

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

Case No. 2011-CP-07-2654

Appeal No. 2011-199666

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MAR 11 2013

SC Court of Appeals

Janet Sue Scheerle.....Respondent,

v.

Brookdale Senior Living, Inc. and Southern Assisted Living, LLC.....Appellants,

and

Sonia S. King.....Defendant.

**RESPONDENT'S MOTION TO DISMISS APPELLANTS' NOTICE OF APPEAL
DATED FEBRUARY 19, 2013 AND REQUEST FOR SANCTIONS**

Janet Sue Scheerle ("Respondent") moves this court for an order dismissing the February 19, 2013 Notice of Appeal of Brookdale Senior Living, Inc., and Southern Assisted Living, LLC's ("Appellants") concerning a discovery order. An appeal cannot be taken from a discovery order, the Notice of Appeal is procedurally improper and the Notice of Appeal is untimely. Respondent requests that sanctions be awarded because the Notice of Appeal is frivolous on its face, is contrary to the Rules, and appears to be interposed for improper purposes of further delay and harassment.

This case arises from the severe physical and verbal abuse Respondent suffered while a resident at Appellants' assisted living facility on Hilton Head Island, South Carolina.

Respondent subsequently died on February 13, 2013, during the pendency of this case. Appellants first filed an appeal on September 7, 2012 from an order denying Appellants' Motion to Reconsider the circuit court's order denying Defendants' Motion to Dismiss and Motion to Compel Arbitration. On January 16, 2013, this Court issued an order consolidating that appeal with those of two other victims of abuse at Appellants' facility, *Elizabeth O'Meara, Yvonne Carrie Pruett, and Janet Sue Scheerle v. Brookdale Senior Living, Inc., Southern Assisted Living, LLC, and Sonia S. King*, Appellate Case No. 2011-199666. Appellants now attempt to file another appeal within the same consolidated case on an interlocutory order which is clearly not immediately appealable, is procedurally improper, and is untimely. This appeal should be dismissed and sanctions awarded.

A. The Discovery Order is Interlocutory and Thus Not Immediately Appealable.

The first sentence of Appellants' February 19, 2013 Notice of Appeal evidences the fact that the order appealed from is not immediately appealable because it is a discovery order. Appellants state: "This is an appeal to a *discovery order*" It is a well established rule that an order compelling discovery is not immediately appealable. *See Ex parte Wilson*, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005) ("We have previously held an order denying or compelling pretrial discovery is not directly appealable since it is an intermediate or interlocutory decision."); *Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994) ("Discovery orders, however, are interlocutory and are not immediately appealable."). The order Appellants now attempt to appeal from is an interlocutory order of the circuit court compelling Appellants to produce documents. At a hearing on Respondent's motion for sanctions for Appellants' failure to comply with the order, Appellants' counsel admitted to the circuit court that its discovery

order was not immediately appealable, without a contempt finding, and it is undisputed that the circuit court did not hold Appellants in contempt.

The Court: So this has to do with my in-camera review of the documents of the internal investigation. Let me ask you: Can you just not directly appeal my decision to turn it over? I guess I'm just questioning. I don't think you can.

Mr. Manos [Appellants' counsel]: That's correct, Your Honor. We don't believe we can either. And unfortunately the common route for doing this is to be held in contempt on a Rule 37 motion.

(Transcript dated January 23, 2003, 2:22-3:5, attached as Exhibit A). By Appellants' own admission, the discovery order is not immediately appealable. Nevertheless, Appellants now file a Notice of Appeal. Respondent requests this Court dismiss Appellants' Notice of Appeal dated February 19, 2013 and award sanctions for a frivolous appeal.

B. The Notice of Appeal is Procedurally Improper.

Appellants' February 19, 2013 Notice of Appeal is also procedurally improper. The Notice of Appeal purports to add this interlocutory discovery issue to a pending appeal by captioning the Notice of Appeal under "Appeal 2011-199666," the consolidated appellate case number for the three appeals from the circuit court's orders denying Appellants' motions to dismiss and compel arbitration. Rule 201, SCACR, specifies that an "[a]ppel may be taken, as provided by law, from any final judgment, appealable order or decision." The words "judgment," "order," and "decision" are singular. Appellants cannot appeal two orders issued at two different times on two different matters in the same appeal. An appeal is taken from a *single* order. Appellants have not sought to amend their original Notice of Appeal, rather, Appellants have simply filed an additional Notice of Appeal, attempting to add a new interlocutory order to

an existing appeal taken from a different order. This tactic is clearly not allowed under the Rules. This appeal should be dismissed and sanctions awarded.¹

C. The Notice of Appeal is Untimely.

Appellants admit in their Notice of Appeal dated February 19, 2013, that on January 17, 2013, they received a copy of the circuit court's written order denying their motion to reconsider. Under Rule 203(b)(1), SCACR, Appellants did not serve the Notice of Appeal on Respondent within thirty days. Therefore, the Notice of Appeal is untimely and must be dismissed.

