THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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

South Carolina Court of Appeals Appellate Case No. 2023-001587
South Carolina Court of Appeals Order filed January 2, 2024
Court of Common Pleas Case No. 2021-CP-26-07488
American Health Law Association Arbitration Claim No. 7029

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

Petitioner,

v.

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

Defendants,

v.

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

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner Dr. Scott F. Duncan, M.D. ("Petitioner") certifies the Petition for Rehearing *En Banc* was made and finally ruled on by the Court of Appeals on April 30, 2024.

QUESTION PRESENTED

I. Did the Court of Appeals err by *sua sponte* dismissing Petitioner's appeal of the circuit court's orders 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 orders are not appealable when the proceeding to enforce the subpoena was a self-contained court proceeding and the circuit court's orders completely disposed of the matter, leaving nothing more for the circuit court to do?

INTRODUCTION

Petitioner is an orthopedic surgeon who is a party to an arbitration proceeding pending before the American Health Law Association (AHLA). He has been attempting to subpoena records in the possession of two nonparties—Respondents OrthoSC, LLC and Dr. Gene M. Massey, M.D.—to use them to prepare his claims in the arbitration. After the arbitrator issued document subpoenas to the Respondents and they failed to respond or comply with the subpoenas, Petitioner filed an application in the circuit court in accordance with the provisions of the South Carolina Uniform Arbitration Act (SCUAA), S.C. CODE ANN. § 15-48-80(a), and S.C. R. CIV. PRO. 37 and 45 seeking to enforce compliance with the subpoenas.

Section 15-48-80(a) states:

> (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). This section was adopted verbatim from the Uniform Arbitration Act (UAA) § 7. An "application to the court" under § 15-48-80(a) "shall be

by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions." S.C. CODE ANN. § 15-48-170.

After the circuit court entered written orders denying Petitioner's application and refusing to enforce the arbitrator's subpoenas, Petitioner timely appealed these orders to the court of appeals. However, the court of appeals *sua sponte* ruled the circuit court's orders are not appealable and dismissed the appeal before any briefing was conducted involving the merits of the appeal. The court of appeals ruled the circuit court's orders denying Petitioner's application under § 15-48-80(a) are nothing more than routine discovery orders that are interlocutory and not appealable.

The controlling question raised by this Petition is whether a circuit court order denying an application pursuant to § 15-48-80(a) to enforce an arbitrator's subpoena issued to a nonparty is appealable when the special proceeding to enforce the subpoena was a self-contained court proceeding and the circuit court's order completely disposed of the proceeding, leaving nothing more for the circuit court to do with respect to enforcement of the subpoena. No state court decision has yet addressed this question. The Petition raises a question of first impression and great importance under our state law. The outcome will have significant ramifications for how arbitration proceedings are conducted in this state under the SCUAA.

An unpublished decision of the South Carolina Court of Appeals ruled in a similar context that an order granting an application made in the circuit court to enforce an investigative subpoena issued by the South Carolina Attorney General (SCAG) pursuant to S.C. CODE ANN. § 35-1-602(c) is immediately appealable when the order resolved the issues in the special proceeding brought to enforce the subpoena. *See Wilson v. Integrated Cap. Strategies, LLC*, No. 2014-001652, 2018 WL 3159909, *2 n.5 (S.C. Ct. App. June 27, 2018). In *Integrated Cap.*

Strategies, the court held the circuit court's orders enforcing compliance with the SCAG's investigative subpoena was immediately appealable. Despite this opinion, the court of appeals held in the present case that the circuit court's orders refusing to enforce the arbitrator's subpoenas issued to the nonparties pursuant to § 15-48-80(a) are not immediately appealable even though the orders disposed of the special proceeding involving the subpoenas, leaving nothing more for the circuit court to do.

As a result, the lower court rulings are inconsistent and the law is unsettled involving when an appeal may be pursued from a circuit court's order enforcing or refusing to enforce a subpoena issued by an arbitrator or agency. Petitioner respectfully requests this court to resolve this novel issue of state law and to provide clarity regarding this question of law. For the reasons discussed below, Petitioner respectfully requests this Court to issue a writ of certiorari to review the decision of the court of appeals in accordance with SCACR 242, reverse the decision of the court of appeals involving appealability of the circuit court's orders, and remand the matter to the court of appeals so it may address the merits of Petitioner's appeal.

