

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Kristi F. Curtis, Circuit Judge

Court of Common Pleas Case No. 2021-CP-26-07488
American Health Law Association Arbitration Claim No. 7029

DR. SCOTT F. DUNCAN, M.D.,

Plaintiff/Appellant on Appeal,

v.

ORTHO SC, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY; DR. GENE M.
MASSEY, M.D.; AND HCA HEALTHCARE, INC., A DELAWARE CORPORATION,
Defendants,

v.

Of whom

ORTHO SC, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY, AND DR.
GENE M. MASSEY, M.D. are the Respondents on Appeal.

NOTICE OF APPEAL

Pursuant to South Carolina Appellate Court Rule 203(b)(1), Appellant Dr. Scott F. Duncan, M.D. (“Appellant”), by and through the undersigned attorneys, hereby appeals the Order of Circuit Judge Kristi F. Curtis dated February 24, 2023 Denying Plaintiff’s Motion to Compel Compliance with or Enforce Arbitration Subpoenas and/or for Order of Contempt, and the Order of Circuit Judge Kristi F. Curtis dated September 25, 2023 Denying Plaintiff Dr. Scott F. Duncan, M.D.’s Motion to Partially Alter or Amend Order. Counsel for Appellant received written notice of the entry of the Circuit Court’s Order Denying Plaintiff’s Motion to Partially Alter or Amend Order on September 25, 2023, thus this Notice of Appeal is timely filed pursuant

to South Carolina Appellate Court Rule 203(b)(1). Copies of the Circuit Court's Orders being appealed from are attached hereto.

ROSEN HAGOOD, LLC

By: */s/ Daniel F. Blanchard, III*

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HCA HEALTHCARE, INC.

After careful consideration of the motions, pleadings, exhibits, and memoranda of the parties, the arguments of counsel, and the other matters of record, the Court hereby finds that the Motion to Dismiss Amended Complaint filed by Defendants OrthoSC and Massey on August 25, 2022 should be DENIED, the Motion for Protective Order and Stay of Discovery filed by Defendants OrthoSC and Massey on August 25, 2022 should be DENIED, the Motion to Compel Discovery Responses filed by Plaintiff on August 26, 2022 should be GRANTED, and the Motion to Compel Compliance with or Enforce Arbitration Subpoena and/or for Order of Contempt filed by Plaintiff on September 8, 2022 should be left to the Arbitrator's determination for the reasons stated herein.

1. OrthoSC/Massey's Motion to Dismiss Pursuant to S.C. R. CIV. PRO. 12(b)(6):

Plaintiff's Amended Complaint filed on August 10, 2022, avers claims against OrthoSC and Massey for (1) Intentional Interference with Contract, (2) Intentional Interference with Prospective Economic Advantage, (3) Violation of South Carolina Unfair Trade Practices Act (SCUTPA), S.C. CODE ANN. § 39-5-10 *et seq.*, and (4) Civil Conspiracy. Defendants OrthoSC and Massey have moved to dismiss all of the causes of action pursuant to S.C. R. CIV. PRO. 12(b)(6).

In considering a Rule 12(b)(6) motion to dismiss, the trial court must base its ruling solely on "the allegations contained within the four corners of the complaint." Charleston Cnty. Sch. Dist. v. Harrell, 393 S.C. 552, 559, 713 S.E.2d 604, 608 (2011). "[A]t the pleadings stage, the factual allegations made by the plaintiff in regards to his claim are taken as true." Tanner v. Florence Cty. Treasurer, 336 S.C. 552, 560, 521 S.E.2d 153, 157 (1999). If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247-48 (2007). "[T]he court must regard all properly pleaded factual

allegations as admitted” and “any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment.” Falk v. Sadler, 341 S.C. 281, 533 S.E.2d 350, 353 (Ct. App. 2000). A complaint is sufficient if it states “*any* cause of action or it appears the plaintiff (or petitioner) is entitled to *any relief whatsoever*.” Baldwin v. Sanders, 266 S.C. 394, 223 S.E.2d 602 (1976) (emphasis added).

“The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action.” Id. (citing Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987)). ““At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice’ to withstand a motion to dismiss.” Town of Arcadia Lakes v. S.C. Dep’t of Health & Env’t Control, 404 S.C. 515, 745 S.E.2d 385, 392 (Ct. App. 2013).

