

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Robert E. Hood, Circuit Court Judge

Case No. 2007-CP-40-3365
Appellate Case No. 2019-001552

RECEIVED
SFP 23 2019
SC Court of Appeals

Estate of Edward James Mims,
Laura M. Cole, Personal Representative, Appellant,

v.

The South Carolina Department of Disabilities
and Special Needs, Kathi Lacy, and Stan Butkus, Respondents.

MOTION TO DISMISS APPEAL

Respondents, the South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stan Butkus, hereby move to dismiss this appeal on the ground that the appealed Orders govern only scheduling, discovery and other non-final issues, and are therefore undoubtedly interlocutory. The August 22, 2019 Order and the September 5, 2019 Order denying reconsideration (the latter

referenced in the Notice of Appeal) are both attached hereto. Respondents also request that if this appeal is dismissed, as would appear to be an obvious outcome, the deadlines in the Order under appeal should begin to run as of the date when the dismissal of this appeal becomes final.

FACTS AND PROCEDURAL HISTORY

While this appeal can and should be dismissed under the authority of such cases as *Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881–82 (1986) (order directing a party to participate in discovery is interlocutory and not directly appealable), Respondents submit the following summary of the procedural history of this case in order to show that the present appeal appears to have been taken solely as a continuation of a year’s worth of dilatory conduct by counsel for the Plaintiff-Appellant in this case.

By way of background, this action was filed in 2007, complaining of actions that occurred between 2000 and 2005. It was not served until approximately a year later, with the service of an Amended Complaint, causing the Defendants to move to dismiss the case for several different reasons. Eventually, the Supreme Court held in 2012 that the case could proceed, and remanded the case for further proceedings. *Mims ex rel. Mims v. Babcock Center, Inc.*, 732 S.E.2d 395, 396, 399 S.C. 341, 343 (2012).

The Supreme Court's decision became final on September 17, 2012. On April 12, 2013, these Defendants moved for summary judgment.¹ The motion was promptly heard in the circuit court on June 4, 2013. By order filed on January 21, 2014, the circuit court granted summary judgment for the Defendants and dismissed the case. A motion to reconsider filed by Plaintiff was denied by order filed on June 3, 2014.

Plaintiff filed a notice of appeal on June 24, 2014, appealing the grant of summary judgment to the Defendants. A review of the history of the appeal as shown on C-Track indicates that the briefing and record were not complete until May 25, 2016, almost two years later. On November 8, 2017, this Court issued an unpublished decision reversing the dismissal of the action. The present Defendants filed a petition for rehearing, which was granted in part and denied in part. A revised, published opinion was issued on February 21, 2018. *Estate of Mims v. South Carolina Department of Disabilities and Special Needs*, 811 S.E.2d 807, 422 S.C. 388 (Ct. App. 2018). These Defendants then filed a petition for rehearing of that latter decision. The petition was denied on April 13, 2018. Defendants filed a Petition for Certiorari, which was denied on August 3, 2018.

¹ At the time, the Babcock Center and certain persons associated with it were also among the defendants, but those defendants eventually settled and were dismissed.

Shortly thereafter, as a result of certain matters referenced in this Court's opinion, Defendants served Interrogatories and Requests for Production on the Plaintiff on August 13, 2018. Plaintiff's initial responses were served approximately a month late. Soon thereafter, Defendants' counsel advised Plaintiff's counsel in a lengthy letter that the responses were incomplete and unsatisfactory.

To summarize the long story of Plaintiff's counsel's post-remand dilatory conduct and resistance to discovery as briefly as possible, Defendants did not receive complete answers to their August 2018 written discovery requests until the end of May 2019. The complete answers came only after Defendants filed two different motions to compel discovery.

The attempts by Defendants to take depositions of many of the 54 witnesses named by Plaintiff, including 8 purported experts, have been frustrated and delayed even more than the written discovery responses. Because deadlines in then-existing scheduling orders were running out, Defendants noticed a number of depositions even in the absence of full answers to written discovery requests. However, of 16 noticed depositions (8 of which were noticed twice following objections by the Plaintiff's counsel to the first set of notices), only 8 actually took place. Some of the witnesses had reasons of their own for not appearing, but others were not

sufficiently identified by Plaintiff's counsel for them even to be located. Plaintiff's counsel also has been slow to respond to requests for mutually agreeable dates, when they respond at all.