In addition, Appellants attempt to appeal the circuit court's discovery order requiring the production of documents in addition to internal investigation documents is even more egregiously untimely. The September 19, 2012 order required Appellants to produce numerous documents in addition to the internal investigation documents. After the circuit court undertook an *in camera* review of the internal investigation documents and ordered their production, Appellants filed a motion "to reconsider or alter or amend its Order compelling Defendants to produce the internal investigation files." (emphasis added). Appellants did not file a motion to reconsider as to any other documents and Appellants did not serve a Notice of Appeal on Respondent within 30 days of the September 19, 2012 order. Therefore, the February 19, 2013 Notice of Appeal as to those documents violates the Rules by more than four months and must be dismissed.

D. Request for Sanctions

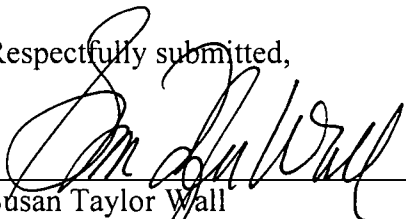
Respondent moves this Court for an order imposing sanctions against Appellants due to the frivolous nature of this February 19, 2013 Notice of Appeal. Pursuant to Rule 269, SCACR:

¹ To clarify the record, Respondent moves this Court for an order striking any matter in the Record on Appeal or Appellants' Brief in the consolidated cases, under Appellate Case number 2011-199666, that references or relates to this Notice of Appeal dated February 19, 2013 and the circuit court's Order of September 19, 2012 compelling Appellants' to respond to discovery.

Where an appeal . . . is frivolous or taken solely for the purpose of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.

The February 19, 2013 Notice of Appeal is blatantly not in compliance with the Rules and appears to be filed in an attempt to delay resolution on the merits of this case and to harass Respondent. Appellants have admitted to the circuit court that the discovery order was not immediately appealable yet they nevertheless filed this Notice of Appeal. The Notice of Appeal is also untimely and not procedurally permitted under the Rules. As a result of this frivolous appeal, Respondent has been forced to expend attorney's fees and costs in response. Respondent respectfully requests that sanctions be awarded and the Notice of Appeal be dismissed forthwith.

Respectfully submitted,



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March 7, 2013

Charleston, South Carolina

1 STATE OF SOUTH CAROLINA

2 COUNTY OF BEAUFORT

CIRCUIT COURT
2011-CP-07-02654

3

4

5 JANET SUE SCHEERLE,
Plaintiff,

6 -vs-

TRANSCRIPT OF RECORD

7 BROOKDALE SENIOR LIVING, INC,
8 SOUTHERN ASSISTED LIVING, LLC,
and SONIA S. KING,
9 Defendant.

10 Heard on Wednesday, January 23, 2013

11 Beaufort, South Carolina

12

13 BEFORE:

14 THE HONORABLE CARMEN TEVIS MULLEN

15

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17 APPEARANCES:

18

Counsel on Behalf of the Plaintiff:
19 Kelly M. Jolley, Esq.
Kathleen Chewing, Esq.

20 Counsel on Behalf of the Defendant:
21 Marcus A. Manos, Esq.
Manton M. Grier, Jr., Esq.

22

23

Cheri L. Young, RPR
Circuit Court Reporter
P O Box 5232
Aiken, SC 29803-5232-1154

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1 ON WEDNESDAY, JANUARY 23, 2013 AT 10:13 A.M.:

2 THE COURT: Janet Scheerle versus Brookdale Senior
3 Living. I see y'all up there. Come on down. I think
4 y'all are it for our ten o'clock. We don't have a whole



5 lot of room in here, but we'll be close. Y'all, what
6 motion are we hearing on this?

7 MS. JOLLEY: Your Honor, two motions of the
8 Plaintiff. Petition for rule to show cause and a motion
9 for sanctions under Rule 37.

