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Jan 10 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2023-001587
Court of Common Pleas Case No. 2021-CP-26-07488
American Health Law Association Arbitration Claim No. 7029

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

Appellant,

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 which ORTHO_{SC}, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY,
AND DR. GENE M. MASSEY, M.D. are the Respondents.

PETITION FOR REHEARING *EN BANC*

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ATTORNEYS FOR APPELLANT

Pursuant to SCACR 221, Appellant Dr. Scott F. Duncan, M.D. (“Duncan”) respectfully petitions this court for a rehearing of its order filed on January 2, 2024. The order dismissed Duncan’s appeal of the circuit court’s order denying his application pursuant to the South Carolina Uniform Arbitration Act (SCUAA), S.C. CODE ANN. § 15-48-80(a), to enforce an arbitrator’s subpoenas *duces tecum* to nonparties on the grounds the order is not appealable.¹ This appeal raises a question of first impression under our state law—whether a circuit court order denying an application pursuant to § 15-48-80(a) to enforce an arbitrator’s subpoena is appealable when the proceeding to enforce the subpoena was a self-contained court proceeding and the court’s order completely disposed of the matter, leaving nothing more for the court to do. Duncan further requests the court to rehear this case *en banc* in accordance with SCACR 219 because of the exceptional importance and novelty of the issues raised in this appeal.

This court based its order on cases holding that discovery orders generally are not appealable. However, the court failed to appreciate that the circuit court’s order in this case is not a typical discovery order. The order in this appeal involves the circuit court’s final determination of Duncan’s special proceeding or application commenced in the circuit court to enforce subpoenas which the arbitrator issued to non-party witnesses in a separate arbitration pending before the American Health Law Association (AHLA). Because an arbitrator’s subpoena is not court-issued, a party to an arbitration seeking to enforce the subpoena must apply to the circuit court for an enforcement order pursuant to § 15-48-80(a). *See* S.C. CODE ANN. § 15-48-80(a) (“Subpoenas so issued shall be served, and *upon application to the court by a party or the arbitrators*, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action.” (emphasis added)).

¹ The court raised the issue *sua sponte*.

This was a self-contained proceeding in the circuit court, which was concluded with finality. There is nothing left for the circuit court to do involving the subpoenas. Unlike routine discovery orders, the order in this case is appealable because it constitutes a “final judgment” or an “intermediate order ... involving the merits” within S.C. CODE ANN. § 14-3-330(1) or a “final order affecting a substantial right made” in a “special proceeding” under § 14-3-330(3).

As discussed below, this court’s order dismissing Duncan’s appeal is at odds with this court’s own decision—as well as decisions of numerous other courts around the country—that a court order enforcing or quashing an administrative subpoena is immediately appealable as a final order when it resolves all issues in the special proceeding. This court’s order is also incompatible with several federal precedents holding that a district court order under the Federal Arbitration Act (FAA), 9 U.S.C. § 7, compelling compliance with or quashing an arbitrator’s subpoena to a nonparty is a final order and is immediately appealable.

As brief background, Duncan is the claimant in an arbitration pending before the AHILA. Respondents OrthoSC, LLC and Dr. Gene M. Massey, M.D. (the “Respondents”) are *not* parties to the arbitration. There are no claims pending against them in the arbitration. On August 3, 2022, the arbitrator issued nonparty document subpoenas to the Respondents pursuant to the authority granted in S.C. CODE ANN. § 15-48-80(a) and Section 5.8(a) of the AHILA’s Rules for Employment Arbitration. The AHILA’s rules state in part:

To the extent authorized by law, an arbitrator may issue subpoenas for the attendance of witnesses or the production of documents. Parties are expected to produce witnesses who are in their employ or otherwise under their control without a subpoena.

See AHILA’s Rules for Employment Arbitration § 5.8(a). Section 15-48-80(a) of the South Carolina Uniform Arbitration Act (SCUAA) further provides as follows:

(a) The arbitrators may issue (cause to be issued) subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. ***Subpoenas so issued shall be served, and upon application to the court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action.***

S.C. CODE ANN. § 15-48-80(a) (emphasis added).