STATEMENT OF THE CASE AND FACTS

Petitioner is the claimant in an arbitration proceeding which the AHLA is conducting in South Carolina. The AHLA assigned the matter AHLA Claim No. 7029 and appointed Henry L. Parr, Jr., Esquire to serve as arbitrator. The defendants in the arbitration include Grand Strand Surgical Specialists, LLC ("GSSS"), Grand Strand Regional Medical Center, LLC ("GSRMC"), and HCA Physician Services, Inc. ("HCA-PS"). Respondents OrthoSC and Massey are *not* parties to the arbitration and there are no claims pending against them in the arbitration.[1]

[1] Petitioner initially filed claims against GSSS, GSRMC, and HCA-PS as well as against Respondents OrthoSC and Massey in the circuit court. However, on January 14, 2022, GSSS, GSRMC, and HCA-PS moved to compel arbitration of Petitioner's claims against them pursuant

Petitioner desired to obtain documents from Respondents OrthoSC and Massey for use in the arbitration proceeding. Because the Respondents are not parties to the arbitration, Petitioner had to apply to the arbitrator for the issuance of nonparty document subpoenas to the Respondents. On August 3, 2022, the arbitrator issued nonparty document subpoenas to both Respondents pursuant to the authority granted in S.C. CODE ANN. § 15-48-80(a) and Section 5.8(a) of the AHLA's Rules for Employment Arbitration.

Section 5.8(a) of the AHLA's rules state in pertinent 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 AHLA's Rules for Employment Arbitration § 5.8(a). As quoted in full above, § 15-48-80(a) of the SCUAA authorizes an arbitrator to issue a subpoena "for the production of books, records, documents and other evidence" and "upon application to the court by a party or the arbitrators, [the subpoena shall be] 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).

When the Respondents refused to comply with the arbitrator's subpoenas, Petitioner initiated a special proceeding or application in the circuit court on September 8, 2022, pursuant

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to a written arbitration agreement. As a result, on April 1, 2022, the circuit court entered an order referring Petitioner's against those parties to binding arbitration to be conducted by the AHLA. At that point, the circuit court was divested of jurisdiction over Petitioner's claims against GSSS, GSRMC, and HCA-PS. *See Main Corp. v. Black*, 357 S.C. 179, 181, 592 S.E.2d 300, 302 (2004). However, in its April 1, 2022 order, the circuit court retained jurisdiction over Petitioner's separate claims against Respondents OrthoSC and Massey which remain in the circuit court. *See* Order filed 4.1.2022 ("… this Order shall not be deemed or construed to stay or affect Plaintiff's claims against any of the other Defendants in this action, which shall proceed in this Court …"). Because of the above, Respondents OrthoSC and Massey are defendants in the initial circuit court case, but they are not parties to the arbitration proceeding before the AHLA. The subpoenas in question were issued by the arbitrator in the arbitration proceeding, not by the circuit court in the circuit court action.

to § 15-48-80(a) and S.C. R. CIV. PRO. 37 and 45 to enforce the subpoenas. This application came before the circuit court for a hearing on November 30, 2022. The circuit judge subsequently entered an order on February 24, 2023, denying enforcement of the arbitrator's subpoenas.

The circuit court denied enforcement of the arbitrator's subpoenas based on its decision to follow the holdings of some federal courts applying the Federal Arbitration Act (FAA), 9 U.S.C. § 7, which have held arbitrators lack authority under this provision to compel a nonparty to produce documents *pre-hearing*. The federal courts are sharply divided on this question. Some federal courts have interpreted FAA § 7 to mean a nonparty witness may be compelled to bring documents with them to an arbitration hearing but may not be subpoenaed to produce or deliver documents pre-hearing. *See Hay Grp., Inc. v. EBS Acquisition Corp.*, 360 F.3d 404, 407 (3rd Cir. 2004); *Life Receivables Trust v. Syndicate 102*, 549 F.3d 210, 216-17 (2nd Cir. 2008). However, other federal courts have eschewed a constrictive reading of FAA § 7 and have ruled that arbitrators may issue subpoenas to nonparties for the pre-hearing production of documents and information. *See In re Sec. Life Ins. Co. of Am.,* 228 F.3d 865, 870-71 (8th Cir. 2000); *Am. Fed'n of Television & Radio Artists v. WJBK–TV,* 164 F.3d 1004, 1009 (6th Cir. 1999); *Int'l Seaway Trading Corp. v. Target Corp.*, No. 020MC00086NEBKMM, 2021 WL 672990, at *4 (D. Minn. Feb. 22, 2021); *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 45 (M.D. Tenn. 1994); *Stanton v. Pain Webber Jackson & Curtis, Inc.,* 685 F. Supp. 1241 (S.D. Fla. 1988).

