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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Case No. 2019-001552

Circuit Court Case No. 07-CP-40-3365

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.

PETITION FOR RECONSIDERATION

In this protective petition for a rehearing filed pursuant to Rule 221, Petitioner seeks reconsideration by this Court and seeks to preserve Appellant's right of review by the South Carolina Supreme Court, in the event that the Court dismisses this appeal. Points overlooked or misapprehended by the Court are described in the attached memorandum. Petitioners pray that this Court will take into consideration the public importance and exceptional circumstances of this case and the substantial rights of both the non-party witnesses and the Plaintiff. Petitioner respectfully prays that the Court will reconsider its decision to dismiss this appeal for the reasons set forth in Petitioner's brief in response to Respondents' motion to dismiss and the attached memorandum.

Respectfully submitted,

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ATTORNEYS FOR THE PLAINTIFF

December 20, 2019

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MEMORANDUM IN SUPPORT OF PETITION FOR RECONSIDERATION

This Court dismissed Mims' appeal on December 5, 2019, finding that the order was not immediately appealable, citing *Ex Parte Whetstone,* 289 S.C. 580, 347 S.E.2d 881 (1986). In that case, the Supreme Court ruled in 1986 that an appeal of a trial court order directing a non-party to attend a deposition and to produce documents was not immediately appealable under S.C. Code Ann. § 14-3-330 (1976). The Supreme Court ruled in *Whetstone* that:

> Instead of appealing immediately, a non-party has two alternatives. He may either comply with the discovery order and waive any right to challenge it on appeal, or refuse to comply with the order and appeal after he is held in contempt for his failure to comply.

Id at 580.

1 In *Whetstone v. Whetstone,* 309 S.C. 227, 420 S.E.2d 877 (1992) the Supreme Court found that Michael K. Whetstone "consistently engaged in contumacious and dilatory actions in defiance of court orders."

But, in *State v. Register (in Re Doe)*, 308 S.C. 534, fn 1 (1992), issued six years after *Whetstone*, the Supreme Court loosened that rule and clarified that discovery orders are not **"ordinarily"** directly appealable. There, the Court recognized an exception to the general rule in cases where a non-party raised a novel issue. The Supreme Court again referenced this more liberal rule in *Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008), noting 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. But, here, Appellant argues that substantial rights of tremendous public importance are affected by the lower court's order. Thirty-two years after *Whetstone,* the Supreme Court recognized in *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, fn 9 (2018) that interlocutory orders may be appealed when they raise companion issues:

> "[D]iscovery 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). However, courts may accept appeals of interlocutory orders not ordinarily immediately appealable when appealed with a companion issue proper for review but not when the issues appealed lack a sufficient nexus. Brown v. Cty. of Berkeley, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005).

(Emphasis added.) In that case, the Supreme Court found that the discovery issue had a sufficient nexus to a companion issue to review an interlocutory order.

Here, Mims raises important companion issues which make this appeal one of those cases that are as "rare as hen's teeth," warranting review of a discovery order. *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Envtl. Control,* 387 S.C. 380, 388 (2010).

Questions Presented

Petitioner respectfully suggests that the following points were overlooked or misapprehended by the Court:

1. The subpoenas were invalid because they were issued against former DDSN Commissioners without authorization by the governing board of DDSN.

2. The lower court erred as a matter of law in ordering non-parties to comply with oppressive subpoenas that were issued after the close of discovery, more than a decade after this lawsuit was filed.

3. The lower court failed to address the non-party witnesses' legitimate requests for protection from retaliation.

4. The lower court erred as a matter of law in failing to order Respondents to pay fees and costs of

non-party expert witnesses.

5. The non-party witnesses who were already deposed by Respondents should not be required to respond to a subpoena which is, in effect, a second deposition.

6. The lower court failed to consider its obligation to protect non-party witnesses from burdensome subpoenas.

7. The lower court failed to consider substantial rights of the non-party witnesses and the Petitioner and the prejudice likely resulting from the enforcement of the subpoenas.

Arguments

1. The subpoenas were invalid because they were issued against former DDSN Commissioners without authorization by the governing board of DDSN.

Minutes of the DDSN Commission show that the governing board of the agency did not go into executive session to discuss a legal matter at any time during 2019 before Respondents filed the motion to compel former members of the Commission to respond to subpoenas, or since taking the extraordinary step of compelling non-party witnesses to comply with the overly burdensome subpoenas. Former Commissioner McPherson discussed in her affidavit that Commissioners were kept in the dark about pending litigation during her tenure as a member of the governing board of DDSN. Three DDSN Commissioners resigned after the motion to compel was issued in this case, leaving the agency without a quorum. Even after the Office of the Attorney General issued an opinion that Commissioners serve until their successors are appointed, the remaining three Commissioners have continued to meet and to conduct business without a quorum, but they have not gone into executive session to receive legal advice.

DDSN Commissioners are volunteer citizens, who serve without compensation, unlike other board and commission members like the Public Service Commission. S.C. Code Section 58-3-70. Currently, four out of the seven congressional districts in the state are not represented due to resignations of Commissioners. To require former DDSN Commissioners to either be held in contempt by the trial court, or to lose their right of appeal will chill any member of the governing board from advocating or testifying for DDSN clients and will certainly affect the willingness of citizens to serve on the Commission.

The Court should require Respondents' counsel to poll the members of the governing board of DDSN, including the four Commissioners whose resignations were ineffective but who have been excluded from

Commission meetings, to determine whether the Commission supports the litigation strategy compelling former Commissioners to respond to the late-issued, oppressive subpoenas.

