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

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

Tommy Taylor, ...Respondent,

v.

Novant Health, Inc. .....Appellant.

APPELLANT NOVANT HEALTH, INC.'S RETURN TO RESPONDENT TOMMY TAYLOR'S MOTION TO DISMISS APPEAL

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Appellant Novant Health Inc. ("Novant") is appealing the order of the Lexington County Circuit Court dated 22 February 2019, and Novant is entitled to do so because that Order awards monetary sanctions to Plaintiff for an alleged discovery violation. Novant complied with the underlying discovery order that is the subject of the sanctions order, in that Novant objected with specificity, and continues to object with specificity, to the production of confidential insurance contracts that have no rational relationship to Plaintiff's claims.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The underlying dispute arises out of Plaintiff's claims that Novant allegedly wrongfully required him to pay in advance for medical services associated with an experimental device. However, Medicare, his insurer, ultimately accepted coverage for the services and Novant refunded all of Plaintiff's prepaid amounts. Plaintiff asserts his claims in the form of a class action complaint in which he seeks to represent all Medicare patients who were allegedly wrongfully required to prepay for any services that were eventually determined to be covered by Medicare. Novant disputes that Plaintiff was wrongfully required to prepay and disputes the existence of any class of Medicare patients who were allegedly wrongfully required to pay in advance for services covered by Medicare. Plaintiff has asked for tens of thousands of patient records from Novant facilities, as well as proprietary third-party insurer contracts unrelated to Plaintiff's treatment at Novant. Novant has produced all records related to Plaintiff's care or billing, but has steadfastly objected to producing information regarding unrelated patients and unrelated payors.

In March of 2018, Novant moved for a protective order under Rule 26 to limit discovery to Plaintiff's own information, and Plaintiff responded with a Motion to Compel. Both motions were heard by Judge Kinlaw in Lexington County on 26 June 2018. Judge Kinlaw denied Novant's Rule 26 motion and granted in part and denied in part Plaintiff's Motion to Compel.

See Order, 18 July 2018, Attached as Ex.1 (the "Kinlaw Order"). In the Kinlaw Order, Novant was ordered to:

> (4) . . . supplement its responses to the entirety of Plaintiff's discovery to (1) update its response to each Interrogatory and Request for Production at issue; (2) **whether any objections remain and, if so (3) restate each objection with the specificity required by the Rules**; and (4) identify which documents are responsive to which Request(s).

See Ex. A, ¶ 4 (emphasis added). Novant and Plaintiff thereafter continued discovery. Novant declined, however, to produce third-party payor contracts other than those related to Plaintiff's care and billing. Instead, Novant restated its objection to Interrogatory #11 and Request for Production #47 "with the specificity required by the [South Carolina] Rules of [Civil Procedure]"—as directed by the court in Paragraph 4 of the Kinlaw Order.

On 17 September 2018, Plaintiff moved for sanctions, arguing that Novant failed to comply with the Kinlaw Order when Novant did not produce the requested third-party payor contracts. The Circuit Court in Lexington County, this time Judge Knie, heard arguments on both a Rule 60 motion that Novant had filed on 4 September 2018 and Plaintiff's motion for sanctions.

Judge Knie ruled in a single order on 22 February 2019, denying Novant's Rule 60 Motion and granting Plaintiff's Motion for Sanctions (the "Knie Order"). The Knie Order sanctioned Novant for restating its objections to Taylor's request for the production of the unrelated proprietary insurance contracts even though the Kinlaw Order allowed Novant to do so. The sanction imposed by the Circuit Court was the requirement that Novant pay Plaintiff's attorneys' fees and costs associated with and incurred by Plaintiff's counsel in preparation for, and appearance at, two specific hearings: the original 26 June 2018 hearing before Judge Kinlaw, and the 19 December 2018 hearing before Judge Knie.

On 4 March 2019, Novant moved the court to alter, amend, or vacate the Knie Order. On 21 March 2019, the court denied Novant's Motion to Alter or Amend.

On 1 April 2019, Novant filed its Notice of Appeal.

