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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price, Circuit Court Judge

Appeal No. 2020-001095

Joseph Abruzzo, Respondent,

v.

Bravo Media Productions LLC, Haymaker Media, Inc., NBC Universal Media, LLC, Comcast Corporation, Craig Conover, Chelsea Meissner, and Madison LeCroy, Appellants.

RESPONDENT'S PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR RESPONDENT

Pursuant to Rule 242, SCACR, Respondent Joseph Abruzzo hereby submits the following Petition for Writ of Certiorari to the Court of Appeals.

Questions Presented for Review

1. Did the Court of Appeals January 28, 2022, order, which granted supersedeas and imposed a stay of discovery in response to the trial court's discovery order denying a motion to stay, conflict with prior decisions of the South Carolina Supreme Court?
2. Did the Court of Appeals January 28, 2022, order, which granted supersedeas and imposed a stay of discovery in response to the trial court's discovery order denying a motion to stay, identify any exceptional circumstances warranting such extraordinary relief?
3. Did Judge McCoy abuse her discretion by denying appellants motion to stay?
4. Did appellants waive the right to contest Judge McCoy's order denying the motion for a stay?

Statement of the Case

Respondent Joseph Abruzzo commenced this action on January 24, 2020. On June 19, 2020, Plaintiff filed an Amended Complaint. In his Amended Complaint, Plaintiff alleges seventeen (17) causes of action against the Appellants. Out of the seventeen (17) causes of action, fifteen (15) allege some form of intentional, willful and/or reckless conduct or some form of misrepresentation. Appellants moved to dismiss the Amended Complaint pursuant to Rule 12(b)(3), SCRCP on June 22, 2020.

Appellants filed their motion to compel arbitration on June 22, 2020. The motion was heard on June 30, 2020 by Judge Bentley Price. On July 6, 2020, Judge Price electronically filed a Form 4 Order denying the Defendants' motion to dismiss and motion for order compelling arbitration. (R. pp. 4-6)(Appx. pp 163-165).

On July 16, 2020, Appellants filed a Motion for Reconsideration pursuant to Rule 59(e), SCRCP. Appellants did not seek a stay of proceedings in its motion to compel arbitration, nor did Judge Price's order that is currently pending on appeal address the matter of a stay. Judge Price electronically signed another Form 4 Order denying that motion without a hearing on July 20, 2020, which was electronically filed on July 22, 2020. (R. pp. 1-3)(Appx. pp. 160-162). Appellants then filed and served a Notice of Appeal of Judge Price's order on August 10, 2020.

Thereafter, respondent served Standard Interrogatories and First Request for Production to the appellants on September 3, 2020. After appellants refused to respond to the discovery requests in their entirety, respondent filed a motion to compel on September 16, 2020. A hearing was held by Judge Jennifer B. McCoy on December 8, 2020. Appellants opposed Plaintiff's motion to compel by making the same arguments presented to the Court of Appeals and further moving for a stay of discovery.[1]

On February 11, 2021, Judge McCoy issued her order granting the motion to compel and denying the motion to stay of discovery. (Appx p. 801). Appellants moved to alter or amend Judge McCoy's order seeking only an extension of time to comply. They did not challenge the propriety of the order itself or the denial of their motion to stay. Judge McCoy denied the Appellants motion to alter or amend by order filed July 23, 2021. (Appx. p. 834). Judge McCoy's discovery order compelling discovery and denying appellants motion to stay did not address the issue of arbitration and it has not been appealed.

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[1] See Defendants petition, p.10; (Appx. p. 511) Defendants' Memo in Opposition to Plaintiff's Motion to Compel) says "Defendants request that this Court treat this Memorandum in Opposition as, alternatively, a Motion for a Stay of Discovery pursuant to 9 U.S.C. § 3 pending the outcome of their appeal to the South Carolina Court of Appeals."

