RECEIVED

Oct 17 2022

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2022-001280

Case No. 2021-CP-40-02306

FREDDIE EUGENE OWENS, BRAD KEITH SIGMON, GARY DUBOSE TERRY, and RICHARD BERNARD MOORE,..... Respondents-Appellants,

v.

BRYAN P. STIRLING, in his official capacity as the Director of the South Carolina Department of Corrections; SOUTH CAROLINA DEPARTMENT OF CORRECTIONS; and HENRY MCMASTER, in his official capacity as Governor of the State of South Carolina, ... Appellants-Respondents.

INITIAL RESPONSE BRIEF OF APPELLANTS-RESPONDENTS

Daniel C. Plyler
Austin T. Reed
SMITH | ROBINSON
2530 Devine Street
Columbia, SC 29205

Counsel for Director Stirling and SCDC

Thomas A. Limehouse, Jr.
Chief Legal Counsel
Wm. Grayson Lambert
Senior Legal Counsel
Erica Wells Shedd
Deputy Legal Counsel
OFFICE OF THE GOVERNOR
South Carolina State House
1100 Gervais Street
Columbia, SC 29201

Counsel for Governor McMaster

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Legislative Acts

STATEMENT OF THE ISSUES ON APPEAL

I. Whether Respondents had a right to appeal from the September 6, 2022 order granting declaratory and injunctive relief to challenge the circuit court's discovery ruling, when the September 6 order never discussed that discovery ruling and did not aggrieve Respondents in any way.

II. Whether Respondents have abandoned their cross-appeal by making only a conclusory argument and citing only a single case, which was merely about the standard of review for discovery orders.

III. Whether the circuit court abused its discretion by precluding Respondents from conducting discovery on SCDC's efforts to obtain lethal injection drugs.

INTRODUCTION

Respondents[1] cross-appeal a single discovery ruling from the circuit court. According to Respondents, the circuit court prohibited them from conducting any discovery on lethal injection. That wildly overstates what the circuit court did in granting Appellants' motion for protective order. The circuit court actually held that Respondents could not pursue discovery about SCDC's efforts to obtain lethal injection drugs. That's all. And that decision was well within the circuit court's discretion.

But before even getting to the substance of that decision, the cross-appeal can be disposed of as procedurally improper. At the outset, Respondents appealed only the circuit court's order granting declaratory and injunctive relief, but that order neither ruled on the discovery issue they want to appeal nor aggrieved them in any way. *See* Rule 201(b), SCACR. As a second procedural

[1] For simplicity and consistency, despite this being the Response Brief in a cross-appeal, this Brief uses "Respondents" to refer to the death row inmates and "Appellants" to refer to the Governor, Director Stirling, and SCDC, as all the other briefs in Case No. 2022-001280 have done.

flaw, when Respondents finally get to their cross-appeal in their brief, they spend a mere half page (a single paragraph) on it, offering nothing more than two substantive sentences of conclusory argument and a citation to one case generally talking about the standard of review for discovery decisions. This is insufficient to raise an issue on appeal, so Respondents have abandoned their cross-appeal.

If somehow Respondents overcome these procedural shortcomings, they fare no better on the merits. SCDC's efforts to obtain lethal injection drugs are irrelevant to all of Respondents' claims. To be sure, Respondents' ex post facto claim required them to prove South Carolina's lethal injection protocol was less painful than electrocution or the firing squad. And if the Court adopts the *Glossip* test for the article I, section 15 claim, Respondents would have been required to prove that single dose of pentobarbital (their proposed alternative) was readily available and less painful than electrocution or the firing squad. But what SCDC did in its attempts to obtain lethal injection drugs is not relevant to either of those inquiries. Nor was it relevant to any claim related to Act 43 because nothing in that Act gives a condemned inmate the right to challenge the Director's certification of available methods.

STATEMENT OF THE CASE

During discovery, Respondents served interrogatories and requests for production on Appellants.[2] *See* R. pp. ___–___ (Mot. for Protective Order Exs. 1 (discovery requests to SCDC and Director Stirling) & 2 (discovery requests to Governor McMaster)). The interrogatories demanded that Appellants describe their "efforts to obtain lethal injection drugs," including

[2] The Statement of the Case in this Response Brief is limited to the facts relevant to the narrow issue of Respondents' cross-appeal. A more detailed discussion of the facts of the case generally is included in Appellants' Opening Brief of their appeal of the circuit court's merits order.

identifying any person or entity with whom Appellants communicated, along with the contents and dates of those communications. R. p. ___, ___ (Mot. for Protective Order Ex. 1, at 3; Ex. 2, at 3). The interrogatories also asked Appellants to "list each person [in the office or agency] who has been involved in efforts to obtain lethal injection drugs, including their title and nature of their involvement in such efforts." R. p. ___, ___ (Mot. for Protective Order Ex. 1, at 3; Ex. 2, at 3).

