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

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.

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS APPEAL

On September 20, 2019, Respondents, the South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stan Butkus, moved 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. That

motion received by this Court on September 23, 2019, the same day that this Court wrote the parties, noting that the order(s) challenged on appeal might not be immediately appealable, and requesting the parties to file memoranda on the issue of appealability. On October 3, 2019, Appellant filed and served a response to Respondents' motion. The present Reply is being filed in order to address the dearth of legal authority in Appellant's response, as well as to address several misstatements of fact in that response.

ARGUMENT

1, Appellant's assertions of appealability are unsupported by any pertinent legal authority.

Appellant cites no pertinent authority for its assertion that the discovery and scheduling orders in this case are immediately appealable. Instead, Appellant cites three categories of cases, none of which is applicable here.

The first category, represented by *Hollman v. Woolfson*, 384 S.C. 571, 683 S.E.2d 495 (2009), involves situations where the issue sought to be appealed would be effectively mooted or vitiated if an appeal were not permitted. *Hollman* involved an order permitting interviews with third party patients, which if permitted to stand would moot any subsequent challenge on appeal to the discovery and also would adversely affect the "significant public interest" in the privacy rights of the patients. Also cited by Appellant, and also in this category of

cases, is *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154 (2009), a case involving discovery of trade secrets. No claim is made in this case that the requested disclosure of information would become moot if not reviewed by an appellate court prior to its disclosure, and there is likewise no plausible claim of an adverse effect on the public interest.

The second category, represented by *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), involves the rare situation in which the requested discovery was grossly out of line with the needs of the case. *Oncology & Hematology Assocs.* was a Certificate of Need case involving only the relocation of a linear accelerator to a different location. Despite this limited nature of the issue in the case, the party opposing the CON "took a shotgun approach and sought virtually all information concerning every facet of [the applicant's] operation," a practice which the Supreme Court deemed "abusive and beyond the pale." 387 S.C. at 383, 385, 692 S.E.2d at 922, 924.

In the present case, however, the subpoenas duces tecum to which Appellant objected, issued to five persons listed by Appellant as potential trial expert witnesses, sought only routine information: documents prepared by them or reviewed by them that relate to this case and their opinions in this case. (The

subpoenas are attached as Exhibit 2 to Appellant's response.) Requests for such information are completely routine, and Appellant cites no authority that would preclude discovery of this information. Indeed, the only thing that is "beyond the pale" in the present situation is that Appellant would go to such extreme lengths in opposing routine discovery.[1]

The third category of cases is represented by *Hagood v. Sommerville*, 362 S.C. 191, 197, 607 S.E.2d 707, 710 (2005), in which a motion to disqualify a party's attorney in a civil case was held to affect a substantial right and therefore could be immediately appealed under S.C. Code Ann. § 14–3–330(2). However, the Supreme Court has held 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 affect a substantial right. *Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008)

In an attempt to claim that a substantial right is affected, Appellant asserts, citing no evidence, that it "risks the loss of some if not all of [its] expert witnesses." Response at 12. Again, however, the information sought from the listed

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[1] While no South Carolina case directly in point has been located, it is generally held elsewhere that "a party does not have standing to challenge a subpoena issued to a nonparty unless the party claims some personal right or privilege in the information sought by the subpoena." *United States v. Idema*, 118 F. App'x 740, 744 (4th Cir. 2005). There is no suggestion that Appellant has any such personal right or privilege in the matters subpoenaed documents.

experts is routine, and Appellant cites nothing to support its claim that production of the requested information would be unduly burdensome, much less so burdensome that the present orders should be immediately appealable. In fact, one of the purported experts, Mary Katherine Bagnal, has already responded to the subpoena, stating she has no records to produce, and that her only interaction with Mr. Mims was a "Visitor's Report" she prepared back in 2005.[2] Her response took her one phone call and one email. Clearly this is not the sort of "unduly burdensome" task Appellant's counsel is claiming it to be.

