THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Judge
The Honorable Daniel Coble, Circuit Court Judge
Case No. 2019 CP 40-04452

South Carolina Court of Appeals
Appellate Case No. 2023-001058

South Carolina Supreme Court
Appellate Case No. 2024-000588

Anesthesiology Professionals of Columbia, LLC, ... Respondent,

v.

Lifepoint Health d/b/a Providence Health and Providence Hospital, LLC, ... Petitioner.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT IN REPLY

I. RESPONDENT'S STATEMENT OF THE CASE IS INACCURATE IN KEY RESPECTS.

Respondent Anesthesiology Professionals of Columbia, LLC's ("Respondent") factual recitation fails to address critical points contained in the record before the circuit court and the Court of Appeals. First, it simply ignores the sworn evidence in the record of Josiah Fecteau, the Vice President and Managing Counsel for Lifepoint. (Appendix ("App.") p. 65.) In his affidavit, Mr. Fecteau states Nelson Mullins was retained only to handle the arbitration; that neither Nelson Mullins nor any individual attorney then at the firm, particularly Ms. Erin Stuckey, was ever retained or employed to represent Lifepoint in the matter subsequently filed in the circuit court (referred to in the Petition and this Reply as "the Challenge Action"); that as the person in charge of the claim for Lifepoint, he was never informed of the existence of the Challenge Action by anyone until it was concluded; and that Lifepoint was never served with the pleadings initiating the Challenge Action or provided with any other filings submitted by Respondent, or purported to be submitted on its behalf, until after Judge Manning's orders were filed and the arbitration company notified Lifepoint of the need for a new arbitration hearing. (*Id*. ¶¶ 7-12).

Mr. Fecteau's affidavit is corroborated by the engagement letter between Lifepoint and Nelson Mullins. (App. 98, ¶ 3 ("Nelson Mullins is being retained to provide legal representation … in connection with an arbitration ….). It is corroborated by the post-arbitration communication from Mr. Fecteau to Ms. Stuckey, who principally handled the arbitration thanking Ms. Stuckey for her work on the arbitration and stating he "look[ed] forward to working with you again in the future. Thanks again," indicating the completion of the agreed upon engagement and not contemplating any other specific matter then under engagement. (App. 95).

Mr. Fecteu'a affidavit is further corroborated by Nelson Mullins' responses to Respondent's Requests for Production of Documents served in response to Lifepoint retaining counsel and filing a motion both challenging the jurisdiction of the circuit court and asserting due process violations as to the Challenge Action. (App. 118-120). As those responses state, Nelson Mullins possessed no communications between Ms. Stuckey (or any other person at Nelson Mullins) and Mr. Fecteau (or any other person at Lifepoint) regarding any aspect of the Challenge Action, including acceptance of service, pleadings or motions and drafts thereof, or other filings, billings, invoices, or even notes of any such communications. (*Id.*).

Contrary to the implication of Respondent's statement of the matter, Lifepoint never learned of the Challenge Action or authorized anyone to act on its behalf in the Challenge Action until the matter was complete and the time for appeal purportedly lapsed.[1] Lifepoint had no opportunity to defend itself in the matter until the Challenge Action was complete and the arbitration association attempted to institute a new arbitration proceeding. Lifepoint then promptly acted to protect its rights.

Section C of Respondent's statement of the facts is also misleading (Return to Pet. 4-5). Nelson Mullins made no appearance *for Lifepoint* before the circuit court in the Challenge Action. Nelson Mullins (including Ms. Stuckey) had no engagement with Lifepoint for that matter. Ms. Stuckey, without any authority or knowledge of Lifepoint, appeared in the Challenge Action and purported to act on Lifepoint's behalf. (App. 65).

Once the American Health Law Association ("AHLA") informed Lifepoint the Challenge Action had occurred and a new arbitration needed to be scheduled, Lifepoint retained counsel –

[1] See *infra,* p. 5 regarding Lifepoint's position on the finality of Judge Manning's Orders.