ARGUMENT

I. Novant's appeal of the Knie Order's grant of sanctions is ripe for review by the Court of Appeals.

South Carolina law broadly defines persons who may appeal orders and judgments not specifically addressed in other statutes, providing that "any party aggrieved may appeal." S.C. Code Ann. § 18-1-30. An aggrieved party is "one who is injured in a legal sense or one who has suffered an injury to person or property." *Ex parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986). In exercising its jurisdiction over "any case in which an appeal is taken from an order, judgment, or decree of the circuit court," § 14-8-200(a), the Court of Appeals "shall apply the same scope of review that the Supreme Court would apply in a similar case." *Id.* Under established Supreme Court jurisprudence, only final judgments are appealable. *See, e.g.*, *Ex parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986).

An order which "leav[es] some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." *Ex parte Wilson*, 367 S.C. 7, 625 S.E.2d 205 (2005). Thus, parties seeking to appeal denial of a Rule 12 dismissal motion, or parties frustrated that they did not receive summary judgment sought under Rule 56, may not immediately appeal those decisions because "the issues raised in the motion may be raised again later in the proceedings . . . ." *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). In essence, when a party will have another chance to argue its position, the order is not final. This is why courts consistently hold that an order to participate in discovery alone is not appealable. Only when the failure to participate in discovery has resulted in some consequence –

the "injury to person or property" mentioned in Title 18 – will the party be entitled to judicial review.

The Knie Order, in granting sanctions to Plaintiff for attorneys fees specific to two completed motions and hearings, is a final order that has bindingly adjudicated the rights of Novant and imposed an injury to its property. Judge Knie ordered that Novant will pay attorneys fees as sanctions. Judge Knie ordered which hearings will be the basis for those attorneys fees. Thus, the party obligated to pay the money (Novant) and the events that will serve as the basis for the money (the hearings of June 26, 2018 and December 19, 2018) have been finally determined. The only matter left for the trial court as it implements the Knie Order will be arithmetic – and surely Plaintiff would agree that basic math is not a question of fact.

Novant's posture stands in stark contrast to the case cited by Plaintiff, *State v. Cooper*, to support its position that questions of fact remain. In *Cooper*, the court held open both the question of *which entity* would pay for the examination as well as *retained jurisdiction to review the fee* submitted. *See State v. Cooper* 342 S.C. 389, 397, 536 S.E.2d 870, 876 (2000). Conversely, here the Knie Order directs that Novant is the party paying fees related to two specific events. Unlike in *Cooper*, there remains no opportunity for Novant to argue whether, or for what, it will pay.

Statutes and rules of court should be construed liberally in favor of the right of appeal. *See Stroup v. Duke Power Co.*, 216 S.C. 79, 84, 56 S.E.2d 745, 747 (1949). Plaintiff is correct that Novant has elected to pursue this appeal prior to being held in contempt by the Circuit Court. And, Novant agrees that a discovery order alone is not appealable. *See e.g. Ex parte Whetstone* 289 S.C. at 580, 347 S.E.2d at 881. Plaintiff points to no authority, however, to support his position that an order for monetary sanctions, based on an alleged failure to follow a

discovery order, does not provide the necessary injury to support judicial review. Novant certainly has, by virtue of the order for sanctions, irrevocably and finally been handed "an injury to . . . property." *Whetstone* at 581, 882 (interpreting § 14-3-330 and § 18-1-30). Neither existing case law nor judicial economy support requiring Novant to go back to the Circuit Court to obtain an order of contempt in addition to the order of sanctions. *C.f. State v. McMillian*, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) (holding that when defendant was denied right to three-judge panel for Court of Appeals oral argument, judicial economy best served by Supreme Court addressing the merits of the appeal rather than remanding to Court of Appeals for a second oral argument).

II. The underlying discovery orders are appropriately included in this appeal.

Novant is subject to a final order of sanctions in the Knie Order, and it seeks judicial review of those sanctions. In evaluating the propriety of a discovery sanction, the reviewing court necessarily considers the merits of the underlying discovery orders. *See e.g., Grosshuesch v. Cramer*, 377 S.C. 12, 659 S.E.2d 112 (2008); *Culbertson v. Clemens*, 322 S.C. 20, 25, 471 S.E.2d 163, 165 (1996). Moreover, "[a]n order that is not directly appealable may be considered if there is an appealable issue before the court." *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005). All of the discovery orders issued in this case to date are therefore properly brought forward to this Court in the notice of appeal.

