

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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JAN 15 2020

S.C. SUPREME COURT

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

The Honorable Michael Nettles, Circuit Court Judge

Case No. 2019-002066

April

Jones.....Appellant,

v.

Tim Ringer, Individually and as
Employee/agent of Wal-Mart
Stores, Inc. d/b/a Wal-Mart
Store #630; Wal-Mart Stores,
Inc.; and Wal-Mart Stores
East, L.P.....

Respondents,

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Individually and as Employee/agent of
Wal-Mart Stores, Inc. d/b/a Wal-Mart
Store #630; Wal-Mart Stores, Inc.; and
Wal-Mart Stores East, L.P

INTRODUCTION

Respondents, Tim Ringer, Individually and as employee/agent of Wal-Mart Stores, Inc. d/b/a Wal-Mart Store # 630, Wal-Mart Stores, Inc., and Wal-Mart Stores East, L.P., submit this Return in Opposition to Appellant's Petition for Writ of Certiorari.

STANDARD OF REVIEW

A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. *See generally Ellison v. State*, 382 S.C. 189, 676 S.E.2d 671 (2009); *In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, 321 S.C. 563, 564, 471 S.E.2d 454 (1990) (holding that this Court reviews decisions of the court of appeals by way of writ of certiorari only where special reasons justify exercise of that power). In determining whether special reasons for review exist, this Court considers the following five criteria: (1) where there are novel questions of law; (2) where there is a dissent in the decision of the court of appeals; (3) where the decision of the court of appeals is in conflict with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; and (5) where a federal question is included and the decision of the court of appeals conflicts with a decision of the United States Supreme Court. *Haggins v. State*, 377 S.C. 135, 137 n.2, 659 S.E.2d 170, 170 n.2 (2008); Rule 242(b) SCACR. As the subject Petition does not meet any of the criteria for review and essentially seeks to appeal the denial of a request for continuance of trial, the Petition should be denied.

COUNTER STATEMENT OF THE FACTS

This appeal arises from Appellant's request to remove a matter from the May 28, 2019 trial roster. Appellant appeals the Order on Defendants' Motion for Continuance and Entry of

Scheduling Order issued on May 13, 2019 (“May 13, 2019 Order”), which set this matter for trial during the May 28, 2019 term of court. *See* App. p. 001, May 13, 2019 Order. On May 22, 2019, six (6) days prior to the scheduled trial of this matter, Appellant’s counsel wrote Chief Administrative Judge Michael Nettles and advised him that a “Rule 601 conflict [had] arisen” as a result of the placement of another matter as first on the Colleton County trial roster for May 28, 2019, and therefore, Appellant’s counsel could not proceed to trial in the underlying action as scheduled. *See* App. p. 019, Emails re: Rule 601 Conflict. In response, Judge Nettles informed Appellant’s counsel that he conferred with Judge Perry Buckner, who was presiding over the Colleton County trial roster, that Judge Buckner agreed to defer to the underlying action, and as such, the underlying action would be subject to trial on May 28, 2019. *Id.*

The following day, May 23, 2019, immediately prior to the scheduled deposition of Respondent Walmart’s Rule 30(b)(6) deposition, the parties conferred by telephone with Judge Nettles, during which time the parties informed the court that counsel for Appellant inquired as to whether Respondents would consent to dismissal of the action pursuant to Rule 40(j), SCRPC. The court informed the parties that if Respondents did not consent to Rule 40(j) dismissal, the case would proceed to trial on May 28, 2019. Further, during the telephone conference, Respondents’ counsel advised the Court and Appellant’s counsel that Respondents were in the process of filing a motion for sanctions regarding the handling of certain evidence in the matter. Directly after the conclusion of the telephone conference, Respondents’ counsel conferred with their clients and informed Appellant’s counsel that Respondents did not consent to Rule 40(j) dismissal. Immediately thereafter, Appellant’s counsel excused themselves and filed the instant Notice of Appeal of the trial court’s May 13, 2019, Order (approximately thirty (30) minutes after the conclusion of the telephone conference with the trial court), returned to

the conference room and handed Respondents' counsel a copy, and cancelled the scheduled Rule 30(b)(6) deposition. *See* App. p. 004, Notice of Appeal.

The Notice of Appeal stated: "Plaintiff April Jones appeals the Order of the Honorable Michael Nettles, signed May 13, 2019, and entered May 13, 2019, which resulted in, among other things, subsequent rulings disqualifying counsel. Appellant received written notice of said Order on or about May 13, 2019." *Id.* Respondents filed a timely Motion to Dismiss and for Sanctions on June 7, 2019 arguing that the underlying order was interlocutory and therefore not immediately appealable. *See* App. p. 010, Respondents' Motion to Dismiss Appeal and For Sanctions. On June 18, 2019, Appellant filed a Return to Respondents' Motion to Dismiss Appeal and For Sanctions arguing for the first time that the underlying order was immediately appealable because it affects a substantial right of choosing one's own counsel. *See* App. p. 041, Return to Respondents' Motion to Dismiss. The Court of Appeals issued a decision on July 31, 2019 granting Respondents' Motion to Dismiss but denying the request for sanctions. *See* App. p. 065, Order.

