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Dec 29 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM MARLBORO COUNTY  
The Hon. Roger E. Henderson, Circuit Court Judge

Appellate Case No.: 2021-001420

Tiffany Provence, as Personal Representative for the  
Estate of E.P., a deceased minor,.....Plaintiff,

v.

Contract Transportation Systems Co., Hector Rodriguez,  
and D.P., a minor,.....Defendants,

And

Felisha Bailey, Individually and as Parent and Natural  
Guardian of K.B., a minor,.....Respondent,

v.

Contract Transportation Systems Co., Hector Rodriguez,  
and D.P., a minor,.....Defendants,

Of Whom Contract Transportation Systems Co. is the.....Appellant.

**PETITION FOR REHEARING**

The Appellant Contract Transportation Systems Co. (“CTS”) respectfully submits this  
Petition for Rehearing pursuant to Rule 221(a), SCACR. CTS bases this petition on the arguments  
and authorities set forth below.

## STATEMENT OF THE CASE

These cases arise from a vehicular accident that occurred near Wallace, South Carolina, on October 1, 2019. While operating a tractor-trailer owned by CTS, Hector Rodriguez was making a left turn when in a vehicle in which minors K.B. and E.P. were both passengers collided with the passenger side of the trailer. Representatives of the minors filed these lawsuits. CTS filed timely Answers and denied liability for the accident.

During discovery, the plaintiff Tiffany Provence, as Personal Representative of the Estate of E.P., served CTS with voluminous sets of interrogatories and production requests. One of the production requests sought all electronically recorded information for any truck driven by Rodriguez for three months prior to the accident and one month afterwards.<sup>1</sup> CTS initially responded to the discovery requests by providing some of the information requested and objecting to the disclosure or production of other information. In response, the plaintiff filed a motion to compel.

Following a hearing, the circuit court granted the motion, but only in part. As relevant to the current appeal, the circuit court ordered CTS to produce 90 days of electronic records pertaining to Rodriguez's operation of the tractor involved in the accident. To the extent CTS possessed additional records, CTS supplemented its discovery responses pursuant to the order. However, it should be noted that CTS did not (and does not) have all of the requested materials. CTS has previously identified to the plaintiffs the materials that were requested, but that CTS does not have and cannot possibly produce.

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<sup>1</sup> Rodriguez did not drive for CTS after the accident, which meant that no such post-accident records ever existed. In addition, during the specified time period Rodriguez did not drive any vehicles for CTS besides the one involved in the accident.

After CTS supplemented its discovery responses, counsel for the plaintiffs requested that they be allowed to inspect CTS' Safety Direct data portal for "all events, history, monitoring, data recording, video recordings, reports, coaching, analytics, safety scores, or other documentation" related to Rodriguez for a period of one year before the accident. Counsel for CTS agreed to this request, subject to certain parameters, which counsel believed were acceptable to the plaintiffs. The parties then attempted to complete the Safety Direct inspection, but various issues – primarily scheduling conflicts – prevented it from taking place.

In February 2021, the plaintiffs submitted supplemental production requests to CTS, including a request to produce a "comprehensive, full PeopleNet<sup>2</sup> report for defendant CTS or access to the data – whether through PeopleNet reporting system or access to it through a Rule 34 inspection in original format." CTS objected to the request as overly broad. Specifically, CTS argued that the request sought information related to **all** of CTS's drivers, tractors and trailers for an unlimited period of time.<sup>3</sup> Thus, it had no bearing on the specific driver and vehicle involved in the subject accident. Furthermore, information from PeopleNet (like information from Safety Direct) is purged six months after being gathered due to automatic system settings. Thus, any information CTS could produce would be no more than six months old and could not have any conceivable relevance to an accident that occurred two years before. Efforts to resolve that dispute were unsuccessful, and the plaintiffs filed a motion to compel.

Meanwhile, the parties scheduled an inspection of Safety Direct for July 21, 2021. Shortly before that date, however, counsel for the plaintiffs canceled the inspection, claiming they did not

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<sup>2</sup> PeopleNet is a software product that produces reports related to the operation of CTS's vehicles.

<sup>3</sup> At any given time, CTS has thousands of drivers and tractors, and multiple types of reports for each driver and tractor for every day the driver is working and/or the tractor is operating. None of that information or those reports could have any possible bearing on the claims and defenses in the present cases.

want to conduct it until the circuit court had ruled on the motion to compel related to the PeopleNet portal. Counsel for the plaintiffs also expressed a desire to inspect the Safety Direct and PeopleNet portals at the same time, despite being informed that this would not be feasible for numerous reasons.

During the communications regarding cancellation of the inspection, counsel for CTS again advised the plaintiffs' attorneys that both Safety Direct and PeopleNet only have six months of data available. Counsel for CTS also asked if the plaintiffs' expert had a reasonable belief that additional information could be obtained through a search method not yet tried by CTS. If so, CTS noted it would be willing to attempt that new search method in an effort to find the requested information. Counsel for the plaintiffs never provided any new search method for CTS to try.