The requests for production, meanwhile, demanded documents related to efforts to obtain these drugs. These requests included:

- "all documents related to [Appellants'] attempts to procure lethal injection drugs, including any emails, written or typed notes, written or typed memoranda, and any call logs, documenting communications between [Appellants] and other Governors, departments of corrections, pharmaceutical companies, compounding pharmacies, and other medical or pharmaceutical providers";
- "all documents related to [Appellants'] attempts to purchase the bulk components for lethal injection drugs to have them compounded";
- "all documents related to [Appellants'] inquiries or investigation into creating or upgrading a state compounding pharmacy to have drugs for lethal injection compounded at by the State of South Carolina"; and
- "all written correspondence, notes, memos, electronic mail, text messages, or other documentation related to your efforts to obtain lethal injection drugs."

R. pp. ___–___, ___ (Mot. for Protective Order Ex. 1, at 5–7; Ex. 2, at 5).

Appellants objected on multiple grounds. They objected to the overbreadth and relevance of these requests. They noted that Respondents had not challenged the constitutionality of lethal injection and that Respondents were trying to turn courts into the types of "boards of inquiry" that

Baze v. Rees, 553 U.S. 35, 51 (2008), said they should not be. Appellants—as the law demands—objected based on section 24-3-580 because these discovery requests might disclose members of the execution team. R. pp. ___, ___–___ (Mot. for Protective Order Ex. 3a, at 9; Ex. 3b, at 7–13). Appellants did, however, produce a dozen public position and policy statements from pharmaceutical companies and five letters that pharmaceutical companies directly sent to the Governor, SCDC, or both, all of which emphatically stated that those companies would not allow SCDC to use their drugs for carrying out an execution by lethal injection. R. pp. ___–___ (Mot. for Protective Order Ex. 3a, at 4–6).

In addition to objecting to these discovery requests, Appellants also moved for a protective order.[3] R. pp. ___–___ (Mot. for Protective Order). Appellants specifically noted these requests sought "information concerning SCDC's attempts to procure lethal injection drugs, to purchase the bulk components for lethal injection drugs to have them compounded, and to create a compounding pharmacy to have drugs for lethal injection compounded at SCDC." R. p. ___ (Mot. for Protective Order 8). Appellants explained that Act 43 does not give a condemned inmate the right to pursue such discovery or to challenge the Director's certification of available methods. R. pp. ___–___ (Mot. for Protective Order 8–10). Appellants also noted that this irrelevant inquiry was nothing more than an attempt to "shift the burden to SCDC to prove an alternative method is *not* feasible and is *not* a readily available alternative method." R. p. ___ (Mot. for Protective Order 9).

Respondents opposed the motion for protective order. Specific to the lethal injection issue,

[3] The discovery requests Appellants included in their argument on lethal injection in the motion for protective order also included a request for a copy of SCDC's execution protocols and autopsy records. The circuit court ultimately required SCDC to produce those documents, so the discovery requests about those documents are irrelevant to the cross-appeal.

they contended that Appellants had not shown a particularized harm from having to disclose their efforts to obtain lethal injection drugs and that they were entitled to this discovery to try to prove lethal injection was an available method. R. pp. ___–___ (Resp. to Mot. for Protective Order 4–6).

The circuit court held a hearing. R. pp. ___–___ (June 23, 2022 Tr.). After that hearing, the circuit court issued a Form 4 order that denied Appellants' motion for a protective order about the execution protocols[4] but "GRANTED" the motion "as to the remaining topics (i.e., lethal injection information, members of the execution team, etc.)." R. p. ___ (July 5, 2022 Order).

This was the last time the circuit court ruled on this issue. At trial, Respondents never tried to ask any questions about SCDC's efforts to obtain lethal injection drugs to any witness. And the circuit court's order granting declaratory and injunctive relief never mentions anything about discovery. *See* R. pp. ___–___ (Sept. 6, 2022 Order).