On August 19, 2019, Appellant filed a Motion for Extension of Time for petition rehearing from order granting dismissal and Petition for Rehearing from order granting dismissal making the same argument that the underlying order was immediately appealable because of Appellant's substantial right to choose one's own counsel. *See* App. p. 066, Motion for Extension of Time and Petition for Rehearing. The Court of Appeals granted Appellant's request to file the petition for rehearing out of time, but after "careful consideration of the petition for rehearing" denied Appellant's request. *See* App. p. 092, Order.

Appellant then timely sought a Petition for Writ of Certiorari, to which Respondents make this instant Return.

ARGUMENT BASED ON QUESTION PRESENTED

- I. Appellant has not presented a novel question for review by this Court because there is established case law that addresses the issue presented by Appellant.**

Appellant argues that this case presents a novel question affecting a party's substantial right to choose her own counsel. A novel question is one that is peculiar and extraordinary and for which no precedent can be found. Despite Appellant's arguments to the contrary, there is no novel issue present in this matter. The issue of whether a party has a substantial right to choose her own attorney has already been addressed by this Court. There are no special and important reasons for this Court to address this same issue again. Therefore, Respondent respectfully requests the Petition for Writ of Certiorari be denied and dismissed as there is no novel question for review for this Court.

- II. The Court of Appeals did not err in dismissing the appeal as interlocutory because the Order appealed from did not affect the substantial right of choosing one's own counsel and therefore was not immediately appealable.**

Appellant also argues that the Court of Appeals' decision directly conflicts prior decisions of this Court. However, the Court of Appeals' decision to dismiss Appellant's Appeal is consistent with state law; Appellant merely disagrees with the Court of Appeals' ruling. Appellant argues that Judge Nettles' May 13, 2019 Order required her attorneys to be in two places at once, thereby resulting in a constructive disqualification of her chosen counsel. She therefore claims that she is entitled to an immediate appeal based on the alleged constructive disqualification. This argument is erroneous. The subject May 13, 2019 Order provided as follows:

This matter came to be heard before me upon the Defendant's Motion for Continuance and Entry of Scheduling Order. The Court denies the Motion and instead orders as follows:

- 1.) This case is subject to being called for trial during the May 28, 2019 term of court.
- 2.) Defendant Wal-Mart shall provide dates for their 30(b)(6) witness to be deposed the week of May 20, 2019 and waive the ten (10) day notice requirement.
- 3.) Defendants have until Friday, May 17, 2019, to disclose expert witnesses and must at the same time provide a written report disclosing the nature of their testimony to include their full opinions and must produce them for deposition waiving the ten (10) day notice requirement.
- 4.) Plaintiff will have until Wednesday, May 22, 2019 to name counter experts under the same conditions.

AND IT IS SO ORDERED.

See App. p. 001, May 13, 2019 Order.

Because the order merely set forth deadlines for the case to proceed, the May 13, 2019 Order is nothing more than a scheduling order; as such, it did not aggrieve Appellant in any manner and is an interlocutory order. *See* Rule 201(a)-(b), SCACR (“Appeal may be taken, as provided by law, from any final judgment, appealable order or decision...” “Only a party aggrieved by an order, judgment, sentence or decision may appeal.”), and Rule 72, SCRCPP (“Appeal may be taken, as provided by law, from any final judgment or appealable order.”¹); *see also Johnson ex rel. D'Andre G. v. Chaudhry*, No. 2013-UP-176, 2013 WL 8508086, at *1 (S.C. Ct. App. May 1, 2013) (dismissing appeal of circuit court’s denial of appellant’s request for an extension of a scheduling order’s deadlines and a discovery sanction order allowing appellant to present only one expert witness at trial on issues of liability, finding decisions not immediately appealable) (citing S.C. Code Ann. § 14-3-330(2)(a) (1977) (“providing appellate

¹The note to Rule 72, SCRCPP, provides: “This Rule 72 parallels, in part, S.C. Code § 14-3-330, but is designed to reduce appeals from interlocutory or intermediate orders in an action. It accords with the modern decisions of the Supreme Court narrowing “dilatatory appeals” from such interlocutory orders as grant or deny motions addressed to the pleadings, motions at trial, and the like. All such questions are left to the appeal from final judgment or order of dismissal...”

jurisdiction to review “[a]n order affecting a substantial right made in an action when such order...in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action”), and *Grosshuesch v. Cramer*, 377 S.C. 12, 31, 659 S.E.2d 112, 122 (2008) (“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”).

Appellant argues that the May 13, 2019 scheduling order had the practical effect of disqualifying her counsel of choice. However, the record before this Court shows that at the time the May 13, 2019 Order was entered, the Rule 601 conflict had not been presented to the trial court for consideration and therefore, had no bearing on the deadlines contained in the Order. In fact, the Rule 601 conflict was not disclosed until May 22, 2019, nine days after the May 13, 2019 Order was entered by the Court. Further, contrary to Appellant’s argument, the May 13, 2019 Order did not result in any “subsequent rulings disqualifying counsel.” *See App. p. 004, Notice of Appeal.* At most, Appellant’s May 22, 2019 email to Judge Nettles notifying the Court of a Rule 601 conflict was a request for a continuance of this matter to a later trial roster.