The taking of depositions paused around the middle of March 2019, because all counsel for both sides found themselves heavily engaged in trial preparation in an unrelated federal case, No. 6:16-cv-01174-DCC, *Timpson et al. v. Haley et al.*, which was tried before a jury from May 6 through May 10. That case involved not only the usual level of pretrial preparation for a jury trial of that length, but also two mediations, four pretrial hearings before the United States District Court, and many filings in advance of the trial, including motions in limine, pretrial briefs, proposed verdict forms and proposed jury instructions.

After that trial, and also after a short break in which to allow all counsel to catch up on other matters, one of the counsel for Defendants sent Plaintiff's counsel an e-mail on May 28, 2019, asking that the remaining unanswered interrogatories from August 2018 be answered by May 31. By agreement, those responses were to have been served by mid-April, but they were not served then. Defendants' counsel also asked Plaintiff's counsel agree to a 30-day discovery extension as permitted by the March 22, 2019, Scheduling Order. Plaintiff's counsel, Patricia Harrison, on May 29, 2019, left a voicemail with Defendants'

counsel, which stated in effect that she could not remember making an agreement to provide more complete answers, and that she also could not remember what she was supposed to answer. Plaintiff's counsel also declined to consent to any extension of the discovery period.

The next day Defendants filed a Motion to Compel and to Extend the Deadlines in the Scheduling Order. Late in the evening on May 31, 2019, Plaintiff's counsel served more complete expert discovery responses. However, Plaintiff's counsel still did not consent to extend the discovery period despite the fact that, among other things, their expert discovery responses were a number of weeks overdue and that it had not been possible to take most of the depositions Defendants sought to take.

Shortly thereafter, on June 3, 2019, Defendants' counsel sent document subpoenas to a number of Plaintiff's designated experts, essentially asking them for documents relevant to their opinions in this case as well as documents relevant to billing.² Plaintiff's counsel then filed a motion for protective order on June 17, 2019, claiming, among other things, that the subpoenas were "burdensome," and that "Responses to the subpoenas would require review of more than a decade of records, many of which are not readily accessible." Several other similar objections

² After Plaintiff's counsel complained that the subpoenas were mailed, rather than personally served, Defendants' counsel had them served personally.

were also made. Finally, Plaintiff requested “an order requiring the Chairperson of the South Carolina Disabilities and Special Needs Commission to attend mediation and for the members of the Commission to be informed about the mediation.”

The motions were heard by Judge Robert Hood on July 30, 2019. By order dated August 22, 2019, Judge Hood determined the issues before him as follows:

- “1. Defendants’ Motion to Extend Scheduling Order Deadlines by 90 days is GRANTED. . . . Discovery in this case shall conclude 90 days after the date of this Order.
2. Mediation shall occur within 30 days after the close of discovery.
3. If the case is not resolved through mediation, the parties are instructed to contact the Chief Administrative Judge for the purpose of scheduling a date certain trial date.
4. Plaintiff’s Motion for Protective Order regarding the document subpoenas is DENIED The witnesses must respond to the subpoenas within 15 days of this Order.
5. Finally, Plaintiff’s motion to have certain DDSN officials present at mediation is DENIED.”

8/22/19 Order. Defendants had originally submitted a proposed Order to Judge Hood that discussed in some detail the dilatory conduct of Plaintiff’s counsel in 2018 and 2019. However, when Plaintiff’s counsel asked that the Order be made more summary in nature, Defendants’ counsel agreed, and submitted to Plaintiff’s counsel a proposed Order that contained little more than the conclusions quoted above. Plaintiff’s counsel Robert Childs advised in an e-mail that

Although we do not agree with the Judge's decision and reserve our rights to request reconsideration and appeal, we agree that the revised order most accurately reflects the directives of the trial judge and should be substituted for the previously submitted proposed order. We reserve our right to request that the Judge consider amending the order to give additional time for responses to subpoenas and to request reconsideration or appeal of the same. Thank you for working with us on this.

Defendants' counsel then submitted a much shorter proposed Order, revised and shortened at the request of Plaintiff's counsel, to Judge Hood, who proceeded to sign it on August 22, 2019.

