THE STATE OF SOUTH CAROLINA

In The South Carolina Supreme Court

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S.C. SUPREME COURT

Appeal from Richland County

Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Case No. 2007-CP-40-3365

Appellate Case No. 2020-417

Estate of Edward James Mims by Laura M. Cole, Personal Representative,
Petitioner,
v.
The South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stan Butkus,
Respondents.

REPLY OF PETITIONER

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This reply is made pursuant to Rule 242(g), as extended by this Court's Cov-19 order of March 20, 2020, granting an additional time for reply.

RESTATEMENT

More than a decade ago, Mims filed a lawsuit against DDSN, its director and the associate state director, also bringing claims against DDSN's agent, the Babcock Center and its director. Mims settled his claims against Babcock Center during the second appeal. The agency Respondents, however, have continued their relentless efforts to harass and intimidate witnesses who have historically advocated for DDSN clients, including former members of the DDSN Commissioners, who are former clients of Respondents' counsel. Appx. I at p. 77, paragraphs 3-9, p. 81, paragraphs 4-9, p. 82, paragraphs 16-18.

At page 2, Respondents argue that their late-filed subpoenas required only that the witnesses "produce documents reviewed by them in the course of their preparation to give expert testimony in this case."[1] The subpoenas in question required far more than that. Four of the witnesses are long-time advocates of DDSN clients and their knowledge of the widespread and systemic issues raised in this case cannot be provided by turning over a Mims file folder. Respondents had years to depose these non-party witnesses, and in 2019 finally actually deposed two of them. Respondents' subpoenas were so broad that to comply, these non-party witnesses would be required to locate, review and produce records going back to 2002 which were never before requested by Respondents when they were more readily accessible.[2]

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[1] In this reply, "Respondent" refers only to the DDSN Respondents.

[2] Former Commissioner McPherson resigned as a director of the Babcock Center in 2002 when its director refused to report the rape of an elderly client. Appx. I at 77, paragraph 5. Attorney Plyler asked McPherson at length about her service on the Babcock Center board and her reasons for resigning.

Rule 45 (c)(1) required Respondents to "take reasonable steps to avoid imposing undue burden or expense on a person subject to [a] subpoena" and the trial court abused its discretion in granting Appellants' motion to compel.

For example, the subpoenas demanded at Appx. I, p. 28 that the non-party witnesses produce:

> 2. All correspondence, memoranda, articles, notes, reports, e-mails or other computer messages ....that you have received from or sent to any person, including attorneys, relating to this case and to any opinions rendered to the Plaintiff, Plaintiff's counsel or other representatives in this case.

This case involves claims of widespread and systemic abuse and neglect of DDSN clients lasting decades and claims that Butkus and Lacy knew of and were consciously indifferent to those violations of DDSN clients' constitutional rights, not just the rights of Edward Mims. Responding to this question would require former Commissioner McPherson not only to attempt to locate and review records from her unpaid public service as a Commisioner of DDSN (2010 to 2014), but also to search for records from her brief stint as a member of the Babcock Center Board (2002) during the period of the CMS and DHEC investigations at Babcock facilities before this lawsuit was filed, as well as records from her 6 ½ years as an employee of DDSN. Appx. I at p. 78. Responding to those subpoenas would require former Commissioners McPherson and Bagnal to locate, review and provide emails and other records related to audits and investigations related to abuse, neglect, exploitation and misuse of funding related to DDSN programs which were conducted by DHHS (2003, 2006) CMS (2005), USC (2008) the Legislative Audit Council (2008), Protection & Advocacy (2005) and the U.S.D.H.H.S. Office of Inspector General (2010, reviewing cost reports from prior years). Id. at p. 85.

Answering this question would require Commisioner Bagnal and witness Lennie Mullis to locate notes and records related to their appointments by the Probate Court in 2005, which

would require them to hire IT professionals to recover data stored in formats no longer accessible from current computer systems (if those records can be retrieved), despite affidavits stating that their reporst were provided to Respondents years ago. Id. at 85-86 and 81-83.

As the non-party witnesses informed the Court, most of these records are in the possession of DDSN and can be retrieved at less cost and burden by the agency. Appx. I at 78, paragraph 18. Respondents took the depositions of former Commissioner McPherson and former DDSN contractee, Lennie Mullis, after the second remand, yet they waited until after the close of discovery to send these abusive and burdensome "trial subpoenas," in an attempt to circumvent the discovery rules established by this Court.[3]

Respondents also demanded that these non-party witnesses produce:

> 3. Notes, memoranda or other written documentation of telephone conversations, which you have had with Plaintiff, Plaintiff's counsel, other witnesses, other experts, or any other individuals with whom you have consulted related to or regarding your opinions in this case.

