envtl. Control, 387 S.C. 380, 692 S.E.2d 920 (2010). (See Ex. E at 45-46). In that case, the South Carolina Supreme Court granted writ of certiorari to review discovery orders, but noted that it "dismissed the notice of appeal from the discovery orders as interlocutory and not immediately

compelling discovery does not involve the merits and may not be appealed. Tucker, 354 S.C. at 574, 577, 582 S.E.2d at 406 (citing Ex parte Whetstone, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986)). As the July 2018 Order merely resolved a common discovery dispute involving, e.g., the scope of certain discovery requests, it is not reasonably argued to have any impact on the merits.[3]

Nor does a routine discovery order affect a substantial right of a party within the meaning of South Carolina Code Ann. Section 14-3-330(2). Indeed, a discovery order can only affect a substantial right in very limited cases, such as where the subject matter of the entire litigation is the protection of information which is effectively rendered moot by an order compelling discovery. See, e.g., Knight Pub. Co. v. Univ. of South Carolina, 295 S.C. 31, 32, 367 S.E.2d 20, 21 (1988) overruled on other grounds by Simpson v. Sanders, 314 S.C. 413, 445 S.E.2d 93 (1994) ("The appealed order allowed discovery of documents that respondents ultimately seek disclosed as the subject of these FOIA actions."). In other words, the Knight Court found the discovery order directly appealable under section 14–3–330(2)(a) because it effectively decided the outcome of the case, i.e., compelled the production of the very information sought by the litigation. Mr. Taylor, however, has alleged fraud and negligence—not a FOIA violation. As such, none of the challenged orders affects a "substantial right," nor would compliance with the orders determine or

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appealable." Id. at 381, 692 S.E.2d at 921 n.1. Thus, Novant was expressly aware that the July 2018 Order was interlocutory and not ripe for appeal when it commenced this action. As the State Supreme Court has had occasion to remind, "sanctions are available against an attorney who requires the Court to review a meritless appeal." Morrisette v. Barnes, 285 S.C. 123, 125, 328 S.E.2d 627, 628 (1985).

[3] Indeed, the lower court granted several of Novant's protection requests, finding a number of Mr. Taylor's requests "overly broad in geographic extent and time period" and limiting those requests to a five year period and to Novant's medical facilities located in North Carolina. (See Ex. A at 3, ¶ 3.

foreclose a fair adjudication on the merits. The discovery orders challenged by Novant, therefore, are not properly subject to an interlocutory appeal.

III. There Is No Final Decision On Any Merits Issue or Substantial Right.

Novant improperly seeks review of discovery orders which are non-final interlocutory decisions. Although the lower court issued its February 2019 Order in response to a Motion for Relief filed pursuant to Rule 60(b), as opposed to a traditional discovery motion such as a motion for protective order or motion to compel, the order merely enforced the July 2018 Order and issued discovery-related sanctions under Rule 37, SCRCP. Thus, the February 2019 Order, for purposes of determining whether appellate jurisdiction exists, is treated as a discovery order. See, e.g., Grosshuesch v. Cramer, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008) (reasoning that a court's decision on a motion seeking to enforce an existing discovery order is also a discovery order and therefore is not immediately appealable).

Significantly, a party may only seek relief from a *final* order under Rule 60(b); Novant's attempt to use Rule 60(b)(5) as a vehicle for relief from a *non-final* discovery order was, consequently, patent procedural abuse.[4] See Rule 60(b), SCRCP ("on motion and upon such terms as are just, the court may relieve a party . . . from a *final* judgment, order, or proceeding" (emphasis supplied)). This Court, therefore, has not had occasion to directly opine on the issue of whether a decision to deny a party relief from a prior discovery order pursuant to Rule 60(b) – as we see in the February 2019 Order – is immediately appealable. This Court, however, has considered the

[4] In fact, South Carolina case law clearly provides that "[a] party may not invoke [Rule 60(b)(5)] where it could have pursued the issue on appeal." Tench v. S.C. Dep't of Educ., 347 S.C. 117, 121, 553 S.E.2d 451, 453 (2001) (citing Smith Companies of Greenville v. Hayes, 311 S.C. 358, 428 S.E.2d 900 (Ct. App. 1993)). It is therefore unclear how Novant reconciles its concurrent appeal of both the July 2018 Order itself and the February 2019 Order denying Novant's request for relief from the July 2018 Order under Rule 60(b)(5), SCRCP.

similar issue of the appealability of an order setting aside default pursuant to a Rule 60(b) motion for relief, and has consistently found that an order of this nature is not final and not immediately appealable. See, e.g., Pocisk, 380 S.C. at 588, 671 S.E.2d at 101 (an order granting a Rule 60(b) motion was interlocutory because it did not satisfy the statutory requirements of section 14-3-330 of the South Carolina Code and "does not affect a substantial right" and, thus, could not be immediately appealed); see also Pioneer Assocs., Inc. v. Ticor Title Ins. Co., 300 S.C. 346, 348, 387 S.E.2d 711, 712 (Ct. App. 1989) ("The order in this case granting a motion to set aside a default judgment does not fall within any exception enumerated in Section 14-3-330, and we hold it is not immediately appealable.").[5]