STANDARD OF REVIEW

"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 based on an error of law or a factual conclusion without evidentiary support." *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 434, 673 S.E.2d 448, 457 (2009).

[4] The circuit court later required production of autopsy records at the beginning of trial, which Appellants produced within the 24-hour window the circuit court gave Appellants to do so. *See* R. p. ___ (Tr. 128:6–24).

ARGUMENT

I. Respondents were not aggrieved by and did not have a right to appeal the September 6 order, which did not even address the discovery issue.

For two separate reasons, the Court can summarily dispose of Respondents' cross-appeal as procedurally improper. *First*, Respondents have no right to appeal from the September 6 order. "Only a party aggrieved by an order, judgment, sentence or decision may appeal." Rule 201(b), SCACR; *see also* S.C. Code Ann. § 18-1-30 ("Any party aggrieved may appeal in the cases prescribed in this title."); *Ex parte S.C. Dep't of Motor Vehicles*, 390 S.C. 457, 458, 702 S.E.2d 568 (2010) ("A well-known rule of appellate procedure is that only an aggrieved party may appeal."). Respondents are in no way aggrieved by the September 6 order. *See State v. Rearick*, 417 S.C. 391, 398 n.9, 790 S.E.2d 192, 196 n.9 (2016) ("An aggrieved party is one who is injured in a legal sense or has suffered an injury to person or property."). Indeed, Respondents prevailed on every front. The one claim on which the circuit court did not rule for Respondents was because Respondents had already won on another claim that disposed of that one. *See* R. p. ___ (Order 35). The Appellate Court Rules do not give Respondents a right to appeal from this order, and it is the Court's "duty to reject an appeal that is prosecuted by a party who is not aggrieved in a legal sense by the judgment of the trial court." *Cisson v. McWhorter*, 255 S.C. 174, 178, 177 S.E.2d 603, 605 (1970).

Second, even if Respondents could appeal an order ruling in their favor, this order has nothing to do with the discovery issue they (tried to) raise in this Court. Respondents "cross appeal[ed] from the Order of the Honorable Jocelyn Newman dated September 6, 2022." Notice of Cross Appeal 1. No other order. But the September 6, 2022 order never discussed anything about "the trial court's pretrial rulings limiting the scope of discovery," which is the issue Respondents say they want to appeal. *Id.* The September 6 order analyzes (incorrectly, as

Appellants have already explained) whether "available" in Act 43 is unconstitutionally vague or impermissibly delegates legislate power to the Director of SCDC, R. pp. ___–___ (Order 32–36), but the order never discusses the issue of whether Respondents were entitled to conduct discovery on SCDC's efforts to obtain lethal injection drugs. In fact, the word "discovery" appears nowhere in the September 6 order.

The circuit court's ruling on this discovery issue was in its July 5, 2022 Form 4 order. *See* R. p. ___ (July 5, 2022 Order). If Respondents wanted to appeal this question, that was the order they were required to appeal at the conclusion of trial (if they had preserved the issue). But that order was not mentioned in or attached to the Notice of Cross Appeal. "An unappealed ruling is the law of the case and requires affirmance." *Dreher v. S.C. Dep't of Health & Env't Control*, 412 S.C. 244, 249, 772 S.E.2d 505, 508 (2015).

Respondents cannot circumvent this conclusion by insisting they wanted to ask Director Stirling questions about SCDC's efforts to obtain lethal injection drugs at trial. *See* R. pp. ___–___ (Tr. 70:8–71:4). For one thing, in their own words, their cross-appeal is focused on "the trial court's *pretrial* rulings limiting the scope of discovery." Notice of Cross Appeal 1 (emphasis added). For another, and even if Respondents are somehow not bound by their own declaration in the Notice of Cross Appeal, a pretrial ruling is not sufficient to preserve an evidentiary issue for appellate review. *See State v. Smith*, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999) ("A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review."); *see also State v. Quinn*, 430 S.C. 115, 124, 843 S.E.2d 355, 360 (2020) ("Because we hold the State may not appeal under the context presented here, we need not address whether this issue is unpreserved . . . ."). Respondents did not try to ask Director Stirling any questions about SCDC's efforts to obtain the drugs that the circuit court could

have permitted or refused. *See* R. pp. ___–___ (Tr. 217:25–256:13) (Stirling testimony). All Respondents did was briefly raise it in closing, *see* R. pp. ___–___ (Tr. 712:20–713:10), but that, of course, isn't *evidence* they tried to offer but the circuit court refused to admit, *see Sulton v. HealthSouth Corp.*, 400 S.C. 412, 420, 734 S.E.2d 641, 645–46 (2012) (arguments of counsel are not evidence).