Appx. I at p. 28. Responding to this question would require witnesses to search more than a dozen years of emails, many of which would require them to hire IT professionals to retrieve.

> 5. All drafts of reports and final reports, which contain your opinions in this matter, including computer drafts that are not hard copies.

Id. Responding to this question would require witnesses who were appointed by the Probate Court in 2005 to search computer records that would again, require them to hire IT professionals to retrieve. Respondents demanded that these non-party witnesses produce:

> 7 A complete list of any and all documents including all articles, treatises, texts, technical bulletins, professional guidelines, periodicals or papers which support your findings, conclusions, opinions, or testimony or that you rely on as a basis for your findings, conclusions, opinions or testimony. For every text or periodical cited, please denote the

[3] Attorney Plyler, who is no longer employed by the firm representing the DDSN, argued that "Subpoenas are not governed by the Discovery deadlines..." Appx. I at page 67.

chapter and page where the information is located that supports your opinion.

Id. Witnesses McPherson, Bagnal and Mullis have each worked in the disability field for more than three decades. Requiring them to produce all sources of the opinions they might offer by "chapter and page" would require weeks, if not months to respond to this question. Appx. I, p. 78-79 at paragraphs 20-21, p. 82-83 at paragraphs 14, 16, 17, 19, 24, 25, 26, p. 85-86 at paragraphs 7, 9, 10, 12, 13. In addition, Respondents' subpoenas sought:

9. A complete list of literature that you have reviewed that provided you with information upon which you rely upon for your opinion in this case.

See response to #7. Further, Respondents demanded:

11. A complete list of any and all documents including, but not limited to, letters, notes, reviewers comments, that in any way assess, review, evaluate, critique or criticize any of your published or unpublished studies, research, reports or other works.

Id. Again, McPherson and Mullis are non-party witnesses who have worked in the DDSN system for more than 30 years. As Mullis states in her affidavit, all of her service notes and billing records for services provided to Mims are in the possession of DDSN. Appx. I at 81, paragraph 3. DDSN terminated Mullis' certification to work as a behavior support provider two times after she advocated for clients and response to this question regarding criticism of her work would require her to locate and produce computer records from more than a decade ago - records which are in the possession of DDSN.[4] Id. at paragraphs 3-9. Bagnal served on the governing board of the DDSN Commission for four of the years covered by this lawsuit, and she was appointed by the Probate Court as a Visitor in Mims' guardianship case before being appointed by Governor Sanford to the governing board of DDSN. During the first ten years of this litigation, DDSN did

[4] Both times DDSN terminated Mullis' certification, the South Carolina Administrative Law Court ruled that DDSN's actions were arbitrary and capricious and in violation of her due process rights.

not take any of these witnesses' depositions.

Respondents demanded that these non-witnesses provide a schedule identifying when documents that may relate to the issues in this case were destroyed or transferred:

13. If any of the documents or items requested above have been destroyed please produce a schedule identifying: a. each such document or item destroyed; b. the date of destruction; c.the reason for destruction; and d.the person(s) or entity(ies) that might have the item or a copy of the document(s) destroyed.

14. If any of the documents or items requested above are no longer in your possession and have been transmitted, conveyed or tendered to another person or entity, please produce a schedule identifying: a. each such document or item; b. the ate of each such conveyance, transmittal or tender; c. the name(s) of each such person(s) or entity(is) to which the document or item was transmitted, conveyed or tendered; and d. the reason for each such conveyance, transmittal or tender.

Appx. I at 29. Respondents have known the identity of these non-party witnesses since before the first appeal to this Court, yet, they never put them on notice to preserve this evidence. The subpoenas require Respondents to produce:

17. Time sheets or other records which will show the amount of time devoted to all aspects of your work on this matter and which identifies the nature of the work done and the dates on which such work was performed.

As Mullis stated in her affidavit, her timesheets and notes for behavioral support services provided to Mims are in the possession of DDSN. Reconstructing those more than a deccade and several computer systems later would be burdensome. Respondents sought:

18. All statements which have been sent to Plaintiff or Plaintiff's counsel for services rendered and for costs incurred in connection with your work on this matter.