10 THE COURT: Okay. I'm looking. I apologize.

11 MS. JOLLEY: Sure. No, no, no, that's fine.

12 THE COURT: I do not see, actually, the motion filed
13 in the file, but it doesn't mean it's not buried
14 somewhere. It may not have hit the file yet.

15 MS. JOLLEY: Do you want me to hand it up?

16 THE COURT: If you don't mind, that would be great.

17 MS. JOLLEY: Manton, have you given Judge Mullen a
18 copy?

19 MR. GRIER: No, Judge Mullen, may I approach?

20 THE COURT: Please.

21 (Documents handed to the Judge.)

22 THE COURT: So this has to do with my in-camera review
23 of the documents of the internal investigation. Let me
24 ask you: Can you just not directly appeal my decision to
25 turn it over? I guess I'm just questioning. I don't

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1 think you can.

2 MR. MANOS: That's correct, Your Honor. We don't
3 believe we can either. And unfortunately the common route
4 for doing this is to be held in contempt on a Rule 37
5 motion.

6 THE COURT: Okay.

7 MR. MANOS: Much as I'm not looking forward to that,
8 but it's a difficult decision for my client. Being a
9 national assisted living chain, they are faced with

10 investigations in anticipation of litigation on a regular
11 basis. They have a way they conduct them that, up till
12 this point, has generally found that what they don't turn
13 over to the regulators is privileged.

14 And now they've got a holding going the other way. And
15 they're struggling, with what will the sanction be, how
16 severe. You know, if we give it up we've waived it
17 haven't we, oh boy. And honestly that's the struggle.
18 That's what's happening.

19 THE COURT: I understand and I appreciate that.

20 MS. JOLLEY: Thank you, Your Honor. He's exactly
21 right. It's the in-camera documents. You actually still
22 have them in camera because we asked that you please
23 retain a copy.

24 we would of course be happy to drop both motions if
25 they, the defense would consent to handing us the

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1 documents or to having you release them to us. However in
2 this case it's clear they're willfully not obeying the
3 Court's order.

4 They have -- in fact, they did file a motion for
5 reconsideration which of course the Court denied and it
6 was filed, I believe you denied it on the 14th and it was
7 filed with clerk's office on the 17th.

8 At this point I am not in any way accusing any of the
9 counsel of bad faith but it's clear their client is
10 intentionally refusing to hand over these documents that
11 the Court has ordered -- ruled they're not privileged.

12 It's also clear because these are internal
13 investigation documents about the very matters in our
14 case, that they are crucial to our case and that we should

15 have them.

16 I'm sure based on the memo that we've just received
17 this morning that they're going to argue that this matter
18 should be stayed, however you may recall our motion to
19 compel was heard the same day as their second motion to
20 dismiss this case or motion to stay.

21 You denied their motion to stay the same time you
22 granted our motion to compel and in that motion
23 granting -- or that order granting our motion to compel
24 you required them giving documents for an in-camera
25 review. So that order was already in place before they

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1 appealed this case. That appeal does not stay this
2 motion.

3 THE COURT: Okay.

4 MS. JOLLEY: In fact, an appeal in any case only ever
5 stays the matter on appeal and the issues on appeal are
6 whether or not this case should have been compelled to go
7 to arbitration or dismissed. It doesn't have anything to
8 do with discovery.

9 Like Mr. Manos just said, unfortunately for them an
10 interlocutory appeal as to discovery order is not directly
11 appealable. Frankly I understand that we'll get an order
12 for sanctions, we'll get an order for contempt and they're
13 going to appeal it. And it's just going to be delayed
14 further. I mean, the case has already been going on for
15 over a year.

16 However, I would just respectfully request that the
17 Court make that delay worth our while given that we have
18 asked for these documents. They should come to the
19 Plaintiff and they're just, frankly, the corporate

20 defendant refusing to hand over documents regarding their
21 investigation of abuse into a woman who they know their
22 employee abused.

23 THE COURT: Okay.

24 MS. JOLLEY: The standard, Your Honor, I'm sure you
25 know this, is just a show of bad faith, willful

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1 disobedience or gross indifference. And I think all of
2 those are present in a corporate defendant refusing to
3 hand over documents that have been ruled by the Court to
4 be not privileged.

5 THE COURT: What are you asking for as far as
6 sanctions?

7 MS. JOLLEY: We proposed three in our motion. One was
8 an order rendering a default judgment against the
9 Defendants leaving only the issue of damages.