CONCLUSION

Wherefore, Novant through undersigned counsel respectfully requests this Court deny Plaintiff's Motion to Dismiss Appeal.

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Attorneys for Appellant Novant Health, Inc.

EXHIBIT A

TO APPELLANT NOVANT HEALTH, INC.'S
RETURN TO RESPONDENT TOMMY TAYLOR'S
MOTION TO DISMISS APPEAL

(Order of the Honorable Alex Kinlaw, Jr., dated July 18, 2018)

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF LEXINGTON	)	**Case No.: 2017-CP-32-2813**
	)	
Tommy Taylor,	)	
	)	
Plaintiff,	)	**ORDER**
	)	
vs.	)	
	)	
Novant Health Inc.,	)	
	)	
Defendant.	)	
	)	

This matter comes before the Court upon Plaintiff's Motion to Compel discovery responses to Plaintiff's First Set of Interrogatories Nos. 1, 2, 4, 5, 6, 10, 11, 15, 19, 21, 23, and 24 and Plaintiff's Requests for Production Nos. 1, 6-13, 16-17, 19-20, 26-27, 29, 30, 32-35, and 37-61. A hearing was held before me at the Lexington County Courthouse on June 26, 2018. Bradley D. Hewett, Esq., represented the Plaintiff. Richard J. Rivera, Esq. and Katon E. Dawson, Jr., Esq. represented Defendant Novant Health Inc. After carefully considering the arguments of counsel and the submittals of both parties, I hereby GRANT, in part, and DENY, in part, Plaintiff's Motion to Compel.

BACKGROUND & FINDINGS

1. Plaintiff (Tommy Taylor) is a Medicare recipient that suffers from malignant hypertension who participated in a clinical trial sponsored by CVRx, Inc. in which he was implanted with a medical device to help regulate his blood pressure. Defendant Novant Health accepted Mr. Taylor as a patient for the maintenance and replacement of the medical device.

2. Plaintiff alleges that upon Mr. Taylor's request for a medical procedure to replace the battery in his device, Defendant informed Mr. Taylor that Medicare would not cover expenses

for the maintenance or replacement of the device and required him to submit pre-payment of funds exceeding $100,000.00.

3. Mr. Taylor asserts that Defendant unlawfully required him, and members of the proposed class of Medicare recipients, to prepay for medical procedures and/or devices that are covered by Medicare. As a result of Defendant's alleged illegal actions and/or omissions, Mr. Taylor alleges he and others similarly situated have sustained actual damages, psychological harm, mental anguish, emotional distress, and consequential damages.

4. Defendant Novant denies any illegal actions and asserts in response that there was no concerted effort to violate Medicare processes and procedures.

5. Mr. Taylor served Defendant with Interrogatories and Requests for Production on December 21, 2017. After being afforded an extension of time, Defendant responded on March 9, 2018, and objected to essentially every interrogatory and request for production with boilerplate objections. Plaintiff attempted to resolve the discovery issues with Defendant prior to filing his Motion to Compel, but the efforts were unsuccessful. Within one week of hearing, Defendant produced certain documents, but did not (1) supplement its discovery responses to identify which documents are responsive to which request(s), (2) provide a privilege log detailing the nature of the privileges it asserts and the bases for the privileges asserted, or (3) identify which, if any, objections remain after the recent production.

CONCLUSIONS

I reach the following conclusions:

1. This was a hearing to decide Plaintiff's Motion to Compel responses to Plaintiff's First Set of Interrogatories Nos. 1, 2, 4, 5, 6, 10, 11, 15, 19, 21, 23, and 24 and Plaintiff's Requests for Production Nos. 1, 6-13, 16-17, 19-20, 26-27, 29, 30, 32-35, and 37-61.

