THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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MAR 16 2020
S.C. SUPREME COURT

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

Case No. 2007-CP-40-3365

Appellate Case No. 2020-417

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

v.

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

RETURN TO PETITION FOR SUPERSEDEAS

Respondents, the South Carolina Department of Disabilities and Special Needs (DDSN), Kathi Lacy and Stan Butkus, submit the following by way of Return to the portion of Petitioner's "Petition for Writ of Certiorari, Mandamus or Supersedeas" that might be regarded as seeking a writ of supersedeas.

FACTS AND PROCEDURAL HISTORY

By order dated December 5, 2019, the Court of Appeals dismissed the present appeal as involving an order that is not immediately appealable, citing *Ex Parte*

Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986) and *Waddell v. Kahdy*, 309 S.C. 1, 419 S.E.2d 783 (1992). App. II, 154. Petitioner sought rehearing, which was denied by the Court of Appeals on February 5, 2020. App. II, 152. The present Petition, seeking relief under several different appellate court rules, was filed on March 6, 2020.

The Court has advised the parties in a letter dated March 10, 2020, that this matter, i.e., Appellate Case No. 2020-417, is being treated by the Court as one in which Petitioner might be "seeking review of the decision of the South Carolina Court of Appeals in Appellate Court Case Number 2019-001552 under Rule 242 of the South Carolina Appellate Court Rules (SCACR)." March 10, 2020, letter at p. 1. The same letter indicates that to the extent that the Petition is seeking a writ of supersedeas in conjunction with review under Rule 242, the Court is treating the petition for supersedeas as a petition or motion under Rule 240, SCACR. March 10, 2020, letter at p. 2 (referencing Rule 240). Such petitions or motions require a Return within 10 days of the date of service of the motion. The present Return is accordingly

being filed solely in response to the part of Petitioner's filing that is being regarded as a Petition for Supersedeas.[1]

A summary of the procedural history of this case prior to the filing of the present appeal is set forth below. The present appeal represents a continuation of a pattern of inexplicable dilatory conduct by counsel for the Plaintiff-Petitioner ever since this case was remanded to the circuit court in August 2018. The primary substantive issue which this appeal attempts to raise is whether several nonparty individuals named by Petitioner-Plaintiff as expert witnesses should be required to respond to routine document subpoenas requesting that they produce documents reviewed by them in the course of their preparation to give expert testimony. [2]

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[1] The Court also advised in a second letter dated March 10, 2020, in Appellate Court Case Number 2020-000424, that to the extent Petitioner's "Petition for a Writ of Certiorari, Mandamus or Supersedeas" and "Complaint" along with an "Appendix" might be read as seeking relief under Rule 245, SCACR, a Return in Appellate Court Case Number 2020-000424 is due 20 days after the date of the letter, that is, on March 30, 2020. These Respondents intend to file a Return in that case which will set forth in detail the facts relevant to the claims made in that matter.

Finally, a second Return in the present Rule 242 case (and a third Return overall) is due on April 6, 2020, 30 days after the filing of the Petition. That Return will contain additional argument as to why certiorari should be denied under that rule.

[2] While no South Carolina case directly on 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 has been no suggestion that Petitioner-Plaintiff has any such personal right or privilege in the subpoenaed documents.

By way of background, this action was filed in 2007, alleging injuries to Edward Mims, a developmentally disabled adult. The alleged injuries occurred at the Babcock Center between 2000 and 2005.[3] The Summons, along with an Amended Complaint, was not served until 2008, approximately a year after the case had been filed, and three to eight years after last alleged injuries at the Babcock Center. Because the summons had not been served within 120 days of the filing of the case, the Defendants moved to dismiss the case. Eventually, this 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).

This Court's decision in that appeal became final on September 17, 2012. On April 12, 2013, the present Respondents moved for summary judgment, based primarily on documents and the deposition of Mims' mother.[4] The motion was heard in the circuit court shortly thereafter 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.

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[3] Mims died in 2015, by which time he had been away from the Babcock Center for 10 years.

[4] 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.