Regardless of the split among federal cases applying FAA § 7, the statutory language in UAA § 7—upon which S.C. CODE ANN. § 15-48-80(a) is derived—is markedly different from the language in FAA § 7. Because of this difference in language, courts applying the uniform act have held arbitrators are authorized to issue pre-hearing document subpoenas to nonparties. *See,*

e.g., Loc. 447 of Int'l Union of Painters & Allied Trades v. Feaker Painting, Inc., 788 N.W.2d 398, *3 & n.2 (Iowa Ct. App. 2010); *Jas. W. Glover, Ltd. v. Derrick Concrete Cutting & Const., Ltd.*, 80 P.3d 1001 (Haw. 2003); *Matahen v. Sehwail*, No. PAS-L-895-19, 2019 WL 11729634, at *1 (N.J. Super. Ct. Apr. 17, 2019); *May Const. Co. v. Thompson*, 20 S.W.3d 345, 352 (Ark. 2000); *Drivers, Chauffeurs & Helpers Loc. Union No. 639 v. Seagram Sales Corp.*, 531 F. Supp. 364, 366 (D.D.C. 1981). Indeed, even those federal courts adhering to the constrictive construction of the federal statute have explicitly acknowledged that a contrary result will obtain when applying state statutes based on UAA § 7. *Hay Grp.*, 360 F.3d at 407 n.1.

Despite the above, the circuit court disregarded this difference in statutory language and premised its order denying enforcement of the arbitrator's subpoenas on those federal cases taking a narrow view of FAA § 7 rather than on the cases applying UAA § 7. The circuit court made this decision even though the SCUAA explicitly directs that its provisions "shall be construed as to effectuate its general purpose to make uniform the law of those states which enact it." S.C. CODE ANN. § 15-48-230. Therefore, decisions from other states that have adopted the uniform act provision are especially persuasive. *Ashley River Properties I, LLC v. Ashley River Properties II, LLC*, 374 S.C. 271, 280-81, 648 S.E.2d 295, 299-300 (Ct. App. 2007); *see Hoover v. Hoover*, 271 S.C. 177, 182, 246 S.E.2d 179, 181 (1978).

On March 6, 2023, Petitioner timely filed a motion to alter or amend the circuit court's order pursuant to S.C. R. CIV. PRO. 54 and 59(e). On September 25, 2023, the circuit court denied Petitioner's motion to alter or amend.

Petitioner then timely filed an appeal to the South Carolina Court of Appeals on October 10, 2023. The court of appeals *sua sponte* raised the question of appealability in a letter sent to the parties' counsel on October 27, 2023. On January 2, 2024, after the parties had filed

memoranda addressing the appealability issue, Judge Letitia H. Verdin issued an order dismissing Petitioner's appeal. The order states in full:

> After careful consideration of the parties' memoranda on appealability, this appeal is dismissed. *See Huntley v. Young*, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995) (providing the denial of a motion to dismiss under Rule 12(b)(6) is not immediately appealable); *Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008) ("[D]iscovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute, involve the merits of the action or affect a substantial right."); *Ex parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986) ("[A]n order directing a non-party to submit to discovery is not immediately appealable."). The remittitur will be sent as required by Rule 221(b), SCACR.

See Order filed 1.2.2024.

On January 10, 2024, the Petitioner filed a Petition for Rehearing *En Banc*. On April 30, 2024, the court of appeals denied this petition.