Appellants have not refused to comply with Judge McCoy's order or been held in contempt for failing to do so.[2] Further, once Judge McCoy denied appellants' motion for a stay, appellants did not immediately seek appellate relief. Instead, they thereafter moved for and negotiated a confidentiality order to govern discovery and produced several thousand pages of documents along with video footage while representing more was forthcoming. The confidentiality order negotiated by the appellants specifically covers the discovery process, has safeguards in place to enable the parties to identify and label documents as confidential, and allows the parties to raise objections related to discovery and/or the designation of confidentiality for particular documents.[3]

Appellants thereafter began complying with Judge McCoy's order and sought further relief from the circuit court on various issues. Upon a negative ruling on its motion to quash production from third parties[4], appellants petitioned the Court of Appeals on January 14, 2022 - nearly a year after Judge McCoy's order denying their request for a stay of discovery was filed – for a writ of supersedeas.[5]

Respondent filed a return in opposition to appellants' petition for writ of supersedeas which pointed out these facts and cited binding South Carolina authority requiring a denial of

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[2] An order compelling discovery does not ordinarily involve the merits of the case and may not be appealed. See Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986). Discovery orders can be appealed in two circumstances, 1) "after the trial court holds a party in contempt" Tucker v. Honda of South Carolina Mfg., 354 S.C. at 577, 582 S.E.2d at 406-07 (2003) or 2) when the order affects "substantial rights which 'in effect determine[] the action and prevent[] a judgment from which an appeal might be taken or discontinues the action'". S.C. Code §14-3-330(2)(a).

[3] See confidentiality order filed June 21, 2021. (Appx. pp. 845-854).

[4] See order denying motion to quash. (Appx. p. 861).

[5] See pet. for writ of supersedeas. (Appx. pp. 501-519).

appellants' petition. (Appx. pp. 818-828). Nevertheless, the Court of Appeals granted the petition for a writ of supersedeas and imposed a stay of discovery in the trial court on January 28, 2022, based on the appellate court's "exclusive jurisdiction" over matters affecting the pending appeal of Judge Price's order denying appellants' motion to compel arbitration. (Appx. p. 871). Respondent filed a petition for rehearing February 10, 2022, addressing the various issues and points that appeared to have been either misapprehended or overlooked. (Appx. pp. 873-885). The Court of Appeals denied respondent's petition on March 2, 2022. (Appx. p. 891).

Argument

I. The Court of Appeals intervention to grant a stay by way of supersedeas conflicts with prior decisions of the Supreme Court.

Here, Judge McCoy's order denying appellants' motion to stay is not immediately reviewable. State v. Rearick, 417 S.C. 391, 790 S.E.2d 192 (2016)(unappealed order is law of the case); Grosshuesch v. Cramer, 377 S.C. 12, 659 S.E.2d 112 (2008)(discovery orders are interlocutory and not immediately appealable because they do not involve the merits of the action).

Further, the order has not determined a substantial matter forming the whole or a part of some cause of action or defense, and it has not discontinued an action, prevented an appeal, granted or refused a new trial, or struck out an action or defense as contemplated by S.C. Code section 14-3-330.

Accordingly, it is interlocutory, not immediately reviewable, and the Supreme Court has made clear that the appellate courts do not typically grant relief with respect to interlocutory orders arising out of motions to stay. Edwards v. Suncom, 369 S.C. 91, 631 S.E.2d 529 (2006) (ruling on motion to stay is interlocutory); Carolina Water Service, Inc. v. Lexington County Joint Mun.

Water and Sewer Com'n, 373 S.C. 96, 644 S.E.2d 681 (2007)(order lifting stay not immediately appealable); Oncology and Hematology Associates of S.C., LLC v. South Carolina Dept. of Health and Environmental Control, 387 S.C. 380, 692 S.E.2d 920 (2010)(discovery orders are interlocutory and not immediately appealable).