Plaintiff's counsel then took the rather surprising step of filing a motion to reconsider, complaining that the revised Order "did not contain facts and conclusions of law addressing why an additional ninety days of discovery should be allowed under the circumstances set forth in Plaintiffs' motions." This was an extraordinary move on the part of Plaintiff's counsel, given that they themselves had asked for details to be removed from the proposed Order and agreed to the format of it once that was done.

Judge Hood quickly denied the motion to reconsider by Order dated September 5, 2019, and extended the deadlines in the original order so that they ran from the date of the Order denying reconsideration. Four days later, on September 9, 2019, Plaintiff filed the Notice of Appeal that commenced the

present appeal. Defendants' counsel have asked twice how this appeal could possibly not be interlocutory, but Plaintiff's counsel have not provided a substantive response.

ARGUMENT

As noted at the outset of this motion, the Supreme Court in *Ex parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986) held that “[a]n order directing a party to participate in discovery is interlocutory and not directly appealable under S.C. Code Ann. § 14-3-330 (1976).” *Whetstone* cited two earlier cases, *Patterson v. Specter Broadcasting*, 287 S.C. 249, 335 S.E.2d 803 (1985) and *Lowndes Products, Inc. v. Brower*, 262 S.C. 431, 205 S.E.2d 184 (1974) in support of its conclusions, and has itself been cited many times thereafter. *Whetstone* also held that “an order directing a non-party to submit to discovery is not immediately appealable.” 289 S.C. 580, 580, 347 S.E.2d 881, 881.

To the extent that the Order mentions the persons who need to be present or do not need to be present at mediation, that reference likewise does not make the present Order a final, appealable order. *See, e.g., Short Bros. Const., Inc. v. Korte & Luitjohan Contractors, Inc.*, 828 N.E.2d 754, 756, (Ill. App. 2005)(“a mediation order is an interim order, which does not establish or affect the rights of the parties but preserves them until those rights can be established”); *In re D.C., Jr.*, 2011 WL

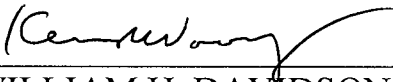
691633 (Tex. App. 2011) (“We have no appellate jurisdiction to review an interlocutory order granting or denying referral of a matter to mediation”).

A review of the August 22, 2019 Order and the September 5, 2019 Order denying reconsideration will show that those Orders were completely interlocutory, involving matters related to scheduling and discovery and to a small extent, mediation. The appeal is not only without substantive merit; Defendants’ counsel are unaware of even a colorable legal basis for this appeal such as would cause it to comply minimally with S.C.R.C.P. Rule 11(a), which provides in part that “The written or electronic signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.” (Emphases added.) Instead, and as has been shown above, delay and obstruction have been the *modus operandi* of Plaintiff’s counsel ever since this case was remanded in mid-2018. If Plaintiff’s counsel can show some colorable basis for arguing that the present appeal is not precluded as interlocutory and nonappealable, these Defendants will address such arguments in a reply memorandum. At present, however, it would appear that *Whetstone*, its predecessors and its progeny, dictate that this appeal must be dismissed.

CONCLUSION

For the foregoing reasons, Defendants-Respondents respectfully submit that this appeal should be dismissed. Defendants-Respondents also request that this Court order, or direct the circuit court to order, that the deadlines in the Order under appeal should begin to run as of the date when the dismissal of this appeal becomes final.

DAVIDSON, WREN & PLYLER, P.A.

BY: 

WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
DANIEL C. PLYLER
1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202
T: 803-806-8222
F: 803-806-8855
E-Mail: w davidson@dml-law.com
k woodington@dml-law.com
d plyler@dml-law.com

ATTORNEYS FOR DEFENDANTS THE
SOUTH CAROLINA DEPARTMENT OF
DISABILITIES AND SPECIAL NEEDS,
KATHI LACY AND STANLEY BUTKUS

Columbia, South Carolina

September 20, 2019

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Estate of Edward James Mims,)
Laura M. Cole, Personal Representative,)
)
Plaintiff,)

Civil Action No. 07-CP-40-3365

ORDER

v.)

The South Carolina Department of)
Disabilities and Special Needs,)
Kathi Lacy and Stanley Butkus,)
)
Defendants.)

This matter comes before the Court upon a motion for reconsideration filed by Plaintiff. Specifically, Plaintiff’s counsel filed a motion for reconsideration on August 30, 2019, asking the undersigned to reconsider the rulings in his August 22, 2019 Order. For the reasons set forth herein, Plaintiff’s motion is **DENIED**.