Plaintiff filed a notice of appeal on June 24, 2014. 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. The case was heard by the Court of Appeals on June 8, 2017. On November 8, 2017, the Court of Appeals issued an unpublished decision reversing the dismissal of the action, and remanding for further proceedings. *Estate of Mims v. S.C. Dep't of Disabilities & Special Needs*, No. 2014-001373, 2017 WL 5171686 (Ct. App. Nov. 8, 2017). The present Respondents 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), again remanding the case, although with some changes in the issues to be considered on remand. The present Respondents then filed a petition for rehearing of that latter decision. After that petition was denied on April 13, 2018, the present Respondents filed a Petition for Certiorari, which was denied by this Court on August 3, 2018.

On August 13, 2018, 10 days after the denial of certiorari, Defendants served a five-age set of Interrogatories and Requests for Production on the Plaintiff. App. II, 233-237. Plaintiff's initial responses were not served until October 17, 2018, approximately a month late. App. II, 276-307. Soon thereafter, Defendants' counsel advised Plaintiff's counsel in a lengthy letter that the responses were incomplete and

unsatisfactory. App. II, 309-314. At a status conference on November 1, 2018, Plaintiffs' counsel promised to send amended responses quickly, see App. II, 324, but when nothing was received by Defendants as of December 14, 2018, Defendants filed a Motion to Compel Discovery. App. II, 265-335. To make a long story short, Defendants did not receive complete answers to their August 2018 written discovery requests until the last day of May 2019, nine and a half months after those discovery requests were served. The complete answers came only after Defendants had filed two different motions to compel discovery, the December 14, 2018 motion referenced above, and another one on May 30, 2019. App. II, 228-260.[5]

The attempts by Defendants to take depositions of many of the 54 witnesses named by Plaintiff, including 8 purported experts, were also largely resisted by Plaintiff. Because deadlines in then-existing scheduling orders were running out in the first months of 2019, 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

[5] Defendants agreed not to go forward with the hearing scheduled on March 12, 2019, for the first motion after Plaintiffs on March 7, 2019 (almost six months late) served more complete responses on everything except the interrogatories pertaining to the experts. As to those, Plaintiffs promised to provide more full responses to the expert interrogatories within 30 days of March 11, 2019, but those responses were not sent until nearly midnight on May 31, 2019, after Plaintiff's counsel first purported not to remember that such a promise had been made. *See* App. II, 259-260.

counsel to the first set of notices), only 8 actually took place. Some of the witnesses had reasons of their own for not appearing. Others were not sufficiently identified by Plaintiff's counsel for them even to be located.

The taking of depositions paused around the middle of March 2019, because all counsel for both sides in the present case were 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, resulting in a defense verdict. 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, undersigned 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. App. II, 260. By agreement, those responses were to have been served by mid-April, but they were not served then. *Id.* Defendants' counsel also asked Plaintiff's counsel to agree to a 30-day discovery extension, as permitted by the March 22, 2019, Scheduling Order. *Id.* 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. App. II, 259. Plaintiff's counsel also declined to consent to any extension of the discovery period.

The next day, May 30, 2019, Defendants filed a Motion to Compel and to Extend the Deadlines in the then-operative Scheduling Order. Those deadlines were set to expire on May 31, 2019, with an option for a 30-day extension if there was mutual consent. App. 39. Late in the evening on that last day, May 31, 2019, Plaintiff's counsel served more complete expert discovery responses. Plaintiff's counsel still did not consent to extend the discovery period for anyone other than the experts, despite the fact that, among other things, it had not been possible to take most of the depositions Defendants sought to take.

Shortly thereafter, on June 3, 2019, Defendants' counsel sent identical or virtually identical 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.[6] An example of one of them is found at App. I, 28-30. In response, Plaintiff's counsel filed a motion for protective order on June 17, 2019, claiming, among other things, that the subpoenas (which, again were directed to nonparties, and not to Plaintiff) were "burdensome," App. I, 59, and that

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

"Responses to the subpoenas would require review of more than a decade of records, many of which are not readily accessible." App. I, 60. Several other similar objections 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." App. I, 61.

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, App. I, 88.

Plaintiff's counsel then filed a motion to reconsider the circuit court's discovery and scheduling order, asserting, among other things, 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." App. 96.[7]

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. App. II, 103-105. Four days later, on September 9, 2019, Plaintiff filed the Notice of Appeal that commenced the present appeal. As noted earlier, the Court of Appeals dismissed the appeal as interlocutory on December 5, 2019, and denied rehearing on February 5, 2020.