ARGUMENTS

The determination of whether a party may immediately appeal an order is governed primarily by statute. S.C. CODE ANN. § 14-3-330; *see Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 708 (2005). "An order generally must fall into one of several categories set forth in [§ 14–3–330] in order to be immediately appealable." *Hagood*, 362 S.C. at 195, 607 S.E.2d at 708. The circuit court's orders in the present case are appealable under subsections (1) and (3) of § 14-3-330, which state that our appellate courts shall have appellate jurisdiction for correction of errors of law involving the following matters:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from; [and]

> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

S.C. CODE ANN. § 14-3-330(1) & (3).

First, 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). "An order 'involves the merits,' as that term is used in Section 14-3-330(1) and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense." *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 7, 630 S.E.2d 464, 467 (2006) (citations & footnote omitted); *see Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 174, 624 S.E.2d 439, 442 (Ct. App. 2005). "A final judgment is an order that 'dispose[s] of the cause, ... reserving no further questions or directions for future determination. It must finally dispose of the whole subject-matter or be a termination of the particular proceedings or action, leaving nothing to be done but to enforce by execution what has been determined.'" *Kriti Ripley, LLC v. Emerald Invs., LLC*, 404 S.C. 367, 379, 746 S.E.2d 26, 32 (2013) (quoting *Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 41-42, 21 S.E.2d 209, 212 (1942))).

Second, the circuit court's orders constitute a "final order affecting a substantial right made" in a "special proceeding" within the meaning of § 14-3-330(3). Our state law has historically divided the remedies in the courts of justice into (1) "actions" and (2) "special proceedings." *Allen v. Partlow*, 3 S.C. 417, 1872 WL 5562 (1872). Actions are distinguished from special proceedings according to the remedy sought. The two terms are used in contradistinction to each other. An "action" is an "ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence." *Allen*, 3 S.C. at 418, 1872 WL 5562 at *1-2. Conversely, a "special proceeding" is any other remedy—"such proceedings being

in their nature independent remedies, that cannot be taken by an action." *Id.*; *see Gibbes v. Elliott*, 8 S.C. 50, 62, 1876 WL 6768, *8 (1876) (noting that "special proceedings" are defined "as being every remedy other than the ordinary proceeding in a Court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense").[2]

To compel Respondents' compliance with the subpoenas issued in the arbitration, Petitioner had to initiate an application or special proceeding in the circuit court to enforce those subpoenas. That application or special proceeding was ended with the entry of the circuit court's orders denying enforcement of the subpoenas. The proceedings in the circuit court to enforce the arbitration subpoenas have been concluded by the circuit court with finality. As a result, the circuit court's orders are appealable because they completely disposed of the application or special proceeding before that court. There is nothing left for the circuit court to do with respect to the arbitrator's subpoenas, thus the orders are final and appealable.

In dismissing Petitioner's appeal, the court of appeals relied upon cases holding that circuit court orders denying or compelling pretrial discovery generally are not appealable because they are interlocutory decisions. *See* Order dated January 2, 2024 (citing cases). The rationale of these cases is that a discovery order issued in a circuit court action ordinarily "is not

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[2] In applying statutes identical to § 14-3-330(3), other states have held that "[a] special proceeding includes every special statutory remedy which is not in itself an action." *Williams v. Baird*, 735 N.W.2d 383, 389 (Neb. 2007); *Sullivan v. Storz*, 55 N.W.2d 499, 502 (Neb. 1952); 4 AM. JUR. 2D *Appellate Review* § 116 (2016) (citing cases). "A special proceeding is defined as usually meaning such a proceeding as may be commenced independently of a pending action by petition or motion, upon notice, in order to obtain special relief." *In re GlaxoSmithKline PLC*, 699 N.W.2d 749, 756 (Minn. 2005). "Its existence is not dependent upon the existence of any other action and it therefore is not an integral part of the original action but is separate and apart" and "[i]t adjudicates by final order a substantial right distinct from any judgment entered upon the merits of the original action." *Id.*; *see In re Estate of Janecek,* 610 N.W.2d 638, 642 (Minn. 2000); *Schuster v. Schuster*, 87 N.W. 1014, 1015 (Minn. 1901).