DDSN paid all bills submitted for Mims' behavior support services. The only statements submitted to Plaintiff or Plaintiffs' counsel for services rendered to date would have been those associated with the Probate Court appointments of Mullis and Bagnal in 2005.

20. A list of all cases in which you have been retained, given depositions, or provided trial testimony in the last five (5) years, including the name of the person for firm who retained you, whether Plaintiff or Defendant, the attorneys you worked with, the subject

matter of the lawsuit, summary of your opinion, your area of testimony, the outcome of the case and your fee for the case. Included in this response should be your role in the litigation, i.e., consultation, testimony by deposition or testimony at trial, etc.

Mullis and Bagnal provide social services which sometimes require them to testify in either the Probate Court or the Family Court. McPherson, Bagnal and Mullis have all given depositions in various cases not involving Mims. McPhersons' depositions are in the possession of DDSN. Appellants made the reasonable request to Respondents to make financial arrangements to pay for the production of these documents (many of which were provided in response to Respondents' request for production to Appellant), which were either ignored or denied. The subpoenas require non-party witnesses to provide:

21. A complete list of each article, pamphlet, book, book chapter, or other document upon which you have read and determined does not support any of the expert opinions you have in this case.

Appx. I at p. 29. This question would require non-party witnesses, without compensation, to locate, review and produce reports already in the possession of DDSN and to attempt to locate any opinion opposing their own. The subpoenas require these non-party witnesses to:

23. Provide the fee agreement for this case and for any other cases where you were named as an expert by Attorney Patricia Harrison.

Appx. I at 29. Over the course of counsel's thirty years of practicing probate law, the probate court has periodically appointed either Mulllis or Bagnal to file reports with the court as Examiners or Visitors in guardianship and conservatorship proceedings at the request of counsel. In some cases, the court order set and approved their fees in matters totally unrelated to Mims'. Requiring these non-party witnesses to produce these records, without compensation would be burdensome. The records of their appointments would be on file in either the Richland or Lexington probate courts. But, it would be burdensome to require them to go through three decades of records to locate fee requests, which normally did not exceed several hundred dollars.

Appellants provided Respondents with a 32 page response to their Interrogatories on October 17, 2018. This Response identified every expert, except the substituted RN, who agreed to testify after RN Hoover terminated her RN license after the sudden death of her son. Appx. II at 276-305.

On March 7, 2019, Appellants supplemented their response to Respondents' interrogatories. Respondents' arguments on pages 4-5 of their Return, that Appellants were responsible for discovery delays, is contradicted by the Court's order of March 22 which states on page 21 of Appx. I:

> Defendants have noticed over a dozen depositions since December and the Plaintiff has supplemented discovery responses at the request of the Defendants. Both parties need to take a number of additional depositions before mediation is scheduled. *The parties have in good faith attempted to comply with this Court's scheduling Orders but have been unable to complete them in a timely fashion.* (Emphasis added.)

This court order negates the unsubstantiated claims of Respondents that delay has resulted from Petitioner's dilatory actions.

On May 28, 2019, Respondents requested additional information, asking that the requested supplemental information be provided by May 31. Appx. II at 260. That information was provided on Friday, May 31, 2019, as requested - on the date set by Respondents. When Appellant's counsel agreed to allow Respondents to depose experts not previously deposed, so long as taking their depositions would not delay mediation and, upon the simple and reasonable condition that Respondents make financial arrangements to be the fees and costs of the expert witnesses.[5] Appx.II at 65.

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[5] Respondents acknowledge receipt of the second supplement on May 31, 2019, which was referred to in the email of Appellant's counsel on May 31 as the supplement "you recently requested." Appx. I at 65.

Prior to the receipt of the information Respondents requested to be provided by May 31, on May 30, 2019, Respondents filed a motion to compel. Return at 5.

Respondents offer no evidence in support their argument at page 6 of their Return that Appellants "often resisted" their taking the depositions of witnesses.[6] The record contains communications of Appellant's counsel offering to allow Respondents to take the depositions of those experts who were not previously deposed after the deadline for diiscovery. Appx. I at 65. See also Appx. I at 70 dated June 13, 2019: "Ken and Daniel, I've not heard from you regarding making arrangements for payment of expert witness fees. We'll be filing a motion to quash and would like to schedule a meting to discuss this issue."