Nonetheless, in an attempt to place this interlocutory order before the Court, Appellant argues that the trial court’s refusal to remove this matter from the May 28, 2019 trial roster effectively deprived Appellant of her right to counsel of her own choosing. Therefore, Appellant argues, her attorneys were constructively disqualified and the alleged disqualification impacts a substantial right, which she argues, entitles her to an immediate appeal. This argument is without merit.

In support of her claim that this appeal is proper, Appellant cites *Energys Delaware, Inc. v. Hopkins*, 401 S.C. 615, 738 S.E.2d 478 (2013) and *Hagood v. Sommerville*, 362 S.C. 191, 907 S.E.2d 707 (2005). These cases are readily distinguishable. In *Energys Delaware, Inc.*, the issue before this Court was “*whether an order denying a motion to disqualify an attorney is immediately appealable.*” 401 S.C. 615, 738 S.E.2d 478 (2013) (emphasis supplied). And in *Hagood*, the issue was “*whether an order granting a motion to disqualify a party’s attorney is immediately appealable.*” 362 S.C. 191, 907 S.E.2d 707 (2005) (emphasis supplied). This appeal does not arise from the granting or denial of a motion to disqualify an attorney. Here, the trial court did not issue a ruling addressing disqualification in the May 13, 2019 Order. Further, even the “subsequent order” of the trial court does not address disqualification of Appellant’s counsel; rather, it was merely a denial of Appellant’s request for a continuance, which is unquestionably interlocutory. See *Townsend v. Townsend*, 323 S.C. 309, 313, 474 S.E.2d 424, 427 (1996); *Crout v. South Carolina Nat’l Bank*, 278 S.C. 120, 293 S.E.2d 422 (1982). Appellant’s argument is an attempt to transform what is, at best, a motion for continuance, to a motion to disqualify counsel. In so doing, Appellant essentially invites this Court to assess and rule upon a motion to disqualify that was never presented or ruled upon by the court below. The Court should decline Appellant’s invitation and deny the petition for certiorari.

Alternatively, even if Judge Nettles’ denial of Appellant’s request for a continuance constitutes a “constructive disqualification,” and it does not, the *Hagood* decision does not hold that a party is entitled to an unlimited number of attorneys of their choosing. Rather, the Court’s decision to allow the immediate appeal of an order granting the disqualification of party’s

counsel was based upon the likelihood of harm to the party. 362 S.C. 191, 197, 907 S.E.2d 707, 710 (2005). Specifically, the Court cited:

(1) the importance of the party's right to the counsel of his choice in an adversarial system; (2) the importance of the attorney-client relationship, which demands a confidential and trusting relationship that often develops over time; (3) the unfairness in requiring a party to pay another attorney to become familiar with a case and repeat preparatory actions already completed by the preferred attorney; and (4) an appeal after judgment would not adequately protect a party's interests because it would be difficult or impossible for a litigant or an appellate court to ascertain whether prejudice resulted from the lack of a preferred attorney.

Id.

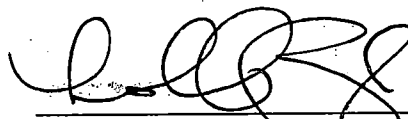
Thus, in reaching its determination in *Hagood*, the Court was assessing the impact of obtaining completely new counsel and not addressing the removal of one or more members of a "trial team" as argued by Appellant. Here, both before and after Judge Nettles' May 13, 2019 Order, Appellant was represented by "Team Jeffries" of the Anastopoulo law firm, her chosen legal counsel. She was not denied access to or guidance from the attorneys who had represented her since her case was filed in 2017. Further, there was no break in the attorney-client relationship; there is no evidence to suggest that any of the four attorneys listed as counsel of record were unfamiliar with Appellant's case; nor is there evidence of the need to pay another attorney to duplicate work in preparation for trial in this matter. Thus, there is no evidence of harm or a deprivation of counsel other than Appellant's statements regarding her need for the entire "trial team." In short, *Hagood* does not support Appellant's claim and her Petition should be denied.

Lastly, the issues that Appellant complain of are moot as there is no longer a Rule 601 conflict as the cases are not currently on a trial roster for the same date. Accordingly, for this additional and independent reason, the Court should deny the petition for certiorari.

CONCLUSION

Based upon the foregoing, no good ground exists to support Appellant's Writ of Certiorari.

Respectfully submitted,



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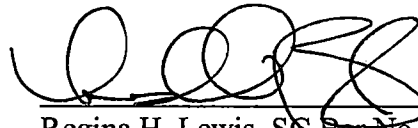
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PROOF OF SERVICE

I certify that on January 15, 2020, I served Respondents' Return to Petition for Writ of Certiorari by depositing a copy of same in the United States Mail, postage prepaid, addressed to her attorney of record, Lane D. Jefferies, 32 Ann Street, Charleston, South Carolina, 29403.



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