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 the court of appeals dealt with the unique issue presented by this appeal; namely, whether a circuit court's order denying a claimant's application or special proceeding under § 15-48-80(a) to enforce an arbitrator's third-party document subpoena 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 at issue in the cases cited by the court of appeals, which involved discovery requests served as part of ongoing litigation in the circuit court, the 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. Petitioner initiated an application in the circuit pursuant to § 15-48-80(a) 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 the cases relied upon by the court of appeals, there are no additional issues for the circuit court to decide with respect to the arbitration subpoenas. 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 Petitioner's application to enforce the arbitrator's subpoenas. That matter is over in the circuit court.

While Petitioner has been unable to find a published South Carolina decision on point, the court of appeals addressed a similar situation in its unpublished decision in *Integrated Cap. Strategies*. In that case, the SCAG commenced an investigation into whether CertusBank (Certus) had violated South Carolina's securities laws. *Integrated Cap. Strategies*, 2018 WL 3159909 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).[3] Following the circuit court's orders enforcing compliance with the subpoena, ICS then appealed to the court of appeals.

[3] 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).

In a footnote to its opinion, the court of appeals in *Integrated Cap. Strategies* 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).

The court of appeals'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 Enf't Div. v. N. Dakota Ins. Rsrv. Fund*, 822 N.W.2d 38, 41 (N.D. 2012); *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); *Colorado State Bd. of Acct. v. Arthur Andersen LLP*, 116 P.3d 1245, 1249-50 (Colo. App. 2005); *Unnamed Attorney v. Attorney Grievance Commission*, 494 A.2d 940, 944 (Md. 1985); *Laurent v. Brelji*, 392 N.E.2d 929, 930-31 (Ill. App. Ct. 1979); *Dana Point Safe Harbor Collective v. Superior Ct.*, 243 P.3d 575, 581 (Cal. 2010).

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 Petitioner'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 Petitioner 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 or the arbitrator's subpoenas. The circuit court's orders do not contemplate any further proceedings between Petitioner 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 courts have looked to federal court precedents when there is no South Carolina authority 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 FAA § 7 compelling compliance with or quashing an arbitrator's subpoena to a nonparty *is a final order* 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.

This 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 Petitioner'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 Petitioner's special proceeding or application to enforce the arbitrator's subpoenas was a self-contained proceeding that is now ended.

The court of appeals's dismissal of the Petitioner's appeal means he cannot seek review of the circuit court's orders until some later point, presumably when the arbitrator has issued a final award in the underlying arbitration before the AHLA and review of the award is sought in the circuit court. If so, it is important to appreciate that Petitioner will have no effective means to appeal from the circuit court's orders refusing to enforce the arbitration subpoenas even after a final arbitration award is made. In *Uber Techs.*, which is discussed above, the California Court of Appeal examined this very contention in an appeal from a trial court order vacating a nonparty subpoena issued in an arbitration. Uber had claimed the superior court's order lacked finality because "after a final award on the merits in the underlying arbitration, Google would be able to petition the superior court to confirm, vacate, or modify the award, and could appeal that result if so inclined" and, thus, the arbitrators' discovery order "eventually could be reviewed in such a direct appeal by Google." 238 Cal. Rptr. 3d at 773.

In rejecting Uber's arguments involving appealability of the superior court's orders, the appellate court noted that while it did not "dispute Google's ability to appeal from a judgment confirming an adverse arbitration award," "Google's right to eventually appeal an adverse judgment from its arbitration with [its former employees] does not render the [discovery order] intermediate or incomplete in the dispute between Uber and Google." *Id.* "Nor does it deprive Google of its ability to appeal a final judgment in a fully adjudicated special proceeding." *Id.* The court emphasized that "this case involved a nonparty to the underlying arbitration, and the single dispute involving the nonparty was conclusively determined by the superior court," thus the order was appealable. *Id.* at 774. The same analysis applies to the present case.

Furthermore, any assertion that Petitioner could seek to appeal from the circuit court's orders refusing to enforce the arbitration subpoenas once a final arbitration award has been made

in the underlying arbitration is illusory. There is no right to appeal an arbitrator's award in the usual sense. *Main Corp.*, 357 S.C. at 180-81, 592 S.E.2d at 301 (dismissing appeal of arbitration order made to Court of Appeals). Instead, a party to an arbitration merely may file an action in the circuit court seeking to vacate or modify the arbitration award based on limited grounds.