Respondents' argument on page 7 of their Return is simply not true, that "Plaintiff's counsel also declined to consent to any extension of the discovery period." Appellants acted reasonably in agreeing to produce the experts that Respondents had failed for more than a decade to depose, allowing their depositions to be taken after the third extended deadline for discovery. Appx. I at 65. All but one of those witnesses had been identified prior to Mims' first appeal.

Petitioner filed a motion for a protective order and other relief on June 17, 2019, providing affidavits containing objections of the non-party witnesses. Appx. I at 56-70. On July 8, 2019, Petitioner filed a supplement to their motion for a protective order and other relief, providing a second set of affidavits. Appx. 72-86. The trial judge failed to include any findings of fact or conclusions of law in its order denying Appellant's motion for protection and granting Respondents' motion to compel. Appx. I at 88-90. The order failed to mention or rule upon Rule

[6] In response to Respondents' argument on page 6, some of the witnesses first identified prior to the first appeal to this Court could not be located by either Appellant's counsel or Respondents' counsel, and one witness, a former employee of the Babcock Center did not appear. Appellants cannot be faulted for those circumstances.

45's mandate regarding obtaining discovery from non-party witnesses and it failed to address the issue of making financial arrangements to pay costs before expert witnesses may be deposed.

Without any analysis of the applicable law or regulations, the Court simply denied Petitioner's motion to require a DDSN official to attend the mediation in this case.[7] As Respondents note on page 9 of their Return, the trial judge also quickly denied Petitioner's motion to reconsider on September 5, 2019, extending the deadline for discovery further, again, without addressing the objections of the non-party witnesses. Appx. I at 390.

REPLY TO RESPONDENTS' ARGUMENTS

Issue 1. Appellants Sought Review in the Trial Court and the Court of Appeals

Respondents seem to argue on page 10-12 of their Return that Appellant failed to raise the issue of the relationship between Respondents' counsel and its client, DDSN. But, in the trial court Appellants sought an order requiring the Chairperson of DDSN to attend the mediation conference, citing violation of ADR Rule 6(2), which requires:

> All individual parties; or ...in the case of a governmental agency, a representative of that agency with full authority to negotiate on behalf of the agency and recommend a settlement to the appropriate decision-making body of the agency.

Appx. I at 61-62. Appellant complained that: "The practice of Defendants' counsel has been to have counsel and only a representative of the Insurance Reserve Fund attend the mediation." Appx. I at 62. Appellant further complained that: "In the past, DDSN Commissioners (the governing board of DDSN) have not even been informed prior to mediation conferences or given the opportunity to attend." Id. This claim is substantiated by the Affidavit of former Commissioner Deborah McPherson at Appx. I, page 77. McPherson stated in her sworn affidavit

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[7] Respondent misstates the position of Appellant's counsel described at footnote 6. Suffice it to say that the trial court's order was not a consent order and that the record does not substantiate that claim.

that "It is common knowledge in the disability community in South Carolina that this law firm will drag out cases and try to starve out plaintiffs by driving up litigation costs and delaying trials, forcing families to give up or to settle for less than the case is worth." Id. at 77-78.

In Appellant's motion to reconsider filed in the trial court, the Estate sought review of Respondents' practice of DDSN's counsel failing to communicate with their client, i.e. the governing board of DDSN, and the failure of any member of the DDNS Commission to attend mediation. Appx. I at 99. Appellant's motion to reconsider states that: "Plaintiffs believe that this Rule demonstrates that **both** the IRF and a representative of DDSN must attend the mediation...The order did not address the issue raised by the Plaintifffs that, historically, DDSN Commisioners have not even been informed prior to mediation conferences or given the opportunity to attend." Id. at 100. (Referencing the affidavit of former Commissioner McPherson, which states that: "As a Commissioner of DDSN, we were never allowed to vote on whether to continue litigation or settle cases and when we attempted to obtain information about cases, we were instructed that we were interfering with management." Id. at 100.

In the Court of Appeals, Appellant sought relief from the same continuing practice of counsel for DDSN failing to communicate with and take direction from its client, the governing board of DDSN. Appx.I at pp. 6,7, and 10. ("After these subpoenas were served ...three then current DDSN Commissioners tendered their resignations, leaving the agency without a quorum to conduct business...Critical issues not only related to this lawsuit, but those affecting thousands of families and providers are at issue here." Id. at 6). See also Appx. I at 7:

> This Court may take judicial notice, pursuant to Rule 201, SCRE of minutes from DDSN Commission meetings in 2-19 which document that the governing board has not at any time during the year gone into executive session to discuss legal matters." Id. at 7. Thus, it appears that the subpoenas were issued without authorization from the governing board of DDSN, and that Respondents' motion to dismiss was filed by counsel without authorization from that board.