Counsel for CTS also noted his understanding of a prior agreement on the protocol for the Safety Direct inspection. Under that agreement, the parties would conduct a split-screen inspection, in which CTS's expert would receive guidance from the plaintiffs' expert, but CTS would reserve its right to object to searches it believed were aimed at privileged information. However, counsel for the plaintiffs indicated they no longer agreed to that protocol. Counsel for CTS requested that a new protocol be proposed and discussed, to no avail.

On August 26, 2021, in another attempt to resolve the dispute without involving the court, an attorney for CTS reached out to the plaintiffs' counsel and asked what specifically the plaintiffs' expert wanted to be able to do. In response, the plaintiffs' counsel indicated for the first time that he wanted Safety Direct and PeopleNet information for more than just Rodriguez or the vehicle involved in the accident. He also wanted information related to other CTS drivers who had no connection whatsoever to the accident at issue in these cases. Counsel for CTS objected to that request and filed a motion for a protective order.

Several days later, the circuit court conducted a hearing on all pending discovery motions. Afterwards, counsel for the plaintiffs submitted a proposed order granting relief that went far beyond the discovery requests themselves and the actual relief sought in the motions and through oral arguments during the hearing. Specifically, the proposed order granted the plaintiffs unfettered access to **all** data contained within CTS's Safety Direct and PeopleNet portals, even though no discovery request for such unrestricted, all-encompassing access had ever been served. The relief sought in the proposed order would give the plaintiffs the ability to seek, find and view information and materials that are not only irrelevant to the case, but also confidential and even privileged. Nevertheless, the circuit court judge signed the proposed order as is and filed it on September 28, 2021. CTS filed a timely motion to reconsider pursuant to Rule 59(e), SCRCF, but the court denied that motion in a form order dated November 8, 2021. These appeals followed.

### ARGUMENT

In the Order dismissing the appeal, the Court stated the underlying order was one compelling discovery and was, therefore, not immediately appealable. Although it is true that orders compelling discovery in general are not immediately appealable, the order in these cases is more than a typical ruling on a garden variety motion to compel. This order grants the plaintiffs an unprecedented, and wholly unwarranted, amount of access to two of CTS's information portals. This will necessarily allow the plaintiffs to view information and materials that are not only irrelevant, but also confidential. The order is the digital age equivalent of allowing a plaintiff to go into a defendant's office and start going through file cabinets at will – with no safeguards to protect against the disclosure of confidential and privileged materials. Thus, this order **must** be immediately appealable. An appeal following a final judgment would be far too late to provide any meaningful relief.

Under South Carolina law, a discovery order can be immediately appealable when it compels a party to disclose or produce information and/or materials that are confidential or privileged. *See Knight Pub. Co. v. University of S.C.*, 295 S.C. 31, 367 S.E.2d 20 (1988) (an order allowing discovery of materials claimed to be confidential was immediately appealable pursuant to S.C. Code §14-3-330(2)(a) because the order in effect determined the action, and an appeal after the production of those materials could not provide any meaningful relief), *rev'd on other grounds, Simpson v. Sanders*, 314 S.C. 413, 445 S.E.2d 93 (1994). As former Chief Justice Toal of the South Carolina Supreme Court has noted:

[I]f an order requires a party to turn over documents, which the party feels are privileged or contain proprietary or confidential matters, compliance with the order without the ability to seek immediate appeal renders the protection afforded by the privilege or confidentiality a nullity. Hence, **where the appealed order has the effect of revealing the very thing the appellant is claiming should remain confidential, an immediate appeal may well be warranted and allowed.** *Cf. City of Columbia v. A.C.L.U. of South Carolina, Inc.*, 323 S.C. 384, 388, 475 S.E.2d 747, 749 (1996) (“Not only is the report relevant to the subject matter involved in this case, it is the subject matter of the case itself.”).

Toal, et al. *Appellate Practice in South Carolina*, 2<sup>nd</sup> Ed. at 94 (emphasis added). Without the ability to pursue immediate appeals in these kinds of scenarios, parties seeking to protect the disclosure of confidential materials would have no sufficient recourse after unsuccessfully opposing a motion to compel. Chief Justice Toal’s analysis makes it clear that South Carolina’s appellate courts should not leave those parties in such a helpless position. Rather, the appellate courts should follow the cases interpreting S.C. Code §14-3-330(a)(2) as allowing for immediate appeals in such situations.