The August 22, 2019 Order addressed two motions. Specifically, that Order denied Plaintiff’s “Motion for Protective Order and Other Relief,” which was filed by Plaintiff on June 17, 2019, as well as Plaintiff’s “supplement” to that motion, which was filed by Plaintiff July 8, 2019. The August 22, 2019 Order also granted Defendants’ “Motion to Compel Discovery and for Extension of Scheduling Order Deadlines,” which was filed by Defendants on May 30, 2019.

As was stated in the August 22, 2019 Order, the Court held a hearing, on July 30, 2019, on Plaintiff’s “Motion for Protective Order and Other Relief” and Defendants’ “Motion to Compel Discovery and for Extension of Scheduling Order Deadlines.” At that hearing the Court heard and considered the arguments from all parties with regards to both motions, and subsequently the Court decided to deny Plaintiff’s motion in its entirety, and to grant Defendants’ motion. Plaintiff’s counsel

subsequently filed a “Motion to Reconsider, Alter or Amend,” and Plaintiff states said motion is based on Rules 52 and 59(e), SCRCP. Plaintiff proceeds to alleged that the August 22, 2019 Order “did not address all of the issues and arguments raised by the Estate.” *See*, Motion at pg. 2.

The undersigned has carefully and fully reviewed the Motion to Reconsider, Alter or Amend and hereby **DENIES** that motion. First, the Court is not required to set forth, on interlocutory Orders, specific findings of fact and/or conclusions of law. The August 22, 2019 Order is not a final Order or Judgment, and therefore Rules 52 and 59(e), SCRCP are not applicable to that Order. Therefore, for that reason alone, Plaintiff’s motion can be, and hereby is, **DENIED**.

Furthermore, to the extent Plaintiff is asking the Court to reconsider its ruling contained in the August 22, 2019 Order, the Court finds Plaintiff has failed to make the requisite showing for why the Court should reconsider, alter or amend its ruling. The Court’s August 22, 2019 Order makes it clear the Court considered all arguments made by Plaintiff’s counsel in Plaintiff’s written submissions, as well as at the oral argument on the motions in question. Having heard and considered those arguments, the Court decided to deny, in its entirety, Plaintiff’s “Motion for Protective Order and Other Relief.” Additionally, the Court decided to grant, in its entirety, Defendants’ “Motion to Compel Discovery and for Extension of Scheduling Order Deadlines.” The Court reiterates said rulings, with the following *caveat*.

Due to the delay in moving discovery forward in this case caused by Plaintiff’s filing of the herein denied motion for reconsideration, the Court hereby Orders that the Scheduling Order in this matter shall be further modified as follows:

1. Discovery in this case shall conclude 90 days after the date this Order is signed and filed.
2. The witnesses must respond to Defendants’ subpoenas within 15 days of this Order.

AND IT IS SO ORDERED.

The Honorable Robert E. Hood
Judge, Fifth Judicial Circuit

Columbia, South Carolina

September _____, 2019



Richland Common Pleas

Case Caption: Margaret Mims , plaintiff, et al vs Babcock Center Inc , defendant,
et al
Case Number: 2007CP4003365
Type: Order/Other

So Ordered

s/ R.E. Hood #2164

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Estate of Edward James Mims,)
Laura M. Cole, Personal Representative,)
)
Plaintiff,)

Civil Action No. 07-CP-40-3365

v.)

ORDER

The South Carolina Department of)
Disabilities and Special Needs,)
Kathi Lacy and Stanley Butkus,)
)
Defendants.)

_____)

This case came before the Court for a hearing on July 30, 2019 regarding two motions. On May 30, 2019, Defendants filed a Motion to Compel Discovery and for Extension of Scheduling Order Deadlines. On June 17, Plaintiff filed a Motion for Protective Order and for Other Relief. After hearing argument from both sides, the Court GRANTS Defendants' motion and DENIES Plaintiff's motion as follows:

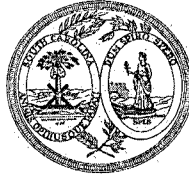
1. Defendants' Motion to Extend Scheduling Order Deadlines by 90 days is GRANTED. This will necessarily remove this case from the September 3, 2019 trial roster. Discovery in this case shall conclude 90 days after the date of this Order.
2. Mediation shall occur within 30 days after the close of discovery.
3. If the case is not resolved through mediation, the parties are instructed to contact the Chief Administrative Judge for the purpose of scheduling a date certain trial date.
4. Plaintiff's Motion for Protective Order regarding the document subpoenas is DENIED The witnesses must respond to the subpoenas within 15 days of this Order.
5. Finally, Plaintiff's motion to have certain DDSN officials present at mediation is DENIED.