By intervening and overruling Judge McCoy on the issue of a stay, the Court of Appeals January 28, 2022 order granting supersedeas conflicts with prior South Carolina Supreme Court opinions regarding appellate review of interlocutory discovery orders, and they should be vacated.

Furthermore, the Court of Appeals decision to grant a stay by way of supersedeas conflicts with its own prior decisions and seems to have determined the issue raised by the appellants' petition for a writ of supersedeas to be one of jurisdiction. It is not. In granting the appellants' petition, this Court addressed the wrong question – whether it had "exclusive jurisdiction" over the "proceedings and discovery" occurring in the trial court. The questions the Court of Appeals did not properly consider were whether the trial court abused its discretion by denying appellants' motion for a stay or whether extraordinary circumstances existed to justify the extraordinary remedy of supersedeas.

There can be no doubt the circuit court has jurisdiction over discovery matters. The Court of Appeals itself said recently involving an appeal of a motion to compel arbitration. *See, e.g.* Sanders v. Savannah Highway Automotive Company, 432 S.C. 328, 852 S.E.2d 744 (Ct. App. 2020)(holding trial court had jurisdiction to enter order compelling discovery after Defendants filed notice of appeal of order denying arbitration and further finding discovery orders are interlocutory and not immediately appealable).

Appellants argue the Sanders case stands for the "the unremarkable proposition that a circuit court has jurisdiction to hear and try tort cases." Appellants Reply pp.2-3. Yet, in Sanders,

the same arguments regarding a stay and the divestiture of the circuit court's jurisdiction were made as the appellants in this case.[6] The Court of Appeals specifically rejected Sanders' notion the circuit court lacked subject matter jurisdiction to compel discovery responses while an appeal on the issue of arbitration was pending and declined to address the discovery orders further because "discovery orders are interlocutory and not immediately appealable." *Id* at 335.

More importantly, the Court of Appeals said *nothing* about having exclusive jurisdiction over discovery in the circuit court *or* that discovery was a matter affected by the appeal of the denial of a motion to compel arbitration. If the Court of Appeals had *exclusive* jurisdiction over discovery under these circumstances, as its January 28, 2022, order in this case says, the circuit court in Sanders would have necessarily lacked jurisdiction, subject matter or otherwise, to compel discovery because it would have been exclusively within the jurisdiction of the Court of Appeals as a "matter affected by the appeal."

By declining to say the issue of discovery while an appeal is pending over arbitration was within the appellate court's sole and exclusive jurisdiction, the Sanders court effectively said discovery matters remain within the jurisdiction of the circuit court to decide pursuant to Rules 205 and 241, SCACR, and that it would not entertain such interlocutory orders through an appeal.[7]

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[6] See Sanders final brief pp. 8, 16-17. https://ctrack.sccourts.org/public/caseView.do?csIID=66702

[7] This rationale has been used before by the Court of Appeals itself in declining to entertain review of the denial of a motion to stay. *See* Service Corp. of South Carolina v. Bahama Sands Development, LLC, 2011 WL 11734673 (Ct. App. June 14, 2011)(holding "the order denying Appellants' motion to stay did not involve the merits, affect a substantial right, or prevent a judgment from which an appeal may later be taken. Therefore, we hold Appellants' appeal is not immediately appealable.").

The Court of Appeals' grant of appellants petition for writ of supersedeas here, however, grants the opposite relief and appears to be in direct conflict with its own prior holding in Sanders. Accordingly, the appellants' petition should have been denied and the order should be vacated.

II. No extraordinary circumstances exist warranting a review of Judge McCoy's order or the grant of supersedeas by the Court of Appeals.

Although discovery orders are interlocutory and not immediately reviewable, writs of supersedeas or certiorari may be granted when exceptional circumstances exist. Oncology and Hematology Associates of S.C., LLC v. South Carolina Dept. of Health and Environmental Control, 387 S.C. 380, 692 S.E.2d 920 (2010)(discovery orders are interlocutory and not immediately appealable and requiring exceptional circumstances to address an interlocutory order). Appellants argue Oncology and Hematology Associates of S.C. is inapplicable because they filed a writ of supersedeas rather than a writ of certiorari. Appellants Reply Brief, p. 3. Once again, this is a distinction without a difference.