The dilemma in which CTS now finds itself demonstrates the need for immediate appellate review. Faced with an order that requires it to allow the plaintiffs unfettered access to its data

portals, which include confidential and privileged information, CTS would have only two choices if appellate review were not available. CTS could comply with the order, thereby giving the plaintiffs the ability to discover anything and everything contained in those systems, even privileged and confidential materials. Alternatively, CTS could refuse to comply with the order, be found in contempt, and appeal the resulting sanction. Both options would lead to dire consequences. If CTS complied with the order, the plaintiffs and their attorneys would have unwarranted access to confidential materials that could be improperly used in the present case, or potentially used to bring other, completely unrelated cases. If CTS defied the order and the resulting appeal wound up being unsuccessful, CTS would be stuck with the effects of a sanction that never should have been imposed in the first place. An appeal after a final judgment would not solve either of those negative outcomes, and a party in CTS's position should not be forced to choose one of those options. This is precisely why some discovery orders **are** immediately appealable, and the order at issue in these appeals falls squarely within that category.

The dismissal orders in these appeals do not contain any analysis of the effects the underlying order would have in terms of allowing for discovery of confidential information and materials. The dismissal orders merely cite the general rule that "discovery orders" are not immediately appealable. By stopping the analysis at that basic level, the Court has misapprehended or overlooked the order's actual impact. For that reason, the Court should grant this petition and extend its analysis.

In dismissing the appeals, the Court has placed too much emphasis on what the challenged order purports to be and ignored what it actually does. It is not the name or the type of an order that matters for purposes of appealability, but rather the order's overall impact. *See Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 (2015). In *Morrow*,

the Supreme Court concluded an order was immediately appealable, regardless of what it was called, because it implicated the appellant's substantial rights. As the Court stated, "**Our review of the trial court order is not constrained by how the order is styled.**" *Id.* at 539, 773 S.E.2d at 147 (emphasis added). The Court further cited *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 479 (Ct. App. 2011), for the proposition that "an appellate court should look to the **effect** of an interlocutory order to determine its appealability." *Id.* at 540, 773 S.E.2d at 147 (emphasis added). *See also Tillman v. Tillman*, 420 S.C. 246, 250, 801 S.E.2d 757, 760 (Ct. App. 2017) (noting that appealability depends upon the "nature and effect of the order, not merely its label").

*Morrow* did not involve an order compelling the disclosure of information and materials, but its reasoning applies by analogy to the present case. As discussed above, the **impact** of the circuit court's order makes it immediately appealable, no matter what the order is called. Even if discovery orders are not immediately appealable as a general principle, an order like the one in this case is nonetheless immediately appealable because it in effect determines the action and creates a situation in which an appeal from a final judgment would not – and could not – provide any meaningful relief.

Here, the Court failed to apply *Morrow* or to discuss the legal principle that it supports. Indeed, the dismissal orders give no indication that the Court even acknowledged or considered *Morrow*. Significantly, the Court did not reject *Morrow* or find that its reasoning does not apply to the present cases. The Court simply did not address *Morrow* at all. This necessarily means that the Court overlooked or misapprehended authority that supports the immediate appealability of the challenged order.

For this reason, the requisite grounds exist for granting this petition and reinstating the appeals. Any other result improperly elevates form over substance and leaves CTS without the possibility of any meaningful appellate recourse. Therefore, the circuit court's order must be reviewed now. An appeal at the conclusion of the case, even if successful, would be too little, too late. By that point, the damage to CTS would already be done.

**CONCLUSION**

The challenged order is far more than just a ruling on a run-of-the-mill discovery motion. Even a brief reading of the order demonstrates that there is nothing routine or standard about it. This is an order that will almost certainly lead to the discovery of confidential or privileged materials that the opposing parties have no right to see. The orders dismissing these appeals give no indication that the Court considered the unique and shocking nature of the underlying order. Therefore, the Court should grant this petition, analyze the order for what it is, rather than what it is called, and reinstate the appeals.

Respectfully submitted,

s/ R. Hawthorne Barrett

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Of Whom Contract Transportation Systems Co. is the.....Appellant.

**PROOF OF SERVICE**

The undersigned, an attorney in this matter for the Appellant, certifies that I have this **29<sup>th</sup> day of December, 2021**, served a copy of the Appellant’s **Petition for Rehearing** upon counsel for the Respondent by causing it to be deposited in the United States mail with sufficient postage attached, addressed to: Douglas E. Jennings; David B. Yarborough; David B. Lail; Yarborough Applegate LLC; 291 East Bay St., 2<sup>nd</sup> Floor; Charleston, SC 29401.

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December 29, 2021

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December 29, 2021

Via E-Mail

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

Re: Felisha Bailey v. Contract Transportation Systems  
Appellate Case No. 2021-001420

Dear Ms. Kitchings:

Attached to this email for filing are the Appellant's Petition for Rehearing and a Proof of Service. Pursuant to section (c) of the Supreme Court's Order re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules, a check for the filing fee is being mailed to your office. Thank you for your kind assistance in filing these materials.

Sincerely,

TURNER PADGET GRAHAM AND LANEY P.A.



R. Hawthorne Barrett

RHB:  
Attachments

cc: Douglas E. Jennings  
David B. Yarborough  
David B. Lail