Not only is counsel required by the ADR rules to communicate with and have its client, DDSN, participate in mediation, but state Regulations promulgated by the Budget and Control Board (now transferred to the Department of Administration under the Governor's Office) provides at S.C.Reg. Ann. 19-415.1:

> Authority for Tort Liability Insurance—Information Service.
>
> The State Budget and Control Board, through the Office of General Services, is authorized to provide insurance for personnel employed by the State, its departments, agencies, institutions, commissions or boards, so as to protect such personnel against tort liability arising in the course of their employment.

That regulation defines the "Insured:" as including "Employees including elective or appointive executive officers or members of the board of trustees, directors or governors of public bodies of the State of South Carolina (or any subdivision thereof) to whom a certificate of insurance has been issued S.C. Reg. Ann. 19-415-1(I), titled "Insuring Agreements" provides that:

> The Fund will pay on *behalf of the insured* all sums which the insured shall become legally obligated to pay as damages because of personal injury or property damage to which this policy applies, caused by an occurrence or event, and the *Fund shall have the right and duty to defend any suit against the insured seeking damages on account of such personal injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the Fund shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the Fund's liability has been exhausted by payment of judgments or settlements. (Emphasis added.)*

S.C. Reg. Ann. 19-415-IV B. states that the Insurance Reserve Fund provides insurance coverage under the following conditions:

> (1) in the event of an occurrence or event, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the Fund or any of its authorized agents as soon as practicable.
> (2) if claim is made or suit is brought against the insured, the insured shall immediately forward to the Fund every demand, notice, summons or other process received by him or his representative.
> (3) the insured shall cooperate with the Fund and, upon the Fund's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or

> indemnity against any person or organization who may be liable to the insured because of injury or damage with respect to which insurance is afforded under this policy; **and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses**. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident.

These regulations clearly demonstrate that the relationship between DDSN and the Insurance Reserve Fund is the same as that between an insurance company and an insured person or organization. Paragraph (3) above clearly requires the parties insured by the Fund, i.e. Butkus, Lacy and DDSN to "attend hearings and trials" and to assist in securing and giving evidence and obtaining the attendance of witnesses.[8] This issue will be more fully addressed in Appellant's Reply to the Rule 245 Returns filed by the DDSN Respondents and the Office of the Governor.

For the reasons set forth above and those that will be presented in that Reply, this Court should grant the Estate's Petition for a writ of certiorari and reverse the decision of the trial court.

Issue 2. This is one of those "rare as hen's teeth" cases where the Court should review an interlocutory order.

On page 11 of their Return, Respondents argue that this case is about nothing but "routine subpoenas" which is indistinguishable from *In Ex parte Whetstone*, 289 S.C. 580, 581 (1986). In that case, in 1986, this Court established the rule that:

> A non-party suffers no legal injury when he is ordered to participate in discovery. The necessary legal injury does not arise until he is held in contempt. 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.

However, six years later, in *State v. Register (in Re Doe),* 308 S.C. 534 (1992), this Court

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[8] Finally, S.C. Reg. Ann. 19-445.2025, titled "Authority to Contract for Certain Services" provides: "D. Legal Services. Prior to the award of any state contract for the services of attorneys, approval for such services shall be obtained by the governmental body from the State Attorney General." One of the questions posed by Appellant's Original Jurisdiction action is what "governmental body" must obtain approval for legal services from the Attorney General? The contract limit for the director of DDSN is $200,000, thus, if DDSN's approval must be provided to contract for legal services, approval must be obtained by the governing board of the agency, i.e. the Commissioners of DDSN. Former Commissioner McPherson's affidavit documents that this was never done.

vacated an interlocutory discovery order where the Appellant's non-party girlfriend sought review of the trial court's decision granting the prosecution's motion to require her to produce a sample of her hair and blood. This Court noted that "*Ordinarily,* this type of order is not directly appealable," citing *Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881 (1986), but it established an exception to the general rule because it was "dealing with a novel issue and the rights of a minor." (Emphasis added.) This case likewise presents such an exceptional case, one that deals not only with a novel issue, but also the rights of a vulnerable adult, and a decision that will affect the rights of thousands of citizens of South Carolina who are served by DDSN.