Rule 241, SCACR identifies no standard of review for the issuance of a writ of supersedeas.[8] In Oncology and Hematology Associates, however, the Supreme Court identified the need for extraordinary circumstances to grant such relief. There, the petitioners initially combined their writ of certiorari with a writ of supersedeas and a notice of appeal. 387 S.C. 380, fn 1. The Supreme Court dismissed the appeal as interlocutory and not immediately appealable, but determined "exceptional circumstance existed, warranting the grant of a writ of certiorari." *Id.* *See also,* Hollman v. Woolfson, 348 S.C. 571, (2009)(exceptional circumstances required to issue writ of cert.); Laffitte v. Bridgestone Corp, 381 S.C. 460 (2009)(same).

[8] It appears the decision is discretionary. *See, e.g.* Matter of Decker, 322 S.C. 212, 214 (1995).

A writ of supersedeas must therefore apply the same standard for this Court to exercise its discretion. If it did not, all kinds of interlocutory orders that are otherwise unreviewable by the appellate courts could be given appellate relief by fiat. This cannot be. There must be a showing of extraordinary circumstances for such extraordinary relief. Those extraordinary circumstances do not exist here, nor did the Court of Appeals identify any such circumstances which would overcome the due deference owed to the circuit court's findings and the longstanding principle that interlocutory orders are not immediately reviewable; a principle that has been stated by South Carolina appellate courts over and over again. The appellants have simply presented no exceptional circumstances warranting the intervention by way of supersedeas, and the Court of Appeals likewise articulated none. Accordingly, the Court of Appeals January 28, 2022, order should be vacated.

Finally, Rule 241, SCACR, governs the issue of stays and supersedeas. The general rule of an automatic stay applies to matters decided in the order. Exceptions to the general rule are found in subsection (b). Rule 241 (b)(2) excepts from the automatic stay judgments directing the delivery of documents, the very thing Judge McCoy ordered appellants to do. Moreover, S.C. Code Ann. § 18-9-150 specifically provides the execution of a judgment directly delivery of documents or personal property "shall not be stayed by appeal" without a surety bond or placing the documents with the court or receiver. No such thing has been done or requested by appellants, and the issuance of a stay conflicts with the plain language of Rule 241 (b)(2), SCACR and S.C. Code Ann. § 18-9-150. Accordingly, the Court of Appeals should have declined to grant supersedeas over a matter that is specifically exempted from the automatic stay general rule, and its decision otherwise should be vacated.

III. Judge McCoy did not abuse her discretion.

"A trial judge's rulings on discovery matters will not be disturbed by an appellate court absent a clear abuse of discretion." *Hollman v. Woolfson,* 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009). "An abuse of discretion occurs when the ruling is controlled by an error of law, or when based on factual conclusions, is without evidentiary support." *Landry v. Landry*, 430 S.C. 153, 160, 843 S.E.2d 491, 494 (2020).

Here, the Court of Appeals did not even address the issue of Judge McCoy's discretion to deny the appellants motion to stay. If it had, it would have concluded no abuse occurred. An appeal of a denial of a motion to compel arbitration simply does not involve the merits of the claims pending in the district court. The United States Supreme Court made it plain in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 21, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), that the merits were "easily severable" from the dispute over the arbitrability of those claims. The Court thus declared that because of that severability, the issue of arbitrability could be litigated in federal court while the merits were determined in state court. *Id.* An issue is generally an aspect of the case on appeal if it results in the district court's deciding an issue that the appellate court is deciding at the same time. By this reasoning, the merits are not an aspect of arbitrability. A determination on the arbitrability of a claim has an impact on what arbiter—judge or arbitrator—will decide the merits, but that determination does not itself decide the merits. *Accord*; Hill v. PeopleSoft USA, Inc. 341 F.Supp.2d 559 (USD Md. 2004)(permitting discovery to proceed pending appeal of the denial of motion to compel arbitration); Motorola Credit Corp. v. Uzan, 388 F.3d 29 (2d Cir. 2004)(same); *Britton v. Co–Op Banking Group,* 916 F.2d 1405, 1411–12 (9th Cir.1990)(same).