The reasoning applied by the Pocisk Court also applies here. Judge Knie's February 2019 Order on Novant's Rule 60(b) motion similarly does not affect a substantial right and did not determine the underlying action or prevent an appealable judgment, nor did it end the action. See Pocisk, 380 S.C. at 588, 671 S.E.2d at 100 (citing S.C. Code Ann. § 14-3-330(2)(a)). And, just as the Court determined that the Pocisk appellant could seek relief following entry of a final judgment in the case, Novant may seek the same relief requested in its Rule 60 motion by appealing a final contempt order. Tucker, 354 S.C. at 577, 582 S.E.2d at 406-407. There is, thus, no violation of a substantial right providing grounds for an interlocutory appeal.

Nor does the February 2019 Order involve the merits of the case creating appellate jurisdiction under South Carolina Code Ann. Section 14-3-330(1). The order only decides

[5] The Pocisk and Pioneer Assocs., Inc. Courts did note that appellate courts had previously considered appeals arising from the granting of a Rule 60(b) motion; however, in those cases, the issue of appealability was not raised and, therefore, are not dispositive on the issue of appealability. Pocisk, 380 S.C. at 589, 671 S.E.2d at 101, n.3; Pioneer Assocs., Inc., 300 S.C. at 348, 387 S.E.2d at 713, n.2.

Novant's Rule 60 Motion, which is merely a request to vacate a discovery order. As shown above, the underlying discovery order did not involve the merits. Tucker, 354 S.C. at 574, 577, 582 S.E.2d at 406. There is no meritorious argument that an order declining relief from a discovery order has the necessary relationship to the merits (which the original order lacked) to confer appellate jurisdiction over the second order. See, e.g., Grosshuesch, 377 S.C. at 30, 659 S.E.2d at 122 (finding that orders issued secondary to discovery orders do not involve the merits of the action or affect a substantial right). Novant's appeal of the February 2019 Order's denial of its Rule 60(b) motion is thus properly dismissed for lack of jurisdiction.

It is true that the February 2019 Order also granted Mr. Taylor's motion for sanctions against Novant, and an interlocutory order that is not immediately appealable may be reviewed if it is coupled with an appealable issue. See Se. Hous. Found. v. Smith, 380 S.C. 621, 636, 670 S.E.2d 680, 688 (Ct. App. 2008) (citing Edge v. State Farm Mut. Auto. Ins. Co., 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005)). But this order also provided that the sanctions award of attorneys' fees and costs shall be in an amount *to be decided* by the trial judge *prior to the commencement of trial.* (Ex. D at 30). An order or judgment that leaves questions of fact unsettled or which leaves in doubt whether the plaintiff will prevail is not final for purposes of an immediate appeal. See, e.g., Watson v. Underwood, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014) (citing Good v. Hartford Accident & Indem. Co., 201 S.C. 32, 41 (1942)). Where an imposition of this nature is merely hypothetical by the terms of an order, as here, it is not a final judgment. State v. Cooper, 342 S.C. 389, 397, 536 S.E.2d 870, 875 (2000). So this order, too, is not "final" and is thus unappealable at this point. Thus, this Court also lacks jurisdiction over Novant's appeal of the February 2019 Order.

Similarly, because Novant's appeal of the February 2019 Order is not viable, its appeal of the March 2019 Order denying reconsideration likewise warrants dismissal for lack of jurisdiction, as it is even further removed from the merits. See, e.g., Tatnall v. Gardner, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002) ("Court may not review an order that 'does not prevent a judgment from being rendered in the action, and [from which the] appellant can seek review . . . in any appeal from [the] final judgment.'" (citing Peterkin v. Brigman, 319 S.C. 367, 368, 461 S.E.2d 809, 810 (1995))).

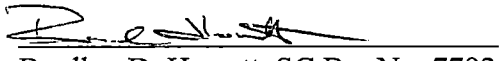
The appeal is properly dismissed as the Court lacks jurisdiction over interlocutory discovery orders which are not immediately appealable under South Carolina Code Ann. Section 14-3-330 and controlling holdings of this Court and the South Carolina Supreme Court.

CONCLUSION

Novant improperly seeks review of discover orders which are non-final interlocutory decisions. While there are situations where this Court can and should review discovery orders, this is not such a case. The Court lacks jurisdiction over Novant's premature interlocutory appeal and, therefore, this action is properly dismissed without further consideration.

Respectfully submitted,

MIKE KELLY LAW GROUP, LLC

BY: 

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PROOF OF SERVICE

I hereby certify that I have served the Motion to Dismiss Appeal and Documents in Support of Respondent's Motion to Dismiss Appeal upon counsel of record for the Appellant by causing them to be deposited in the United States Mail, postage prepaid, on April 16, 2019, to the following addresses:

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April 16, 2019