Viewed in the light most favorable to the Plaintiff, Plaintiff’s Amended Complaint alleges sufficient facts to constitute causes of action against Defendants OrthoSC and Massey for (1) Intentional Interference with Contract, (2) Intentional Interference with Prospective Economic Advantage, (3) Violation of the SCUTPA, and (4) Civil Conspiracy. Accordingly, the Motion to Dismiss must be denied.

2. OrthoSC/Massey’s Motion for Protective Order and Stay of Discovery:

Defendants OrthoSC and Massey moved for a protective order and a stay of discovery pending the resolution of their Motion to Dismiss. As discussed above, the Court has denied the Motion to Dismiss filed by Defendants OrthoSC and Massey, thus that motion has been resolved. Defendants OrthoSC and Massey have not shown good cause to grant a protective order or to stay discovery once their Motion to Dismiss is disposed of. Accordingly, the Motion for Protective Order and Stay of Discovery must be denied.

3. Plaintiff's Motion to Compel Discovery Responses:

Plaintiff served Interrogatories and Requests for Production of Documents upon Defendants OrthoSC and Massey on July 22, 2022. Under the rules, Defendants OrthoSC's and Masseys' responses to these discovery requests became due on August 26, 2022. Defendants OrthoSC and Massey did not provide any of the information or documents sought by Plaintiff. Rather, on August 25, 2022, Defendants OrthoSC and Massey served objections to Plaintiff's discovery requests. Defendants OrthoSC and Massey objected and argued it would be premature and improper to require them to respond to Plaintiff's requests until their Motion to Dismiss is resolved.

As discussed above, the Court has denied the Motion to Dismiss filed by Defendants OrthoSC and Massey, thus that motion has been resolved. The objections made by Defendants OrthoSC and Massey to Plaintiff's Interrogatories and Requests for Production of Documents are overruled. Defendants OrthoSC and Massey shall provide full and complete responses to Plaintiff's Interrogatories and Requests for Production of Documents. Accordingly, Plaintiff's Motion to Compel Discovery Responses is granted.

4. Plaintiff's Motion to Compel Compliance with or Enforce Arbitration Subpoena and/or for Order of Contempt:

In addition to serving Interrogatories and Requests for Production upon Defendants OrthoSC and Massey in this lawsuit, Plaintiff also issued subpoenas *duces tecum* to Defendants OrthoSC and Massey on August 3, 2022.

Defendants OrthoSC and Massey are not parties to the arbitration. Because the non-party subpoenas were issued in a pending arbitration, the Arbitrator should be the one with authority to enforce those subpoenas in the first instance. This Court finds that it does not have the authority to

compel Defendants OrthoSC and Massey to comply with the subpoenas at this time. S.C. CODE ANN. § 15-48-80(a). Accordingly, Plaintiff's Motion to Compel Compliance with or Enforce Arbitration Subpoena and/or for Order of Contempt is left to the determination of the Arbitrator. Accordingly,

IT IS ORDERED that the Motion to Dismiss Amended Complaint pursuant to S.C. R. CIV. PRO. 12(b)(6) filed by Defendants OrthoSC, LLC and Dr. Gene M. Massey, M.D. on August 25, 2022, is hereby DENIED; and

IT IS FURTHER ORDERED that the Motion for Protective Order and Stay of Discovery filed by Defendants OrthoSC and Massey on August 25, 2022, is hereby DENIED; and

IT IS FURTHER ORDERED that the Motion to Compel Discovery Responses filed by Plaintiff Dr. Scott F. Duncan, M.D. on August 26, 2022 is hereby GRANTED and Defendants OrthoSC and Massey shall provide full and complete responses to Plaintiff's Interrogatories and produce the documents or things requested in Plaintiff's Requests for Production of Documents no later than thirty (30) days from entry of this Order; and

IT IS FURTHER ORDERED that the Motion to Compel Compliance with or Enforce Arbitration Subpoena and/or for Order of Contempt filed by Plaintiff on September 8, 2022 is hereby left to the determination of the Arbitrator; and

AND IT IS SO ORDERED!

Kristi F. Curtis
Presiding Circuit Court Judge
Court of Common Pleas
Fifteenth Judicial Circuit

This ___ day of _____, 2023.