II. Respondents have failed to sufficiently raise this issue in the unappealed order.

The Appellate Court Rules require a litigant to raise an issue with "discussion and citations of authority." Rule 208(b)(1)(E), SCACR. When "the argument in the brief is not supported by authority or *is only conclusory*," *Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 573, 772 S.E.2d 882, 892 (Ct. App. 2015) (emphasis added), it is abandoned. It is not this Court's responsibility—nor should it be—to research and craft arguments on appeal. *See Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 148 n.10 (2011) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.").

On their cross-appeal, Respondents offer only a half-page paragraph (despite having requested an additional five pages for their brief so that they could address this issue in a consolidated response brief). *See* Resps.' Br. 54. In that paragraph, they summarily claim that evidence about SCDC's efforts was relevant to their as-applied challenge in their statutory claim. Those two sentences are followed by a cite to *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989), which simply repeats than the well-established rule that discovery orders are reviewed only for abuse of discretion and what constitutes an abuse of discretion.

That's it for Respondents' cross-appeal. This is not sufficient to raise an issue for this Court's review. If this had been a standalone brief (as it would have been, but for this Court

allowing Respondents to consolidated their briefing), it would be even more obvious for the Court to conclude this argument is insufficient. The Court should therefore deem the cross-appeal abandoned. *See, e.g.*, *State v. King*, 349 S.C. 142, 157, 561 S.E.2d 640, 648 (Ct. App. 2002) (finding an argument conclusory and the issue abandoned when an appellant merely argued the trial court's ruling was erroneous and prejudicial and cited an evidentiary rule); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) ("Mere allegations of error are not sufficient to demonstrate an abuse of discretion. On appeal, the burden of showing abuse of discretion is on the party challenging the trial court's ruling.").

III. Respondents' cross-appeal fails on the merits.

Even if the Court were to overlook these procedural flaws, Respondents still lose. Before getting into the details of why, it's important to keep in mind what exactly Appellants sought a protective order on: discovery requests about SCDC's efforts to obtain lethal injection drugs. They did not seek some general prohibition on Appellants conducting investigations or third-party discovery on lethal injection more broadly. And it was that motion for a protective order on discovery of Appellants' own efforts that the circuit court granted.

Thus, when Respondents, in their brief, frame the issue as "[w]hether the circuit court erred[5] in limiting the scope of discovery to prevent Respondents from inquiring into information related to lethal injection, including the Department's efforts—if any—to acquire drugs to make lethal injection available as a method of execution," Resps.' Br. 1, they are mischaracterizing the discovery order. The order did not prohibit Respondents from doing any discovery about lethal injection generally. Nor were Respondents "prevented . . . from putting forward any evidence" on

[5] This implies a de novo review. Discovery orders are, of course, reviewed for abuse of discretion.

lethal injection "other than what has already been established in the Supreme Court's precedents." Resps.' Br. 49; *see also* Apps.' Reply Br. 20–21 (explaining in more detail why Respondents are incorrect on this point).

With the actual scope of the order in mind, nothing about the discovery Respondents were not allowed to pursue was relevant to their claims, so the circuit court's pretrial ruling represented a sound exercise of its broad discretion. In the first place, Respondents' allegation in their complaint was that "the most reliable and humane way to conduct a lethal injection is by single dose of pentobarbital." R. p. ___ (Compl. 20). SCDC has always used a three-drug protocol that does not include pentobarbital. Thus, none of SCDC's efforts to obtain other lethal injection drugs were relevant to that allegation because none of those efforts "ha[d] any tendency to make the existence of" pentobarbital's availability "more probable or less probable than it would be without the evidence" of SCDC's efforts to get different drugs. Rule 401, SCRE.

In the second, assuming the Court applies its longstanding precedent that the original understanding of constitutional terms controls, the availability of any lethal injection drugs is irrelevant to Respondents' article I, section 15 claim. The proper focus for that inquiry is whether electrocution and the firing squad are cruel, unusual, or corporal as the framers and the people understood those terms in 1971. None of that involves a comparison to lethal injection or necessitates inquiring into SCDC's efforts to obtain lethal injection drugs (which would provide anti-death penalty advocates additional entities to lobby to try to make drugs harder to obtain).