The scope of judicial review in such an action is far more restricted than appellate review of a circuit court's decision. The court's function in vacating or modifying an arbitration award is severely limited. *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009) ("Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award. An award will be vacated only under narrow, limited circumstances."). In *Waldo v. Cousins*, No. 2022-000134, 2024 WL 1900583 (S.C. May 1, 2024), this court just recently "acknowledge[ed]—and reaffirm[ed]—the rare and narrow basis upon which we may disturb an arbitration award." *Id.* at *1. "Judicial review of an arbitration award is limited in scope, and any attempt to convert arbitration into a trial-like judicial proceeding is looked upon with disfavor." *Lauro v. Visnapuu*, 351 S.C. 507, 516, 570 S.E.2d 551, 555 (Ct. App. 2002); *cf. Trident Tech. Coll. v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 105, 333 S.E.2d 781, 785 (1985) ("In order to advance the underlying purposes of arbitration, the scope of judicial review is necessarily restricted. '[T]he court's function in confirming or vacating an arbitration award is severely limited.'" (citations omitted).

Under the SCUAA, an arbitration award *must* be confirmed by the court unless a party timely seeks to correct, modify, or vacate the award. *Swentor v. Swentor*, 336 S.C. 472, 478, 520 S.E.2d 330, 334 (Ct. App. 1999) (citing S.C. CODE ANN. § 15-48-120). "Review of an arbitration award is limited and the decision of the arbitrator will be vacated only under certain grounds as provided by statute, or upon the non-statutory ground of manifest disregard or perverse misconstruction of the law." *Lauro*, 351 S.C. at 516, 570 S.E.2d at 556. The statutory grounds

for vacating an arbitration award are limited to showing, *inter alia*, (1) the award was procured by corruption, fraud, or other undue means; (2) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators; (3) the arbitrators exceeded their powers; (4) the arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy; or (5) there was no arbitration agreement. *See* S.C. CODE ANN. § 15-48-130.

"In addition to the statutory grounds for vacating the award, an award may be vacated where there has been a 'manifest disregard or perverse misconstruction of the law.'" *Harris v. Bennett*, 332 S.C. 238, 244, 503 S.E.2d 782, 786 (Ct. App. 1998) (quoting *Batten v. Howell,* 300 S.C. 545, 549, 389 S.E.2d 170, 172 (Ct. App.1990)). "This standard is met only when the award is the product of an intentional or reckless flouting of the law, not a mere error in interpreting it." *Waldo*, 2024 WL 1900583 at *1. These statutory and judicial grounds for vacating an arbitration award examine the actions of the arbitrator, not the circuit court.

Even if Petitioner were to seek to vacate an award made in the arbitration, he could not hope to raise any of these grounds with respect to the subpoenas issued to the Respondents because he agrees the arbitrator properly issued those subpoenas—*i.e.*, he makes no claim the arbitrator erred in issuing them. It would be nonsensical for Petitioner to claim the arbitrator erred or committed a manifest disregard of the law by issuing the subpoenas when Petitioner is attempting to enforce them, much less that the arbitrator erred in any of the ways listed in the statute. In sum, if Petitioner cannot immediately appeal the circuit court's orders refusing to enforce compliance with the arbitrator's subpoenas before a final arbitration award is made, he will never be able to appeal those orders.

For the forgoing reasons, Petitioner respectfully submits the court of appeals erred by holding the circuit court's orders are not appealable. Those orders constitute a "final judgment" or an "intermediate order … involving the merits" within the meaning of § 14-3-330(1) or, alternatively, constitute a "final order affecting a substantial right made" in a "special proceeding" within the meaning of § 14-3-330(3). Due to the exceptional importance and novelty of the issues addressed in this appeal, Petitioner respectfully submits the court should issue a writ of certiorari to the court of appeals, reverse the decision of the court of appeals, and remand the matter to the court of appeals so it may address the merits of Petitioner's appeal.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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