In that case, this Court directed the trial court on remand to require the prosecution to demonstrate: (1) a clear indication that material evidence relevant to the question of the suspect's guilt will be found, and (2) that the method used to secure this evidence is safe and reliable. Only if those tests were met, this Court directed, after balancing the "need for the evidence against the intrusion on the girlfriend" should the Court order the non-party to comply.

The following year, in *McGee v. Bruce Hosp. Sys.*, 312 S.C. 58 (1993), this Court again reviewed interlocutory discovery order. The Defendant hospital appealed from the trial court's order granting the plaintiff personal representative's motion to compel, ordering the hospital to produce the credentialing files and clinical privileges for each defendant physician. In that interlocutory appeal, this court found "that the public interest in candid professional peer review proceedings should prevail over the litigant's need for information from the most convenient source." Id. at 62.

The next year, in *Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238 (1994), the Appellant, a consumer advocate, sought review of a decision of a trial court order that denied appellant's motion for a continuance of a rate hearing and appellant's motion to compel contract information

from the respondent. Appellant had served interrogatories on the company, which objected to the production of the documents in an interlocutory appeal. Although this Court did not overturn the decision of the trial court in that case, it established the rule that "The person requesting protection from the court or commission must initially show good cause by alleging a particularized harm which will result if the challenged discovery is had." 4 JAMES W. MOORE, ET.AL., MOORE'S FEDERAL PRACTICE P 26.75 (2nd ed. 1993). The burden then shifts to the party seeking to compel production. In discussing that standard, this Court ruled that:

> Once the party seeking the protective order has met its burden of showing good cause by alleging a particularized harm, *the party seeking the discovery must come forward and show that the information sought "is both relevant and necessary to the case. When both parties meet their burden of proof, the court must weigh the opposing factors."*

Id. at 241-242. The trial court in this case clearly failed to apply this Court's burden-shifting rule after the non-party witnesses (who are entitled to more protection than a party under S.C.R.C.P. 45(c)) met their burden by providing affidavits describing particularized harms. Appx. I at pp. 76-86. The trial court here abused its discretion by failing to require Respondents to come forward and meet their burden of proving that the information sought "is both relevant and necessary to the case." The trial court clearly abused its discretion by failing to require such a showing and failing to weigh the opposing factors, as required by this Court in *Hamm.*

Nine years later, in *Hagood v. Sommerville,* 362 S.C. 191 (2005), the Petitioner bicyclist appealed an interlocutory order of the circuit court which required him to either get a new expert or get new counsel. The trial court determined that because the expert was employed by the bicyclist's attorney as a professional investigator and accident reconstruction expert, that expert witness could not testify. This Court considered the issue of whether the interlocutory order was immediately appealable. The trial court had given the bicyclist only two options:

(1) do not use the expert as a witness, but find another expert witness and proceed to trial

> with his attorney or (2) the attorney had to withdraw due to the disqualification, and the bicyclist could retain new counsel, and use the expert witness at trial. The bicyclist's attorney withdrew.

Id. The bicyclist in that case argued the trial court's order was immediately appealable under S.C. Code Ann. § 14-3-330(2) (1976) because it affected a substantial right, namely, i.e. the right to proceed with a lawyer of his choosing.

This Court held that not only was the bicyclist's order immediately appealable, but it had to be immediately appealed in order to preserve the error. Id. In this case, Mims' Estate, which, like most persons who have disabilities and the estates of those persons, has limited resources, unlike the state with its seemingly unlimited litigation budget. Not only will the Estate be forced to find other expert witnesses if the trial court's order is not reversed by this Court, but other knowledgeable advocates with knowledge of systemic abuse, neglect and exploitation in the DDSN system will be chilled from testifying or serving as Commissioners. The decision of the trial court affected a substantial right of Appellant to present these witnesses

For the reasons set forth above and those that will be presented in Appellant's Reply to Respondents' Rule 245 Return, the Court should grant Petitioner's *writ of certiorari,* or grant a common law *writ of certiorari,* as it did in the *Oncology & Hematology Asso. v. SCDHEC* case. 387 S.C. 380 (2010).

Respectfully submitted,

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Cleveland, South Carolina June 9, 2020