When the Respondents refused to comply with the subpoenas, Duncan had to initiate a special proceeding or application in the circuit court pursuant to § 15-48-80(a) and S.C. R. CIV. PRO. 37 and 45 to enforce them. This special proceeding or application came before Circuit Judge Kristi F. Curtis for a hearing, who subsequently entered orders denying enforcement of the arbitrator's subpoenas. That special proceeding was ended with the entry of the circuit court's orders denying enforcement of the subpoenas. As a result, the orders are appealable because they completely disposed of the special proceeding or application before that court.

Duncan timely appealed the circuit court's orders to this court. In dismissing Duncan's appeal, this court's order cites to cases holding that orders denying or compelling pretrial discovery generally are not appealable because they are interlocutory decisions. *See* Order dated January 2, 2024 (citing *Grosshuesch v. Cramer*, 377 S.C. 12, 659 S.E.2d 112 (2008) and *Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881 (1986)). The rationale of these cases is that a discovery order issued in a circuit court action ordinarily "is not a final order because it leaves some further act to be done by the court before the rights of the parties ... are determined." *Ex parte Wilson*, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005). The purpose of this "final decision" rule is to avoid the temporary halt or delay of the litigation process that would be required by an appeal from a discovery order in an action that is still ongoing. When a case is not finished in the circuit court, a party seeking or opposing the discovery must wait until a final decision or final judgment has been rendered in the circuit court to appeal from the discovery order.

None of the cases cited by this court's order are on point with the present appeal. None dealt with the precise issue presented here; namely, whether a circuit court's order denying a claimant's application in a self-contained court proceeding under § 15-48-80(a) to enforce an arbitrator's document subpoena to a nonparty is appealable when the order completely disposed of the matter, leaving nothing more for the circuit court to do but enforce the judgment.

Unlike the discovery orders appealed from in *Grosshuesch*, *Whetstone*, and *Wilson*, which involved discovery requests served as part of ongoing litigation in the circuit court, the circuit court's orders in this case do not involve discovery conducted as part of ongoing litigation in the circuit court. To the contrary, the subpoenas were issued in a separate arbitration proceeding. Duncan initiated a special proceeding or application in the circuit court for the sole purpose of enforcing those subpoenas when the Respondents refused to comply with them. After the circuit court issued its orders refusing to enforce the arbitrator's subpoenas, the special proceeding in the circuit court ended. The orders resolved all the issues in the special proceeding.

Unlike the situations in *Grosshuesch*, *Whetstone*, and *Wilson*, there are no additional issues for the circuit court to decide with respect to the arbitration. The purpose of the "final decision" rule will not be thwarted by allowing an appeal of the circuit court's orders because the appeal will not cause a halt or delay of any ongoing litigation in the circuit court, which is the oft cited reason for denying interlocutory appeals. Here, the circuit court has nothing further to do or decide with respect to the arbitrator's subpoenas. That matter is over in the circuit court.

While Duncan has been unable to find a published South Carolina decision directly on point, this court addressed a similar situation in its unpublished decision in *Wilson v. Integrated Cap. Strategies, LLC*, No. 2014-001652, 2018 WL 3159909 (S.C. Ct. App. June 27, 2018). In that case, the South Carolina Attorney General (SCAG) commenced an investigation into

whether CertusBank (Certus) had violated South Carolina’s securities laws. *Id.* at *1. As *ex officio* Securities Commissioner, the SCAG may issue investigative or administrative subpoenas as part of his statutory authority to “conduct public or private investigations within or outside of this State which the Securities Commissioner considers necessary or appropriate to determine whether [an entity] has violated, is violating, or is about to violate” the South Carolina Securities Act. *See* S.C. CODE ANN. §§ 35-1-601(a), -602(a)(1).