ARGUMENT

To the extent that the Petition seeks a writ of supersedeas, that request should be denied for two reasons. First and foremost, there is nothing that needs to be superseded or stayed, because the two Circuit Court Orders in this case were already automatically stayed by the September 9, 2019 service of a notice of appeal on behalf of the Mims Estate. These Respondents have never suggested otherwise. In addition, although the issue probably need not be reached, as this Court's March 10, 2020, letter (p. 2, n. 3) advises, ". . . a writ of supersedeas is only available where there is an appealable order," quoting *State v. Hill*, 314 S.C. 330, 332, 444 S.E.2d 255, 256

[7] The original proposed order submitted by Defendants to Judge Hood did contain such findings and conclusions, but Defendants then submitted a revised and shortened version at the request of Plaintiff's counsel.

(1994). Here, there is no appealable order, and the Petition does not appear to argue otherwise.[8] Each of these two issues will be discussed herein.

1. A writ of supersedeas is unnecessary, because the two circuit court Orders in this case were already stayed by the September 9, 2019 service of a notice of appeal.

The general rule pertaining to writs of supersedeas is set forth in Rule 241(a), SCACR. That rule provides in pertinent part as follows:

> As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

(Emphasis added.) Rule 241(b) sets forth a non-exhaustive list of exceptions to the automatic stay, but none of those nor any other exceptions not listed apply to the orders of the circuit court in the present case.[9] The August 22, 2019 Order pertained

[8] Instead, and as discussed below, while the Petition, p. 2, makes two passing references to Rule 242, it appears that as a practical matter, the only writ of certiorari actually sought by the Petition is a common law writ of certiorari, not certiorari under Rule 242.

[9] The two orders below are the original August 22, 2019 Order and the September 5, 2019 Order denying reconsideration thereof. (Only the latter is actually referenced in the Notice of Appeal, but both Orders reached essentially the same result.)

only to scheduling, discovery (requiring compliance with document subpoenas issued to five expert witnesses named by Plaintiff), and mediation. App. I, 88. The September 5, 2019 Order denying reconsideration reiterated the holdings of the August 22 Order, modifying the discovery schedule to start the timeframes on September 5, given that Plaintiff's motion to reconsider had delayed the start date for those timeframes. Plaintiff filed a notice of appeal four days later, on September 9, 2019.

In the time since the filing of Petitioner's Notice of Appeal on September 9, 2019, Respondents DDSN, Butkus and Lacy, that is, the Defendants in *Estate of Mims,* have never argued that the August 22 and September 9 Orders were anything other than completely stayed. Likewise, Plaintiff (the Petitioner in this Court) has never argued that those Orders are presently in effect, or that they constitute an exception to the general automatic stay rule. Nor does the Petition contain any argument that an order of supersedeas "is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR. As indicated by the procedural history above, neither of those grounds is present in this case. The entire case has been on hold since September 9, 2019, when Petitioner filed the notice of appeal. A writ of supersedeas is manifestly not necessary, and should therefore be denied.

The only apparent reason for Petitioner-Plaintiff to have mentioned supersedeas at all is that that writ was mentioned in *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). In that case, it was noted that

> In challenging the discovery orders, Petitioners initially combined their writ of certiorari with a writ of supersedeas and a notice of appeal. We dismissed the notice of appeal from the discovery orders as interlocutory and not immediately appealable. We determined exceptional circumstances existed, warranting the grant of a writ of certiorari.

387 S.C. 380, 381 n.1, 692 S.E.2d 920, 921 n. 1(2010). Because an appealable order is necessary before a writ of supersedeas can be granted, *State v. Hill, supra,* and because the Court dismissed the notice of appeal in *Oncology & Hematology Assocs., supra,* it would appear that *Oncology & Hematology Assocs.* involved the granting of a common law writ of certiorari to review the discovery orders in that case, and not a writ of certiorari under Rule 242, SCACR, to review a final decision of the Court of Appeals.[10]

[10] To the extent Petitioner seeks relief from this Court under Rule 245 instead of Rule 242, these Respondents will address those aspects of the Petition in their Return in Appellate Court Case Number 2020-000417, which is due on March 30, 2020.

2. Even if there had been a need for a writ of supersedeas, it should not be granted, because this case (Appellate Court Case Number 2020-000417) does not involve an appealable order.