The South Carolina Supreme Court has likewise made clear that rulings on motions to stay do not involve the merits, are interlocutory, and are not immediately reviewable absent extraordinary circumstances. Edwards v. Suncom, 369 S.C. 91, 631 S.E.2d 529 (2006). Again, the Court of Appeals identified no extraordinary circumstances warranting the extraordinary relief of supersedeas over an order that is otherwise not reviewable at all at this stage of the proceeding. The Court of Appeals should *not* be permitted to grant supersedeas over a matter that has been so routinely declined to be entertained by the South Carolina appellate courts, particularly when the party seeking such extraordinary relief provides no binding authority which would support a grant of such a request under these unique circumstances.[9] Accordingly, the Court of Appeals order should be vacated.

IV. A stay is not proper under the circumstances.

A complete stay of all proceedings is simply not appropriate here because of the aforementioned reasons as well as the appellants' actions or inactions in earlier stages of this litigation. Judge McCoy's Order simply directs Appellants to respond to discovery. Appellants have not refused to comply with the order and been cited for contempt.[10] Instead, they began

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[9] Notably, no case cited by appellants in their briefs granted the relief the appellants here seek – undoing an order compelling discovery from which the appellants have already begun compliance and negotiated a confidentiality order to govern. To the contrary, the only South Carolina authority cited by appellants stand for the unremarkable proposition that the circuit court retains jurisdiction to proceed with matters not affected by the appeal.

[10] An order compelling discovery does not ordinarily involve the merits of the case and may not be appealed. See Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986). Discovery orders can be appealed in two circumstances, 1) "after the trial court holds a party in contempt" Tucker v. Honda of South Carolina Mfg., 354 S.C. at 577, 582 S.E.2d at 406-07 (2003) or 2) when the order affects "substantial rights which 'in effect determine[] the action and prevent[] a judgment from which an appeal might be taken or discontinues the action'". S.C. Code §14-3-330(2)(a).

complying with the order, sought further relief from the circuit court on various issues, and, only upon a negative ruling on its motion to quash production from third parties, petitioned this court for a writ of supersedeas - nearly a year after Judge McCoy issued her order.

Once Judge McCoy denied appellants' motion for a stay, appellants did not immediately seek appellate relief. Instead, they thereafter negotiated a confidentiality order to govern discovery and produced several thousand pages of documents along with video footage while representing more was forthcoming. The confidentiality order negotiated by the appellants specifically covers the discovery process, has safeguards in place to enable the parties to identify and label documents as confidential, and allows the parties to raise objections related to discovery and/or the designation of confidentiality for particular documents.

Appellants do not seem to argue Judge McCoy's order compelling discovery affects their "substantial rights" or the merits of the case. Even if they made that argument, appellants would have to show that once the information was produced there would be no more need for the action. *See, e.g.*, Knight Pub. Co. v. Univ. of South Carolina, 295 S.C. 31, 32, 367 S.E.2d 20, 21 (1988) ("The appealed order allows discovery of documents that respondents ultimately seek disclosed as the subject of these FOIA actions. This order is directly appealable under S.C. Code Ann. § 14-3-330(2)(a) (1976) because it in effect determines the action and prevents an appealable judgment."), overruled on other grounds, Simpson v. Sanders, 314 S.C. 413, 445 S.E.2d 93 (1994).