In the third, if the Court adopts the federal *Glossip* test for Respondents' article I, section 15 claim, Respondents had the burden to offer a less painful and readily available method. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019). They failed to do so. Not only did they fail to introduce any evidence that lethal injection is less painful, *see* Apps.' Br. 39, but they did not offer

any evidence that pentobarbital was available to SCDC. Given that Respondents bore the burden here, whatever SCDC had done or is doing to obtain these drugs does not matter. Respondents had to prove that SCDC could have obtained them. To carry that burden, Respondents could have investigated what pharmaceutical manufacturers produce pentobarbital and whether those companies would sell that drug to SCDC. They could have done any number of things to prove their case. But, for whatever reason, they didn't. The fact that they were not allowed to conduct discovery on SCDC's efforts to obtain other drugs does not excuse this failure. *See State v. Jones*, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) ("given that Jones has offered no evidence in support of his claim, he has utterly failed in his burden").

In the fourth, Respondents' ex post facto claim did not necessitate the discovery the circuit court prohibited. Although that analysis requires a comparison to the lethal injection protocol SCDC had used in the past, *see* Apps.' Br. 42, the comparison is to the pain allegedly caused by the methods at issue. The availability of the drugs for one method is not necessary to conducting the comparative-pain analysis.

In the fifth, nothing in or about Act 43 contemplates, authorizes, or requires discovery on SCDC's efforts to obtain lethal injection drugs. The Act provides that the Director shall certify whether lethal objection is "available" for a particular execution. 2021 S.C. Acts No. 43, § 1 (amending S.C. Code Ann. § 24-3-530(B) (Supp. 2022). Act 43 was designed to ensure the State could carry out death sentences after an inmate exhausted his direct and collateral appeals. *See* Apps.' Br. 6–7. It makes no sense to interpret Act 43, as Respondents do, to create yet another layer in the "seemingly endless proceedings" before the State may carry out a death sentence to allow condemned inmates to assert last-minute challenges to what SCDC did in determining whether lethal injection was available at that particular time. *Baze*, 553 U.S. at 69 (Alito, J.,

concurring). Bolstering this conclusion is the fact that Respondents have not—and cannot—point to any evidence indicating that the General Assembly intended for a condemned inmate to be able to challenge the Director's certification. *See Georgetown Cty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 353, 713 S.E.2d 287, 289 (2011) (a statute creates an implicit private right of action only if the General Assembly intends to create such a right).

Finally, in the sixth, the circuit court enjoyed "broad latitude in limiting the scope of discovery." *Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 854 (1994). This case was set to be tried in 90 days from this Court's order expediting the proceedings after staying notices of execution for Sigmon and Moore. Given this tight timeframe, the circuit court needed to ensure discovery was focused on relevant issues, which is exactly what the circuit court did in exercising its discretion. And in any event, nothing about the circuit court's limitation on discovery of SCDC's efforts barred Respondents from doing their own investigation into the availability of pentobarbital. The circuit court did not abuse its discretion in ruling on this narrow discovery issue.

CONCLUSION

For the foregoing reasons, the Court should dismiss Respondents' cross appeal as procedurally improper or affirm the circuit court's pretrial discovery ruling, but as explained in Appellants' other briefing, the circuit court's order granting declaratory and injunctive relief should be reversed and the case remanded with instructions to enter judgment for Appellants.

Respectfully submitted,

s/Wm. Grayson Lambert
Thomas A. Limehouse, Jr. (S.C. Bar No. 101289)
Chief Legal Counsel
Wm. Grayson Lambert (S.C. Bar No. 101282)
Senior Legal Counsel
Erica W. Shedd (S.C. Bar No. 104287)
Deputy Legal Counsel
OFFICE OF THE GOVERNOR
South Carolina State House
1100 Gervais Street
Columbia, South Carolina 29201
(803) 734-2100
tlimehouse@governor.sc.gov
glambert@governor.sc.gov
eshedd@governor.sc.gov

Counsel for Governor McMaster

s/ Daniel C. Plyler
Daniel C. Plyler (S.C. Bar No. 72671)
Austin T. Reed (S.C. Bar No. 102808)
SMITH | ROBINSON
2530 Devine Street
Columbia, SC 29205
(803) 254-5445
Daniel.Plyler@SmithRobinsonLaw.com
Austin.Reed@SmithRobinsonLaw.com

Counsel for Director Stirling and SCDC

October 15, 2022
Columbia, South Carolina