AND IT IS SO ORDERED.

The Honorable Robert E. Hood
Judge, Fifth Judicial Circuit

Columbia, South Carolina

August _____, 2019



Richland Common Pleas

Case Caption: Margaret Mims , plaintiff, et al vs Babcock Center Inc , defendant,
et al
Case Number: 2007CP4003365
Type: Order/Scheduling Order

So Ordered

s/ R.E. Hood #2164

Electronically signed on 2019-08-21 15:40:03 page 3 of 3

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Robert E. Hood, Circuit Court Judge

Case No. 2007-CP-40-3365
Appellate Case No. 2019-001552

RECEIVED
SEP 23 2019
SC Court of Appeals

Estate of Edward James Mims,
Laura M. Cole, Personal Representative, Appellant,

v.

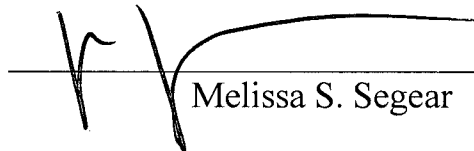
The South Carolina Department of Disabilities
and Special Needs, Kathi Lacy, and Stan Butkus, Respondents.

CERTIFICATE OF SERVICE

The undersigned employee of Davidson, Wren & Plyler, P.A., attorneys for the Respondents, does hereby certify that service of the **Motion to Dismiss Appeal** in the above referenced action was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 20th day of September, 2019:

Patricia L. Harrison, Esquire
47 Rosemond Road
Cleveland, South Carolina 29635

Robert C. Childs, III, Esquire
Childs Law Firm, LLC
2100 Poinsett Highway, Suite D
Greenville, South Carolina 29609


Melissa S. Segear

DAVIDSON, WREN & PLYLER, P.A.

ATTORNEYS AND COUNSELLORS AT LAW

1611 Devonshire Drive, Second Floor (29204)

William H. Davidson, II
Michael B. Wren
Daniel C. Plyler

Post Office Box 8568
Columbia, South Carolina 29202-8568
Telephone: (803) 806-8222
Facsimile: (803) 806-8855

David A. DeMasters
Brandon M. Briggs
Jonathan M. Riddle

Of Counsel
Kenneth P. Woodington

September 20, 2019

Writer's Email: kwoodington@dml-law.com

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

RE: Estate of Edward James Mims, Laura M. Cole, Personal Representative v. The South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stan Butkus
Appellate Case Number: 2019-001552
Civil Action Number: 2007-CP-40-3365
Date of Incident: January 4, 1999
Claim Number: 44654
Our File Number: 104.7785

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of the **Motion to Dismiss Appeal** and **Certificate of Service** in the above referenced matter. Please file the original and return a clocked-in copy to me in the enclosed envelope.

By copy of this letter, I am serving copies on all counsel of record. Thank you for your assistance in this matter.

With highest regards, I am

Sincerely yours,

DAVIDSON, WREN & PLYLER, P.A.



Kenneth P. Woodington

RECEIVED
SEP 23 2019
SC Court of Appeals

KPW/mss
Enclosures

The Honorable Jenny Abbott Kitchings
September 20, 2019
Page 2

cc: *(w/ Enclosures)*

Patricia L. Harrison, Esquire
47 Rosemond Road
Cleveland, South Carolina 29635

Robert C. Childs, III, Esquire
Childs Law Firm, LLC
2100 Poinsett Highway, Suite D
Greenville, South Carolina 29609

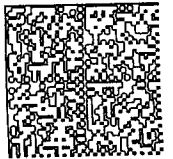
104,0785
DAVIDSON, WREN & PLYLER, P.A.


Attorneys and Counsellors at Law

Post Office Box 85668
Columbia, South Carolina 29202-8568

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

RECEIVED
SEP 23 2019
SC Court of Appeals



U.S. POSTAGE  PITNEY BOWES
ZIP 29204 \$ 007.85
02 1W
0001400565 SEP 20 2019