10 Another was an order deeming all the Plaintiff's
11 allegations in the complaint admitted. We can't --
12 normally I would request that you strike the answer, but
13 they never answered because they tried to dismiss it. And
14 an order refusing to allow the Defendants to oppose
15 Plaintiff's negligence claims. I know which one I would
16 prefer, however.

17 THE COURT: Which one would you prefer obviously?

18 MS. JOLLEY: I'd prefer a default judgment against the
19 Defendants leaving only the issue of damages, or an
20 order -- well, actually, it might just be simpler for an
21 order deeming all of the Plaintiff's allegations against
22 these two corporate Defendants to be admitted.

23 There is a third Defendant in the case who was their
24 employee who's never appeared and is in default, but...

25 THE COURT: Okay. Let me ask you this: Ms. Jolley,

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1 would you all be comfortable with me just speaking with
2 them privately?

3 MS. JOLLEY: Certainly.

4 THE COURT: Are you okay with that? And I'm not going
5 to talk about anything. The only reason why I don't want
6 you necessarily in their presence is that obviously I know
7 what's in documents as do they. And you don't know at
8 this point.

9 And if you're comfortable with that, I do want to
10 speak with them. If you're fine with that. If you're
11 not, I totally understand and if you would prefer me not
12 to, I am --

13 MS. JOLLEY: I trust you, Your Honor.

14 THE COURT: Okay. I just want to -- obviously I know
15 it's not lawyers and I understand. I understand the
16 position they're taking and what they're doing.
17 Certainly. So if you're comfortable with that.

18 MS. JOLLEY: Yes, Your Honor.

19 THE COURT: Are you sure?

20 MS. JOLLEY: I am.

21 THE COURT: All right. We're kind of close quarters,
22 do you mind --

23 MS. JOLLEY: Do you want me to leave?

24 THE COURT: Do you mind? Yeah. That way we won't be
25 traipsing everyone through, if that's okay with you.

8

1 MS. JOLLEY: Your Honor, is this conversation off the
2 record?

3 THE COURT: Yes. Absolutely.

4 (Plaintiff's attorneys exit courtroom. Off-the-record
5 discussion from 10:21 a.m., until 10:28 a.m., when the
6 Plaintiff's attorneys returned to the courtroom and the
7 hearing resumed as follows:)

8 THE COURT: All right. Ms. Jolley, I just need one of
9 the two of you just to give me where my authority is for
10 doing these three different sanctions. And what is the
11 standard for what I can choose as far as the sanction is
12 concerned?

13 MS. JOLLEY: Sure. The standard, Your Honor, comes
14 from Karppi versus Greenville Terrazzo Company. It's 327
15 South Carolina 538 and I can hand these cases up to you.

16 THE COURT: Okay.

17 MS. JOLLEY: And then Griffin Grading and Clearing.
18 Let me just go ahead and do that.

19 THE COURT: Okay.

20 MS. JOLLEY: Well, actually, they're both cited in the
21 more recent cases, a Court of Appeals case QZO, Inc.,
22 which involves a corporate defendant.

23 And, Your Honor, the standard's kind of articulated
24 on, it starts on page three. Of course the decision
25 whether or not to impose sanctions is within your

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1 discretion as the trial judge. It can only be overturned
2 if there's a showing of an abuse of discretion using the
3 general abuse of discretion standard.

4 The general thing is when you come down here, I'm
5 looking at headnote number 14 on page four. When a party
6 fails to obey an order relating to discovery, the trial
7 court may strike that party's pleadings and enter a
8 default judgment.

9 That's Rule 37(b)(2)(c) which has been cited in those
10 cases, Griffin and Karppi that I just mentioned. And
11 frankly that rule expressly grants the trial court the
12 power to order a judgment by default for either the
13 violation of a court order or upon motion for a party's
14 failure to respond to certain discovery requests.

15 THE COURT: Can I ask you?

16 MS. JOLLEY: Sure.

17 THE COURT: What are your damages in this case? And
18 you have to remind me. And I apologize, I just don't
19 remember what the specific issue was as to Ms. Scheerle.

20 MS. JOLLEY: Mrs. Scheerle was abused by an employee
21 of Carolina House on December, I believe, 31st. And so --
22 she was a woman with Alzheimer's. Her damages thus stem
23 from actual damages from the abuse but ongoing emotional
24 damages to the fact that Ms. Scheerle can no longer be
25 touched and has really had a hard time dealing with care

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1 givers which she will always need.