In *Integrated Cap. Strategies*, the SCAG issued an administrative subpoena to Integrated Capital Strategies, LLC (ICS) requiring it to produce certain documents related to the SCAG’s ongoing investigation into Certus’s activities. *Id.* After ICS objected to the subpoena, the SCAG made an application in the circuit court for an order enforcing the subpoena pursuant to S.C. CODE ANN. § 35-1-602(c).² Following the circuit court’s orders enforcing compliance with the subpoena, ICS then appealed to this court. In a footnote to its opinion, this court noted the circuit court’s orders were immediately appealable and explained:

Upon receipt of the notice of appeal, this court requested that ICS and the Securities Commissioner file memoranda addressing the issue of appealability of the Order Requiring Compliance. ***Because the Order Requiring Compliance ended the circuit court case, it is distinguishable from typical orders compelling discovery.*** *See* S.C. CODE ANN. § 14-3-330(3) (1976) (stating “[a] final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment” is immediately appealable); *F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 873 n.21 (D.C. Cir. 1977) (holding “it is settled that an order of a ... court granting or denying an agency’s petition for enforcement of a subpoena is final and appealable”).

2018 WL 3159909 at *2 n.5 (emphasis added).

² Section 35-1-602(c) provides: “If a person does not appear or refuses to testify, file a statement, produce records, or otherwise does not obey a subpoena as required by the Securities Commissioner under this chapter, the Securities Commissioner may apply to the Richland County Court of Common Pleas or a court of another State to enforce compliance.” S.C. CODE ANN. § 35-1-602(c).

This court's opinion in *Integrated Cap. Strategies* accords with case law from other states which have held that a court order enforcing or quashing an investigative or administrative subpoena is appealable as a final judgment when the order resolves all issues in the special proceeding initiated to enforce or quash the subpoena. *See, e.g., State ex rel. Dep't of Hum. Servs., Child Support Enft Div. v. N. Dakota Ins. Rsrv. Fund*, 822 N.W.2d 38, 41 (N.D. 2012) (holding that court order denying enforcement of administrative subpoena issued by state department of human services was immediately appealable under statute authorizing an appeal from "[a] final order affecting a substantial right made in special proceedings"); *Las Vegas Police Protective Ass'n Metro, Inc. v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 130 P.3d 182, 189 & n.14 (Nev. 2006) (holding that court order enforcing or refusing to enforce a municipal citizen advisory review board's administrative subpoena is appealable as a final judgment, when the order resolves all issues in the proceeding and "leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs"); *Colorado State Bd. of Acct. v. Arthur Andersen LLP*, 116 P.3d 1245, 1249-50 (Colo. App. 2005) (While acknowledging the general rule that "orders quashing subpoenas have been held to be not appealable because they are simply interlocutory and do not finally resolve the issues in the case," the court still found that court's order enforcing an administrative subpoena issued by the state accountancy board was appealable because it "was entered to conclude a special statutory proceeding" brought by the board to enforce its administrative subpoena.); *Unnamed Attorney v. Attorney Grievance Commission*, 494 A.2d 940, 944 (Md. 1985) (stating Maryland has consistently held that "where a court proceeding is commenced to quash or to enforce an administrative subpoena ..., where the court refuses to quash or orders enforcement, and where the court's order terminates the court proceeding, the order is final and appealable")

notwithstanding general rule that “orders in pending court cases enforcing subpoenas for the production of documents in the pending judicial proceedings” are not appealable); *Laurent v. Brelji*, 392 N.E.2d 929, 930-31 (Ill. App. Ct. 1979) (holding that court order enforcing an administrative subpoena *duces tecum* issued by state civil service commission was appealable because “the proceeding before the circuit court [to enforce the subpoena] was a separate, independent action” and the order “finally determined the rights of the parties before it and terminated the litigation” thus making it “distinguishable from other discovery orders entered in a cause pending in the same court”); *Dana Point Safe Harbor Collective v. Superior Ct.*, 243 P.3d 575, 581 (Cal. 2010) (order compelling compliance with legislative or administrative subpoenas is an appealable final judgment because it leaves nothing to the party against whom judgment is rendered except to comply).