The former director, who resigned under pressure and his associate state director, who have conflicting interests with the agency, continue to be represented by a team of lawyers at taxpayer expense. In the event that this Court dismisses this appeal, it should direct the agency to provide independent legal counsel at taxpayer expense for the former DDSN Commissioners who have been served with these burdensome subpoenas. The Court should also require Respondents' counsel to notify DDSN Commissioners of mediation and require attendance of members of the Commission at any mediation of this case.

2. The lower court erred as a matter of law in ordering non-parties to comply with oppressive subpoenas that were issued after the close of discovery, more than a decade after this lawsuit was filed.

This lawsuit was filed in 2007 and Respondents only took two depositions during the first decade. Respondents dilatory conduct should not be rewarded by allowing them to ignore scheduling orders. The lower court failed to address the issues raised by the non-party witnesses as to the burdensomeness of the subpoenas.

3. The lower court failed to address the non-party witnesses' legitimate requests for protection from retaliation.

A former DDSN Commissioner and former provider of behavior support services testified in their affidavits regarding their fear of retaliation and the history of Respondents retaliating against persons who testify. The Court should issue an order protecting all witnesses from retaliation.

4. The lower court erred as a matter of law in failing to order Respondents to pay fees and costs of non-party expert witnesses.

Witnesses who were not previously deposed agreed to be deposed, even after the close of discovery, once Respondents made satisfactory arrangements to pay their fees and cost. Respondents refused and demanded that they comply with the late-issued subpoenas. S.C. R. Civ. P. 26(b)(4)(C) provides two different scenarios, each with a unique payee, in which a deposing party may be required to pay an expert witness's fees. *James v. S.C. DOT*, 393 S.C. 440 (S.C. Ct. Appeals 2011). The first provision obligates the party initiating the deposition to pay the expert a reasonable fee for time and expenses spent in traveling and the taking of the deposition. Id. The second vests the circuit court with discretion to find the initiating party liable to the producing party for a fair portion of the fees and

expenses reasonably incurred by the producing party during its own communications with the expert witness. The lower court judge abused his discretion by failing to address the issue of payment of the expert witnesses' fees and costs.

5. The non-party witnesses who were already deposed by Respondents should not be required to respond to a subpoena which is, in effect, a second deposition.

SCRCP RULE 30(a)(1) allows depositions to bee taken of "any person, including a party, by deposition upon oral examination. But, that Rule provides that: "The deposition of any party or witness may only be taken one time in any case except by agreement of the parties through their counsel or by order of the court for good cause shown." Here, Respondents took depositions of McPherson and Mullis prior to the close of discovery. Respondents' subpoenas demanded, after the close of discovery, for them to effectively submit to a second deposition upon written questions. This case involves a novel issue of whether a defendant should be allowed a second bite of the same apple.

SCRCP RULE 33 allows for the service of interrogatories only upon parties, but not upon non-parties. This case raises the novel question of whether a defendant can circumvent this rule, effectively serving non-parties with interrogatories after the close of discovery.

6. The lower court failed to consider its obligation to protect non-party witnesses from burdensome subpoenas.

SCRCP Rule 45(c)(1) requires a party or an attorney responsible for the issuance and service of a subpoena to take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The lower court failed to enforce this duty. The lower court also failed to consider its obligation under Rule 45(c)(2)(A) regarding the production of electronically stored information.

7. The lower court failed to consider substantial rights of the non-party witnesses and the Petitioner and the prejudice likely resulting from the enforcement of the subpoenas.

The Court overlooked that the lower court failed to consider substantial rights of the non-party witnesses. In *Hagood v. Sommerville,* 362 S.C. 191 (2005), a bicyclist sued the driver of a vehicle who being injured him in an accident. The trial court gave the bicyclist two options: (1) not to use the expert as a witness, but to find another expert witness and proceed to trial with his attorney or (2) to require his attorney to withdraw to be allowed to use the expert witness at trial. When the bicyclist's attorney withdrew, he argued the order was immediately appealable under S.C. Code Ann. § 14-3-330(2) because it affected a substantial right, namely, the right to proceed with a

lawyer of his choosing. The appellate court held that not only was the order immediately appealable, but it had to be immediately appealed in order to preserve the error.

Here, Petitioner is faced with the draconian choice of proceeding without hybrid expert witnesses who have first-hand knowledge of the facts relevant to this case or locating new witnesses twelve years after this lawsuit was filed. The Court also overlooked substantial rights of the non-party witnesses to be free from harassment and unduly burdensome discovery demands.

Conclusion

Mims has raised important companion issues which make this appeal one of those cases that are as "rare as hen's teeth," warranting review of a discovery order. *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Envtl. Control,* 387 S.C. 380, 388 (2010). Petitioners in this case agreed to allow limited discovery, even after the deadline for discovery, if satisfactory arrangements were made for payment to the experts who have not previously been deposed. Petitioners have presented legitimate companion issues of tremendous public importance and they pray that the Court will deny Respondents' motion to dismiss. Alternatively, Petitioners pray that this Court will transfer this appeal to the South Carolina Supreme Court pursuant to SCRCP Rule 204.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned has served Petitioner's Petition to Reconsider by hand delivery on this 20th day of December, 2019 at the following address:

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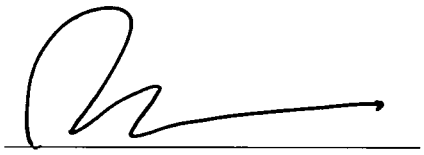

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