2 She has been moved to another facility and her health
3 has fallen down considerably.

4 THE COURT: And do you have an expert that is going to
5 testify as to she no longer trusts or --

6 MS. JOLLEY: Yes, Your Honor. We have fact witnesses
7 and an expert that will testify in regards to that.

8 THE COURT: Okay.

9 MS. JOLLEY: Granted, we haven't gotten very far in
10 the --

11 THE COURT: Right, because you haven't done discovery
12 yet. I understand that. I just wanted to know just what
13 you were going to put up were I to grant, you know,

14 obviously and give you a default, okay.

15 And that's obviously your preference is what you
16 said. That's what you're asking for; correct?

17 MS. JOLLEY: Your Honor, either one or two. I'd be
18 happy, frankly, if you'd just deem our allegations in our
19 complaint as to these two corporate defendants admitted.
20 It's actually our amended complaint.

21 THE COURT: Amended complaint. okay. Anything else
22 you need to tell me?

23 MS. JOLLEY: I don't believe so, Your Honor.

24 THE COURT: Okay. Thank you.

25 MS. JOLLEY: Thank you.

11

1 MR. MANOS: May it please the Court, Your Honor.

2 THE COURT: Yes, sir.

3 MR. MANOS: First of all, to inform the Court of where
4 the scope of the issue is now. Part of the motion to
5 compel related to the reports actually made to the
6 regulators, the ombudsman, DHEC. Those have been produced
7 now at this point on November 19th.

8 In consulting with my client over the last week, the
9 other thing we talked about is the scope of the notes that
10 Your Honor reviewed. And as we discussed it, it -- I
11 believe the regulators would have had a right to demand
12 the notes of the interview with the eyewitness in which
13 case the anticipation of litigation preparation privilege
14 doesn't exist. And after discussing that with my client,
15 they are willing to produce Deshondra (phonetically) Young
16 interview notes.

17 THE COURT: She is the witness to the incident?

18 MR. MANOS: She actually saw Ms. Scheerle; that's

19 correct.

20 THE COURT: Okay.

21 MR. MANOS: And we really only resolved that last
22 night. I've not made that offer to the other side. I
23 don't know if that would be sufficient to resolve the
24 issue, I doubt it but...

25 MS. JOLLEY: (Shakes head.)

12

1 MR. MANOS: But my client is willing to do that, will
2 do that. I've actually got an extra copy that I'll turn
3 over today.

4 THE COURT: Okay.

5 MR. MANOS: And that kind of leads us to an overview
6 of this motion. South Carolina Rule 37 is substantially
7 identical to the federal rule. And as we looked over the
8 years at the sanction law from federal and state courts,
9 one of the things was the severity of the sanctions.

10 Certainly discovery orders get disobeyed. The
11 ultimate sanction is a default judgment or the rendering
12 of an admission of the pleadings. It's normally reserved
13 for a scoff law, someone who's absolutely not cooperated
14 in discovery.

15 The case that was just handed up to you by the
16 Plaintiffs, not only did the individual not turn over the
17 hard drive when ordered to do so but after they turned it
18 over the court found out they'd scrubbed it. They
19 actually hid the information.

20 That's not what my client's done. My client's put
21 these documents on a privilege log, has a justifiable, one
22 the court's disagreed with, but a justifiable argument
23 about privilege that reasonable parties could disagree

24 over, has put that forward and we are in the unfortunate
25 position of what the law does to the claim of privilege if

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1 my client compels that the order of privilege is waived.

2 And so my client either has to oppose the order,
3 request that this Court send a conditional appeal up,
4 which I know our courts don't like to do and our appellate
5 courts don't like you to do, or wait for a sanction order
6 and disobey it and then appeal.

7 And, in those circumstances, Your Honor, particularly
8 when there's no real prejudice to the Plaintiff and
9 despite what's being said in this argument, this case is
10 not up for trial. They don't have to make a decision
11 about expert witnesses tomorrow where this information
12 might be absolutely, you know, arguably vital to what
13 they're able to do.

14 This case is on appeal to the Court of Appeals and the
15 Defendants actually disagree with the Plaintiff's
16 characterization of whether discovery is part of that
17 appeal.

18 The agreement to arbitrate in this case provides for
19 alternative discovery to what the rules normally provide.
20 Should the Court of Appeals find that the arbitration
21 agreement is indeed binding, there will be a different
22 discovery parameter and a different discovery rule in
23 place. Thus this order actually is affected by the
24 appeal.