In *Uber Techs., Inc. v. Google LLC*, 238 Cal. Rptr. 3d 765 (Cal. Ct. App. 2018), the California Court of Appeal applied these principles in the specific context of a special proceeding to vacate a nonparty subpoena issued by arbitrators in an arbitration proceeding. The court held a party to an arbitration that is dissatisfied with a court order vacating an arbitrator’s discovery order in favor of a nonparty has a right of direct appeal because the order constitutes a “final judgment.” *Id.* at 870-71. Google LLC (Google) initiated an arbitration against two of its former employees. Google, as a party to the arbitration, issued a discovery subpoena for the production of documents to Uber Technologies, Inc. (Uber), a nonparty. *Id.* at 871. After the arbitration panel upheld the subpoena, Uber applied to the superior court to vacate the arbitration panel’s discovery order, which application the court granted. Google then appealed from the superior court’s order vacating the arbitration panel’s decision. Uber moved to dismiss the appeal on the grounds the order was not appealable.

The court in *Uber Techs* acknowledged it “[knew] of no case that addresses the precise issue before [the court], namely, whether a party to an arbitration has a right to appeal an adverse superior court order vacating an arbitrator’s discovery order in favor of a third party to the arbitration.” *Id.* at 771. Still, the court concluded “such a right of direct appeal exists based on the one final judgment rule” because the superior court’s discovery order “was the final resolution of the special proceeding initiated by Uber for the sole purpose of vacating the arbitration panel’s order compelling Uber to produce the [documents].” *Id.* at 772. The court pointed out that “[t]he superior court’s order resolved the dispute between Uber and Google with finality,” “the court’s order relieved Uber of any obligation to produce the [documents] in the underlying arbitration and conclusively determined Uber’s obligations to Google,” and “[t]here was nothing left for the superior court to determine as between Uber and Google, and the Order disposed of all issues between them in the special proceeding.” *Id.* “Because the [discovery order] is a final determination of the discovery rights between Uber and Google in the special proceeding commenced for the sole purpose of resolving this discovery dispute, the order is appealable.” *Id.* at 774.

The same reasoning applies with equal force to the current appeal. The circuit court entered a final order disposing of Duncan’s application or special proceeding which he initiated pursuant to S.C. CODE ANN. § 15-48-80(a) to obtain a court order enforcing the arbitrator’s document subpoenas issued to the Respondents. The circuit court’s orders resolved the dispute between Duncan and Respondents with finality. Once the circuit court ruled that Respondents do not have to comply with the arbitrator’s subpoenas, there was nothing left for the circuit court to do involving the arbitration. The circuit court’s orders do not contemplate any further proceedings between Duncan and Respondents involving the arbitration. That matter is now

ended in the circuit court. *See Kriti Ripley, LLC v. Emerald Invs., LLC*, 404 S.C. 367, 379, 746 S.E.2d 26, 32 (2013) (“The denial of Kriti's motion for foreclosure . . . was unquestionably a final judgment. . . . Here, the only relief requested or available in the action was the issuance of a charging order and foreclosure upon the lien. Once foreclosure was denied, the action was over and nothing was left to be done. Therefore, as a final judgment, the order is immediately appealable.”).

In determining what is an appealable order under § 14-3-330(3), our state supreme court has looked to federal court precedents when there is no South Carolina authority directly on point. *Burkey v. Noce*, 398 S.C. 35, 37, 726 S.E.2d 229, 230 (Ct. App. 2012). The federal courts hold that a district court order under the Federal Arbitration Act (FAA), 9 U.S.C. § 7, compelling compliance with or quashing an arbitrator’s subpoena to a nonparty *is a final order* for purposes of appellate jurisdiction and is immediately appealable when the litigation to enforce the subpoena was a self-contained court proceeding and the court’s order completely disposed of the matter, leaving nothing more for the court to do but enforce the judgment. *See, e.g., Dynegy Midstream Servs. v. Trammochem*, 451 F.3d 89, 93-94 (2nd Cir. 2006); *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 573-75 (2nd Cir.2005); *Amgen, Inc. v. Kidney Ctr. of Delaware Cnty., Ltd.*, 95 F.3d 562, 566-67 (7th Cir. 1996). In *Dynegy*, for instance, the court explicitly found an arbitration subpoena “to be more akin to an administrative subpoena” and noted that “[t]he litigation to enforce the subpoena is an entirely self-contained court proceeding, and the [district] court’s order compelling compliance completely disposed of the case, leaving nothing more for the court to do but enforce the judgment.” *Dynegy*, 451 F.3d at 93-94.