Appellant also makes the novel assertion that it has "a substantial right to have litigation decisions made by the governing board of the agency that provided him services. . . ." Response at 12-13. However, statutory law is directly contrary to this claim. It is undisputed that the claims against DDSN are covered by the Insurance Reserve Fund, a branch of the Fiscal Accountability Authority. S.C. Code Ann. § 1-11-140(A) provides that the Authority, *i.e.*, the Insurance Reserve Fund, "has the exclusive control over the investigation, settlement, and defense of claims against the various entities and personnel for whom it provided insurance coverage and may promulgate regulations in connection therewith." (Emphases

[2] *See*, Exhibit 1.

added.) That authority includes the power to determine how discovery should be conducted in litigation.

2. Appellant's response misstates the history of this case.

Appellants' response misleadingly and incorrectly asserts that "Respondents had not taken any depositions when this decade-old case appeared as number two on the trial docket two months after this Court remitted the case to the trial court in 2018." Response at 2. In fact, prior to the 2014 appeal in this case, Respondents took enough depositions to support the filing of a motion for summary judgment, which was then granted by the circuit court, although reversed by this Court. And while Respondents did not immediately resume taking depositions once the case was remanded in 2018, Respondents did quickly serve written discovery requests once the case was remanded. As previously discussed in the Motion to Dismiss Appeal, it took a number of months and two motions to compel discovery before complete answers to those requests were finally received.

Appellant characterizes the five expert document subpoenas as "extremely onerous and requir[ing] the non-party witnesses to answer questions and to locate documents more than a decade old." Response at 3. However, as noted above, the subpoenas merely requested the information reviewed or prepared by the experts in

formulating their opinions. Nothing was requested that the experts should not have already had available if they were going to testify.

Two of the purported experts were former DDSN Commissioners who voluntarily agreed to testify on behalf of the Appellant and against DDSN in this case. Appellant makes a completely illogical argument or inference that since three other DDSN Commissioners resigned in the Summer of 2019, which happens to be after the subpoenas in this case were served, their resignations must have occurred out of concerns that they also might have their records subpoenaed by DDSN in this lawsuit. Response at 6, 9-10. However, none of those Commissioners have been named by Appellant as expert witnesses, which means that there would be no occasion for subpoenas to issue to them. This *non sequitur* of an argument is therefore specious.[3]

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 scheduling deadlines in the

[3] Appellant also appears to argue that the Notice of Appeal in this case should be treated as a petition for some unspecified form of extraordinary writ. Response at 13-15. First of all, no such petition has actually been filed. In any event, however, Appellant has made no showing of irreparable harm or other special circumstances that would support the issuance of an extraordinary writ.

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: /s/ William H. Davidson, II

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

Columbia, South Carolina

October 4, 2019

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

Exhibit 1

Reply Memorandum in Support of Motion to Dismiss Appeal

From: Daniel C. Plyler
To: Kenneth P. Woodington; Melissa S. Segear
Subject: Fwd: Mims
Date: Monday, September 16, 2019 1:31:33 PM

Sent from my iPhone

Begin forwarded message:

From: Mary Katherine Bagnal <Mkbagnal@seniormatters.com>
Date: September 16, 2019 at 1:06:30 PM EDT
To: "dplyler@dml-law.com" <dplyler@dml-law.com>,
"tharrison@loganharrisonlaw.com" <tharrison@loganharrisonlaw.com>
Subject: Mims

Dear Mr. Plyler:

This is in response to a second request for information which I have already submitted.

Please be advised that the only interaction I had with Mr. Edward Mims was a Vistor's Report requested by the Richland County Probate Court which should be included in the record.

Please note that we are not required to hold client information more than 7 years and this request exceeds that time period.

Respectfully,
Mary Katherine Bagnal, MSW, CMC, NCG

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson, Wren & Plyler, P.A., attorneys for the Respondents, does hereby certify that service of the **Reply Memorandum in Support of 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 4th day of October, 2019:

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

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2100 Poinsett Highway, Suite D
Greenville, South Carolina 29609

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Of Counsel
Kenneth P. Woodington

October 4, 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 **Reply Memorandum in Support of 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

KPW/mss
Enclosures

cc: *(w/ Enclosures)*

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

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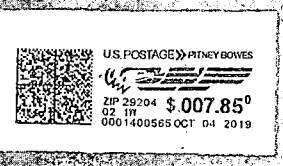

104.7785
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The Honorable Jenny Abbott Kitchings
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