25 And under Rule 205 of the appellate rules, this Court

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1 loses the power, it's not a subject matter jurisdiction

2 issue, our courts have said, but loses the actual power to
3 conduct activities in this case that touch on the appeal.

4 And I think two of the best examples of that in our
5 current case law is the Arnal versus Fraser case. It's
6 641 SE 2d 419. A family court order was involved in that
7 appeal.

8 The child support portion of the order was not
9 appealed but the family court then got a motion to modify
10 child support, was going to modify it and the Court of
11 Appeals said, no, you can't change what's in the order to
12 touch on the appeal even though that particular issue's
13 not on appeal because what we do may affect what you're
14 able to do.

15 And, likewise, in Wilson V Walker, 532 SE 2nd 19, a
16 Court of Appeals' decision, there was contempt for
17 violating an order that was affected by the order on
18 appeal. And the Court of Appeals said, no, you can't do
19 that again because what we do with this other order may
20 affect what your power is here. So don't put a contempt
21 sanction on a party while this appeal is pending.

22 And while we have no South Carolina cases on point
23 about what happens when you're on appeal for arbitration,
24 there are a series of federal cases under the FAA, two
25 unreported ones we've attached to our memo, Clupper and

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1 road Builders, as well as Merrill which is 357 F Supp 2d
2 1277. And what the federal courts have generally said is,
3 we're not going to do discovery while the question of
4 arbitration is on appeal because your arbitration
5 agreement, either you don't have discovery or you have
6 limited and designed your discovery to fit your

7 arbitration. And so we're not going to give you the full
8 rights under the rules and proceed with those issues while
9 there's an appeal about whether or not this should be an
10 arbitration.

11 And the Defendants believe that is the better position
12 for the Court to be in in this situation.

13 Secondly, when you look at when the motion to sanction
14 was filed, it was six days after Your Honor entered your
15 order and immediately prior to us entering a motion to
16 reconsider. Now time has moved. Motion to reconsider has
17 been denied on the 17th and we still have not produced the
18 documents except for the limited production done and the
19 one we just agreed to do. That's true.

20 But if you look at the time when the motion was filed,
21 the order didn't set a specific deadline. It didn't tell
22 my client, do it by this date or else, which frankly would
23 be very useful for my client. One thing it lets in-house
24 counsel do is weigh. We have this issue of privilege. We
25 are concerned about as a corporation, we're concerned

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1 about these other interviews of people who didn't witness
2 this specific incident. And, you know, what are our
3 choices. What are we facing if we don't, and what happens
4 if we do.

5 And then the corporation can make an intelligent
6 decision as to, all right, are we going to buck up and
7 face that in an appeal or not.

8 THE COURT: Okay.

9 MR. MANOS: And I think if you look at Kemp V Harris,
10 it's a federal case we cited, 263 Federal Rule Decisions
11 293, one of the things the Court says there is when

12 deciding whether to sanction or the severity of the
13 sanctions, it's the reasonableness and justifiability-ness of
14 the conduct even if the Court disagrees with it of the
15 party.

16 And ultimately I think -- did I miss anything?

17 MR. GRIER: (Shakes head.)

18 MR. MANOS: Thank you very much, Your Honor.

19 THE COURT: Do you want to respond?

20 MS. JOLLEY: Yes, Your Honor, just couple of points.

21 First, I appreciate their willingness to hand over some of
22 the notes.

23 when you look at the privilege log though, most of
24 what is there involves notes. And many of those were
25 notes taken by the then-administrator of the facility who

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1 has since been fired.

2 And part of the issue we have, they're right,
3 discovery is to some extent not happening because the case
4 is on appeal. But shortly after the abuse they took this
5 investigation and then they fired several of the employees
6 who have now moved away, making it much more difficult for
7 us to locate and even know if we should because we don't
8 know what they knew. And they do.

9 The other issue is there was some discussion about the
10 arbitration agreement in this case. The arbitration
11 agreement, and you may remember this, you ruled that it
12 was unconscionable in addition to limiting because it
13 strictly limited depositions to experts and it limited the
14 damages.

15 Nothing in the arbitration agreement limited the
16 documents the Plaintiffs could request or receive. And

17 nothing in there said, oh, by the way, if you get abused
18 or hurt in our facility you can't request our internal
19 investigation documents or our internal records. That's
20 not in the arbitration agreement. Even if arbitration was
21 ordered by the Court of Appeals, it's not going to change
22 the fact that the Plaintiff should receive non-privileged
23 documents in this case.