2. South Carolina has a broad scope of discovery. *Samples v. Mitchell,* 329 S.C. 105, 108, 495 S.E.2d 213, 215 (Ct. App. 1997). The scope and conduct of discovery are within the sound discretion of the trial court and will only be reversed where that discretion has been abused. *Palmetto Alliance v. South Carolina Public Service Commission*, 282 S.C. 430, 434, 319 S.E.2d 695, 698 (1984). Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. S.C. R. Civ. P. 26(b)(1). Any party may request another party "to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents...within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served." S.C. R. Civ. P. 34(a)(1).

3. Plaintiff's First Set of Interrogatories Nos. 1, 2, 4, 5, 6, 10, 11, 15, 19, 21, 23, and 24 and Plaintiff's Requests for Production Nos. 1-14, 16-17, 19-20, 26-27, 29, 30, 32-35, and 37-61 ("Plaintiff's Discovery") are overly broad in geographic extent and time period and are properly limited to Defendant's facilities physically located in North Carolina and for the five-year period covering the years before the date of Plaintiff's requests. Defendant is ordered to produce the requested information, for each of Defendant's medical facilities located in North Carolina for a period covering 5 years from the date the Plaintiff's discovery was served. Any patient's name in the documents that are found to be responsive to Plaintiff's requests must be redacted prior to Defendant's production of documents.

4. In addition, Defendant is ordered to supplement its responses to the entirety of Plaintiff's discovery to (1) update its response to each Interrogatory and Request for Production at issue; (2) whether any objections remain and, if so (3) restate each objection with the specificity required by the Rules; and (4) identify which documents are responsive to which Request(s).

5. Defendant is also ordered to produce a privilege log meeting the requirements of South Carolina Rule\ of Civil Procedure 26(b)(5) for all materials that Defendant asserts are subject to privilege. Defendant shall describe the nature of the documents, communications, or things not produced or disclosed that will enable Plaintiff to assess the applicability of the privilege or protection.

Plaintiff's Motion to Compel, therefore, is GRANTED, in part, and DENIED, in part. Defendant shall produce the interrogatory responses and requested documents as ordered above to Plaintiff's counsel within forty-five (45) days of the date of the filing of this Order.

IT IS THEREFORE ORDERED:

Plaintiff's Motion to Compel is GRANTED, in part, and DENIED, in part.

AND IT IS SO ORDERED.

_____

The Honorable Alex Kinlaw, Jr.
Judge, Thirteenth Judicial Circuit

_____, SC

_____, 2018

Lexington Common Pleas

Case Caption: Tommy Taylor VS Novant Health Inc

Case Number: 2017CP3202813

Type: Order/Compel

So Ordered

s/Alex Kinlaw, Jr., #2763

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

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

Tommy Taylor, ...Respondent,

v.

Novant Health, Inc. .....Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on May 3, 2019 he caused a copy of the foregoing **APPELLANT NOVANT HEALTH, INC.'S RETURN TO RESPONDENT TOMMY TAYLOR'S MOTION TO DISMISS APPEAL** to be served upon all counsel of record via hand delivery at the following address:

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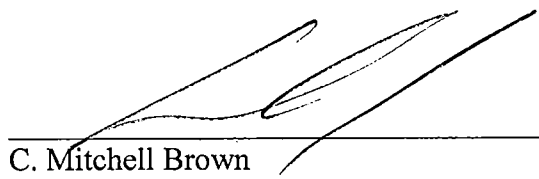

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May 3, 2019

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: ***Tommy Taylor v. Novant Health, Inc.*, Appellate Case No. 2019-000547**

Dear Mrs. Kitchings:

Enclosed for filing please find an original and six copies of ***Appellant Novant Health Inc.'s Return to Respondent Tommy Taylor's Motion to Dismiss Appeal*** in the above-referenced matter. By copy of this letter, we are serving all counsel of record with a copy of the above-reference document.

Should you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

David B. Summer, Jr.

DBS:vm

CC: Brad Hewett, Esquire (*w/ encl. via hand-delivery*)
Jamie N. Smith, Esquire (*w/ encl. via hand-delivery*)
C. Mitchell Brown, Esquire (*w/ encl. via hand-delivery*)
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