_____, South Carolina.



Horry Common Pleas

Case Caption: Scott F Duncan MD VS OrthoSC LLC , defendant, et al

Case Number: 2021CP2607488

Type: Order/Other

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

Scott F Duncan MD
PLAINTIFF(S)

OrthoSC LLC et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (*CHECK REASON*):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (*CHECK REASON*):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Plaintiff's Motion/Alter and/or Amend is Under Advisement.

ORDER INFORMATION

This order ends does not end the case.

See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 07/17/2023 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Horry Common Pleas

Case Caption: Scott F Duncan MD VS OrthoSC LLC , defendant, et al

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Type: Order/Electronic Form 4

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

STATE OF SOUTH CAROLINA
COUNTY OF Horry

DR. SCOTT F. DUNCAN, M.D.,
Plaintiff,

v.

ORTHOSC, LLC, a South Carolina
limited liability company; DR. GENE
M. MASSEY, M.D.; and HCA
HEALTHCARE, INC., a Delaware
corporation,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2021-CP-26-07488

**ORDER DENYING PLAINTIFF DR. SCOTT
F. DUNCAN, M.D.'S MOTION TO
PARTIALLY ALTER OR AMEND ORDER**

On September 8, 2022, Plaintiff Dr. Scott F. Duncan, M.D. (“Plaintiff”) filed a motion in this action to compel compliance with and to enforce two subpoenas dated August 3, 2022 issued in a separate arbitration action involving Plaintiff, Grand Strand Surgical Specialists, LLC, Grand Strand Regional Medical Center, LLC and HCA Physician Services, Inc. assigned American Health Lawyers Association Claim No. 7029 (“Arbitration Proceeding”). The subpoenas sought the production of documents from OrthoSC, LLC (“OrthoSC”) and Dr. Gene M. Massey, M.D. (“Massey”), non-parties to the Arbitration Proceeding. After a hearing, the Court denied the motion by order dated February 24, 2023 (“February Order”). Thereafter, Plaintiff filed a Motion to Partially Alter or Amend the February Order on March 6, 2023 (“Motion to Amend”) under Rules 54 and 59(e). This Court heard the Motion to Amend on July 11, 2023.

Under Rule 59(e), SCRPC, parties may file a motion to alter or amend a judgment “not later than 10 days after receipt of written notice of the entry of the order.” Similarly, under Rule 52(b), SCRPC, “[u]pon motion of a party made not later than 10 days after receipt of written notice of entry of judgment the court may amend its findings or make additional findings and may amend

the judgment accordingly[.]” Broadly, “[I]t is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court ‘alter or amend the judgment,’ but also as a vehicle to seek ‘reconsideration’ of issues and arguments. A motion under Rule 59(e) long has been viewed as [a] ‘motion for reconsideration’ despite the absence of those words from the rule.’ Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778-79 (2004). More specifically, as held by the *Elam* court,

[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

Elam, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (emphasis in original). “A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.” *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990).

After reviewing the applicable law, the parties’ filings, and considering the arguments raised at the hearing, the Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Consistent with this Court’s prior ruling, this Court may not compel compliance with the Arbitration Subpoenas issued in a separate arbitration to non-parties. This determination is based on the plain language of South Carolina Code Ann. § 15-48-80(a) as well as the rationale of the federal circuit courts when analyzing the Federal Arbitration Act, that have held arbitrators do not have authority to compel a non-party to produce documents pre-hearing, including *Hay Group, Inc. v. EBS Acquisition Corp.*, 360 F.3d 404 (3rd Cir. 2004) and *Life Receivables Trust v. Syndicate 102*, 549 F.3d 210 (2d Cir. 2008). In addition, the parties have not come forward with any South

Carolina law indicating that this Court may compel OrthoSC and Massey—who are non-parties to the Arbitration Proceeding—to comply with the Arbitration Proceeding subpoenas or anything else in connection with the Arbitration Proceeding.

Consequently, the Motion to Amend and the relief requested therein is **DENIED**.

AND IT IS SO ORDERED!

Kristi F. Curtis
Presiding Circuit Court Judge
Court of Common Pleas
Fifteenth Judicial Circuit

_____, 2023

_____, South Carolina



Horry Common Pleas

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Defendants,

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Of whom

ORTHO SC, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY, AND DR.
GENE M. MASSEY, M.D. are the Respondents on Appeal.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the Defendants by mailing a copy of it to their attorneys of record on October 10, 2023, by United States first-class mail, with sufficient postage affixed thereto, and addressed as follows:

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By: /s/ Daniel F. Blanchard, III
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