24 THE COURT: The arbitration provision, remind me, was
25 it according to anything specific? I know it wasn't under

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1 Triple A because they're not doing nursing homes but was
2 it any specific arbitration rules?

3 MS. JOLLEY: No, it was their own.

4 THE COURT: It was their own?

5 MS. JOLLEY: Yes, Your Honor.

6 THE COURT: So it didn't limit it. And it wasn't
7 specific.

8 MS. JOLLEY: I have a copy, I think, in my bag if you
9 want it.

10 THE COURT: That's okay. You told me what I needed to
11 know.

12 MS. JOLLEY: Uh.

13 THE COURT: Okay.

14 MS. JOLLEY: I mean, that's my thing. I'm not prepared
15 unfortunately to answer the federal cases cited in their
16 memo today. Of course, we're happy to submit proposed
17 orders for your consideration.

18 THE COURT: Let me do this. I am going to tell you, I
19 have not had an opportunity. I didn't have the memos.
20 They weren't in the file and they weren't e-mailed to me.
21 So let me read both of them and let me go through the case

22 law.

23 Again, I understand your client is making these
24 decisions not to turn them over. I mean, this is many,
25 legal, financial, and everything else and I understand and

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1 appreciate that so let me go through and let me look at
2 it. I'm going to go ahead and I'm going to review the
3 documents again just for a third time, not that I'm going
4 to reconsider my motion to reconsider but I'm going to
5 look at them again. Let me go through and figure out what
6 I can do.

7 The practical purpose is so we grant a default
8 judgment, we go to a damages hearing. Non-jury? Jury? I
9 mean, what would you want to do with a damages hearing?
10 I'm just trying to figure out what it is that you would
11 prefer to do.

12 MS. JOLLEY: I think I would still want a jury trial
13 on damages, Your Honor.

14 THE COURT: I assume you would.

15 MS. JOLLEY: Yes, Your Honor. You know, and I'll be
16 honest, those were our suggestions for remedies.

17 THE COURT: Right.

18 MS. JOLLEY: I recognize that you may have had better
19 success with different remedies. And we're certainly not
20 saying we would refuse anything else. That's up to the
21 trial court.

22 THE COURT: Okay. I'm just trying to figure out what
23 would be the most effective. Truthfully one of the things
24 I asked them was, you know, obviously much of what they do
25 is a financial decision and so based on, you know, what we

1 do and the damages in this case. Okay.

2 MR. MANOS: And I will say, Your Honor, that 37(b)
3 does give you a broad range of discretion from those most
4 severe sanctions to daily fines, paying of attorney's
5 fees, et cetera.

6 THE COURT: So part of my problem, too, is that I
7 don't want to be fining people when it could be money
8 going to your client. That doesn't make sense to me. So,
9 again, --

10 MS. JOLLEY: Yes, Your Honor. That's why we didn't
11 request it; however, having been on that side before I
12 know that sometimes that's effective.

13 THE COURT: Right. Okay. And you want anything I do
14 do to give you an amount of time to let your in-house
15 counsel reconsider, either turn them over or the sanction
16 goes into effect?

17 MR. MANOS: Your Honor, that would be ideal from the
18 Defendant's perspective, if you issue the order and say
19 you got ten days or the following happens to you or
20 something along those lines. Certainly clarifies and puts
21 it all into perspective as to what the heck you're going
22 to do.

23 THE COURT: And you say your in-house counsel is from
24 Wisconsin; is that correct?

25 MR. MANOS: Yes, Your Honor.

21

1 THE COURT: Just make them come argue the appeal.

2 MR. MANOS: I was going to say years ago in Aiken
3 County Judge Peeples asked me in a similar situation, he
4 said, you do have your toothbrush, he said, I'm sorry I'd
5 send your lawyer and your corporate lawyer to jail, but if

6 I have to send somebody it's going to be you since you're
7 here.

8 (Laughter.)

9 THE COURT: No, definitely not that harsh. Let me
10 look at it. Let me read it.

11 Ms. Jolley, if you feel like you need to respond to
12 his federal cases don't brief it. If you just want to
13 just shoot an e-mail or whatever, that's fine, just make
14 sure you copy them. I don't need anything formal other
15 than, you know, this case is distinguishable because, you
16 know, just like I said. And just, you know, informal
17 memo, whatever, is fine by me but don't feel compelled to
18 do it if you don't feel it's necessary. I probably will
19 ask someone for a proposed order and I plan on getting
20 this done by the weekend, so let me go through it.