As indicated above, the Orders which Petitioner attempted to appeal to the Court of Appeals, and of which Petitioner now seeks review, involved nonappealable issues pertaining to pretrial matters. For that reason, the Court of Appeals dismissed the appeal, citing *Ex Parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881 (1986) and *Waddell v. Kahdy*, 309 S.C. 1, 419 S.E.2d 783 (1992). App. II, 154.

To the extent that the Petition in the present case might be viewed as a petition for writ of certiorari under Rule 242, SCACR, that is, a petition seeking review of a final decision of the Court of Appeals, it should be denied for two reasons: First, the issue has not been argued, and secondly, it would lack merit even if it had been argued.

With respect to the failure to argue the point, the Petition, pp. 9. 21, presents two questions, neither one of which challenges the dismissal of this case by the Court of Appeals on the ground that the "orders on appeal are not immediately appealable." 12/5/19 Order of the Court of Appeals. App. II, 154. Nor does the Petition mention either *Ex Parte Whetstone, supra,* or *Waddell v. Kahdy, supra,* the two cases cited by the Court of Appeals in support of that court's dismissal of the appeal of the circuit court Orders. It should therefore be concluded that not only did the Court of

Appeals correctly decide to dismiss the appeal, but also that the Petition contains no argument or challenge to that decision. Instead, the Petition appears actually to seek only review by way of a common law writ of certiorari, such as occurred in *Oncology & Hematology Assocs., supra.* Again, that request will be addressed in Respondents' Return to that aspect of the Petition, currently due on March 30, 2020.

Secondly, as held in *Ex Parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986), cited by the Court of Appeals, "[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. In addition, the Court of Appeals cited *Waddell v. Kahdy*, 309 S.C. 1, 4, 419 S.E.2d 783, 785 (1992), which holds that an order requiring a person "to submit to deposition is not directly appealable." *See also, e.g., Wieters v. Bon–Secours–St. Francis Xavier Hosp., Inc.,* 381 S.C. 332, 333, 673 S.E.2d 417,

418 (2009) ("an order compelling discovery is not immediately appealable even if it is challenged as violating the attorney-client privilege").[11]

A review of the August 22, 2019 circuit court Order and the September 5, 2019 Order denying reconsideration thereof will show that those Orders were completely interlocutory, involving matters related to scheduling and discovery and to a small extent, mediation. The petition for supersedeas should therefore be denied because of the absence of a final, appealable order.

Finally, these Respondents would reiterate that it is the Petitioner-Plaintiff in this case, not the Defendants, who has engaged in dilatory conduct. Petitioner-Plaintiff has gone to extraordinary and inexplicable lengths to prevent Plaintiff's own designated experts from producing the documents the experts may have reviewed in preparing their testimony (assuming they reviewed any documents and actually have prepared any testimony, which is by no means certain). One wonders what those documents might contain, such as to provoke this level of resistance

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[11] To the extent that the court below mentioned the persons who need to be present or do not need to be present at mediation, issues pertaining to mediation are also not final or appealable. *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"). As with other parts of the circuit court orders, Petitioner does not appear to argue that this aspect of the lower court's ruling immediately appealable. To the extent Petitioner mentions this issue in connection with Petitioner's request that the Court take original jurisdiction, the issue will be addressed in the Returns of one or more of the Respondents to that aspect of the Petition.

(again assuming that the records even exist). These issues will be addressed in more detail in later Returns to be filed, but it is very odd for a plaintiff to take such unusual and extreme steps, causing months of delay of the progress of this case by a plaintiff who claims to be interested in having the case resolved quickly.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that a writ of supersedeas should not be issued in this case. Additional reasons why all other relief sought by Plaintiff will be set forth in subsequent Returns.

Respectfully submitted,

DAVIDSON, WREN & DEMASTERS, P.A.

BY: /s/ Kenneth Woodington

WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Respondents South Carolina Department of Disabilities and Special Needs, Butkus and Lacy

Columbia, South Carolina

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and

Henry McMaster in his capacities as Governor of the State South Carolina and Chair of the State Fiscal Accountability Authority,

Respondents

CERTIFICATE OF SERVICE

The undersigned employee of Davidson, Wren & DeMasters, P.A., attorneys

for the Respondents, does hereby certify that service of the Respondent's **Return to Petition for Supersedeas** 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 16th day of March, 2020:

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

Sherri H Rodgers