That is not the case here. Even if appellants provide the proverbial "smoking gun" through discovery, respondent would have to use that information in a motion or a trial to finally determine his claims. Appellants would then have the right to appeal that judgment without

worrying that the rights they seek to protect could never be vindicated. Similarly, if respondent provided appellants the proverbial "smoking gun" somehow proving one of their defenses, appellants would have to use that information in a motion or trial to finally determine the defense. This would need to occur in either the circuit court or arbitration. The order compelling discovery simply does not affect or finally decide any issue in the case.

Further, Appellants admit they have produced over 5,500 pages of documents and videos already and continue to review materials for privilege and relevance. Appellants Reply Brief p. 7; Appx. p. 901. Appellants also admit that discovery is appropriate even if their appeal is granted and the case was referred to arbitration. Appellants Reply Brief p. 3; Appx. p. 897. Thus, the exchange of information and documents would admittedly occur no matter the forum for adjudication. The question is whether it can proceed now in the circuit court. The answer should be yes.

Appellants have all the information in this case. No matter if the case is determined by an arbitrator or a jury, nothing suggests discovery in arbitration is vastly different from formal discovery in the South Carolina Court of Common Pleas. Because an arbitrator can allow for the additional exchange of information to ensure a fundamentally fair process, the arbitrator could allow for the same discovery as in the circuit court or even greater discovery if needed. The only difference being in court, the discovery is uniform across all cases while in arbitration discovery may vary from case to case.

Even if this case is referred to arbitration, engaging in the information and document exchange process beforehand, rather than beginning from scratch in an arbitration forum, would actually benefit the parties and the arbitrator. The arbitrator would still retain the right to determine

such pre-trial matters, but the parties will have already identified the key areas of interest and related documents, thus narrowing the pre-trial issues required to be decided by an arbitrator.

Ironically, the primary effect of a stay of discovery pending the appellants' appeal of the arbitration issue is delay. Appeals routinely remain pending for several years, and the entire judicial system has been delayed since the arrival of the coronavirus pandemic. The practical effect of granting a stay in this case is antithetical to one of the main arguments put forward for the supposed benefits of arbitration – savings of time and expense. See, e.g. Appellants Petition p. 11; Appx. p. 512. Moreover, with a stay in place, the supposed benefit of a quicker resolution is lost, and the effectiveness of either the court or an arbitrator to determine the merits is diminished. Documents are lost or discarded. Photos and videos are lost or discarded. Memories fade. Witnesses relocate. Employees obtain jobs elsewhere. In short, staying discovery does a disservice to a speedy and just resolution of the merits, particularly for the respondent. This is perhaps one of the most compelling reasons why interlocutory discovery orders are not normally immediately reviewable, by appeal or supersedeas.

Ultimately, even appellants admit information and documents will be exchanged regardless of the forum and they have already begun doing so. Similarly, testimony will be taken, subpoenas will be issued, hearings on pre-trial matters will be briefed, argued, and decided. Routine litigation expenses related to these matters will be incurred either way; the only exception being the fees associated with the arbitrator – an expense not found in the circuit court. A determination on the arbitrability of a claim has an impact on what arbiter—judge or arbitrator—will decide the merits, but that determination does not itself decide the merits. The merits are fleshed out through discovery, not trial by ambush. Accordingly, the Court of

Appeals order granting supersedeas over Judge McCoy's discovery order and imposing a stay of discovery should be vacated.

CONCLUSION

For the reasons set forth herein, the respondent's Petition for a Writ of Certiorari to the Court of Appeals should be granted with such other relief as the Court deems appropriate.

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CERTIFICATE OF COUNSEL

I certify that the **Petition for Writ of Certiorari to the Court of Appeals** complies with Rule 242, SCACR.

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PROOF OF SERVICE

I certify that I have served **Respondent's Petition for Writ of Ceriorari to the Court of Appeals** on Appellants by emailing it to their attorneys of record as follows:

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