21 And when I say I'm going to ask somebody for an order
22 by probably Sunday is what I'm going to do. Okay? And in
23 all likelihood of course it's going to you, but again, I'm
24 just not sure what I'm going to do with it yet.

25 MS. JOLLEY: Yes, Your Honor.

22

1 THE COURT: But we'll go from there. Anything else
2 you guys need to tell me? Anything else you need to put
3 on the record?

4 MR. MANOS: Nothing further from the Defendants.
5 Thank you very much, Your Honor.

6 THE COURT: All right.

7 END OF CASE: 10:43 A.M.

8 CERTIFICATE OF REPORTER

9 STATE OF SOUTH CAROLINA)

10 COUNTY OF AIKEN)

11 I, Cheri L. Young, Registered Professional Reporter
12 and Official Court Reporter for the State of South
13 Carolina, Second Circuit-At Large, do hereby certify that
14 the foregoing is a true, accurate and complete transcript
15 of record of the proceedings had and evidence introduced
16 in the hearing of the captioned case, relative to appeal,
17 in the Court of Common Pleas for Beaufort County, on the
18 23rd day of January, 2013.

19 I do further certify that I am neither of kin,
20 counsel, nor interest to any party hereto.

21 I have hereunder set my hand this 5th day of March,
22 2013.

23

24

25

Cheri L. Young, RPR
Official Court Reporter

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

Case No. 2011-CP-07-2654

Appeal No. 2011-199666

RECEIVED
MAR 11 2013
SC Court of Appeals

Janet Sue Scheerle.....Respondent,

v.

Brookdale Senior Living, Inc. and Southern Assisted Living, LLC.....Appellants,

and

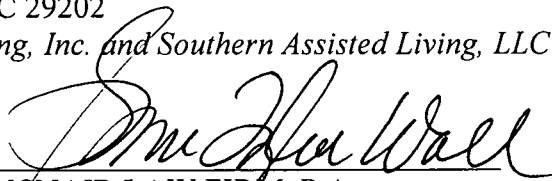
Sonia S. King.....Defendant.

PROOF OF SERVICE

The undersigned hereby certifies that on March 7, 2013, the foregoing **RESPONDENT'S MOTION TO DISMISS APPELLANTS' NOTICE OF APPEAL DATED FEBRUARY 19, 2013 AND REQUEST FOR SANCTIONS** was served on all counsel of record via U.S. Mail, postage prepaid and addressed as follows:

Marc Manos, Esq.
Manton M. Grier, Jr., Esq.
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29202

Attorneys for Appellants Brookdale Senior Living, Inc. and Southern Assisted Living, LLC



MCNAIR LAW FIRM, P.A.
100 Calhoun Street, Suite 400
Charleston, South Carolina 29401
Phone: (843) 723-7831



11

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MCNAIR
ATTORNEYS

March 7, 2013

Susan Taylor Wall

swall@mcnair.net
T (843) 723-7831
F (843) 722-3227

Via U.S. Mail

The Honorable Jenny Abbott Kitchings
Clerk of Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *Janet Sue Scheerle vs. Brookdale Senior Living, Inc., et al.*
Appeal Tracking No.: 2011-199666

Dear Ms. Kitchings:

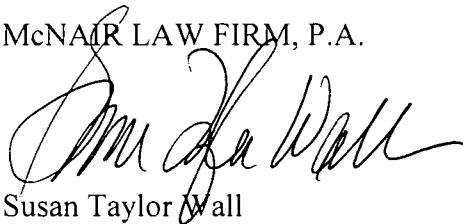
Enclosed for filing, please find the original and seven copies of Respondent's Motion to Dismiss Appellants' Notice of Appeal Dated February 19, 2013 and Request for Sanctions in the above-referenced case. I have also enclosed my office check in the amount of \$25.00 to cover the filing fee, as well as a Proof of Service. Please file these documents and return a stamp-filed copy to me in the enclosed self-addressed stamped envelope.

By copy of this letter, I am serving a copy of the same upon all counsel of record.

If you have any questions, please do not hesitate to call my office. With kind regards, I am

Very truly yours,

McNAIR LAW FIRM, P.A.



Susan Taylor Wall

STW:jh
Enclosures

cc: Manton M. Grier, Jr., Esq. (w/ Enclosures, via U.S. Mail)
Kelly M. Jolley, Esq.
Kathleen Chewing, Esq.

RECEIVED

MAR 11 2013

SC Court of Appeals

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