Our state supreme court’s decision in *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006), provides further support for the appealability of the orders in this case. In

Capital U-Drive-It, the plaintiff brought a civil embezzlement action in circuit court against a recent family court litigant. *Id.* at 4, 630 S.E.2d at 466. During discovery in the circuit court action, the circuit court plaintiff filed a motion in the family court to unseal the family court record so it could “review and copy all information in the file pertaining to [the circuit court defendant’s] financial affairs.” *Id.* at 4-5, 630 S.E.2d at 466. The family court granted the motion to unseal the record and permitted the circuit court plaintiff to inspect it. *Id.* at 5, 630 S.E.2d at 466. On appeal, the supreme court held the family court order was immediately appealable because “it is a final order issued by the family court which stands separate and apart from the civil lawsuit.” *Id.* at 6, 630 S.E.2d at 467. The family court’s order unsealing the record was a self-contained court proceeding which completely disposed of the matter, leaving nothing more for the family court to do but enforce the judgment.

The same situation exists here. The circuit court’s order denying Duncan’s special proceeding or application for an order enforcing the arbitrator’s subpoenas is a final order issued by the circuit court which stands separate and apart from any lawsuit against the Respondents. The circuit court’s disposition of Duncan’s special proceeding or application to enforce the arbitrator’s subpoenas was a self-contained proceeding that is now ended.

For the forgoing reasons, Duncan respectfully submits this court has overlooked or disregarded facts showing the circuit court’s orders are appealable because they constitute a “final judgment” or an “intermediate order ... involving the merits” within the meaning of § 14-3-330(1) or, alternatively, the orders constitute a “final order affecting a substantial right made” in a “special proceeding” within the meaning of § 14-3-330(3). Duncan respectfully submits the court’s order is erroneous, a rehearing should be granted, and the circuit court’s orders should be

reversed. Due to the exceptional importance and novelty of the issues addressed in this appeal, Duncan further requests the court to rehear this case *en banc*.

Respectfully submitted,

ROSEN HAGOOD, LLC

By: /s/ Daniel F. Blanchard, III

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ATTORNEYS FOR APPELLANT

Charleston, South Carolina
January 10, 2024.

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM HORRY COUNTY
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Defendants,

v.

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

PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing on the Respondents by mailing a copy of it to their attorneys of record on January 10, 2024, by United States first-class mail, with sufficient postage affixed thereto, and addressed as follows:

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ROSEN HAGOOD, LLC

By: /s/ Daniel F. Blanchard, III
Daniel F. Blanchard, III, Esquire
ATTORNEYS FOR APPELLANT

ROSEN | HAGOOD

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Jan 10 2024

SC Court of Appeals

DANIEL F. BLANCHARD III
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January 10, 2024

VIA E-MAIL FOR ELECTRONIC FILING:

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

Re: Dr. Scott F. Duncan v. OrthoSC, LLC, a South Carolina limited liability company, Dr. Gene M. Massey, M.D.; and HCA Healthcare, Inc., a Delaware corporation
Appellate Case No. 2023-001587
Court of Common Pleas Case No. 2021-CP-26-07488
American Health Law Association Arbitration Claim No. 7029

Dear Ms. Kitchings:

Please find enclosed for filing the following:


1. Petition for Rehearing *En Banc*,
2. Proof of Service, and
3. Filing fee check in the amount of \$50.00.

We would greatly appreciate your filing these on our behalf.

With best regards, I am

Sincerely,

ROSEN HAGOOD, LLC



Reviewed and Approved for Electronic Transmission

Daniel F. Blanchard, III

Encls.

cc: Charles E. Ipock, Esquire (w/ encls.)
Stafford John McQuillin, III, Esquire (w/ encls.)
Jonathan D. Klett, Esquire (w/ encls.)
Sarah P. Spruill, Esquire (w/ encls.)