K&L Gates, not Nelson Mullins[2]—to appear and challenge the circuit court's jurisdiction because Lifepoint was never properly served, was not subject to the jurisdiction of the court, and was denied an opportunity participate in the Challenge Action. Lifepoint subsequently retained Nelson Mullins to represent it in the appeal of the circuit court's order denying Lifepoint's motion to dismiss or, in the alternative, enter a final order. Nelson Mullins is identified as Lifepoint's counsel on the Notice of Appeal. (App. 3). As explained in *supra* note 2, Ms. Stuckey remains listed on the circuit court docket as counsel of record for Lifepoint despite the fact she was never retained and despite Lifepoint repudiating her representation when it discovered the Challenge Action. Accordingly, Ms. Stuckey was served with a copy of the Notice of Appeal as noted on the Proof of Service, but she was not identified as counsel for Lifepoint on the Notice of Appeal, itself.

II. RESPONDENT BOTH FAILS TO ADDRESS THE CORRECT RULES GOVERNING APPEALS IN MATTERS ARISING UNDER THE SOUTH CAROLINA ARBITRATION ACT AND MISAPPLIES THE APPELLATE RULES IT DOES DISCUSS.

As stated by the Court in *Heffner v. Destiny, Inc.*, 321 S.C. 536, 538, 471 S.E.2d 135, 136 (1995), in a proceeding under the South Carolina Arbitration Act in state court, the statutory grounds for appeal in that matter are governed by the specific provisions of S.C. Code Ann. § 15-48-200 rather than the general appellate provisions of S.C. Code Ann. § 14-3-330 if they conflict. As set forth more fully in the Petition, pp. 6-13, the circuit court's May 31 Order is

[2] At the time of the original arbitration, Ms. Stuckey was an attorney at Nelson Mullins. Her representation of Lifepoint ended with the arbitration as noted above. Lifepoint never entered into any engagement agreement with Ms. Stuckey or anyone at Nelson Mullins regarding Lifepoint's defense of the Challenge Action in the circuit court. Ms.Stuckey departed Nelson Mullins effective December 31, 2021, before Lifepoint and others at Nelson Mullins discovered Ms. Stuckey failed to notify or disclose to Lifepoint or the firm that Respondent had initiated the Challenge Action. Ms. Stuckey has taken no action to withdraw her appearance in the matter although she departed from Nelson Mullins and Lifepoint has repudiated her purported representation of it in the Challenge Action.

immediately appealable under subsection 15-48-200(6), which provides for immediate appeal from "[a] judgment or decree entered pursuant to the provisions of [Title 15, Chapter 48]." *Id.*

The May 31 Order is also appealable under subsection 15-48-200(3), which permits an appeal from "[a]n order confirming or denying confirmation of an award [,]" and subsection 15-48-200(5), which permits an appeal from "[a]n order vacating an award without directing a rehearing[.]" *Id.* Lifepoint incorporates by reference the arguments set forth in its Petition regarding these subsections. (*See* Pet. 10-13). Respondent's Return fails to mention the controlling appellate statute pursuant to *Heffner*, nor does it address the arguments Lifepoint raised in its Petition as to the three relevant subsections. As stated in Rule 240(e) of the South Carolina Appellate Court Rules ("SCACR") in the context of a party filing no timely Return at all to a petition, "[f]ailure of a party … to file a return may be deemed a consent by that party to the relief sought in the motion or petition." *Id.* Based on the provisions of S.C. Code Ann. § 15-48-200, which are unaddressed and unrebutted by Respondent, the decision of the Court of Appeals dismissing Lifepoint's appeal as interlocutory should be reversed.

Although Respondent partially addresses S.C. Code Ann. § 14-3-330, the general appeal statute, Respondent fails to note subsection (2)(b) of that statute, which provides for an appeal from "[a]n order affecting a substantial right made in an action when such order … (b) grants or refuses a new trial…." In this case, the three orders from which Lifepoint appeals grant Respondent a new trial, i.e., a new arbitration hearing. This Court, construing subsection (2)(b), has previously an argument that the granting of a new trial is not immediately appealable. *See Bailey v. Peacock*, 318 S.C. 13, 14 n.2, 455 S.E.2d 690, 692 n.2 (1995) ("[T]his Court has appellate jurisdiction to review grants of a new trial.") Thus, under the very statute cited by

Respondent, Lifepoint's appeal is authorized.[3] This Court should reverse the Court of Appeals' holding to the contrary and remand the matter to the Court of Appeals to address the merits of Lifepoint's appeal.

Further, as set forth in the Petition, the August 4 and November 29 Orders were not, on their face, final because the clerk of court failed to enter final orders as prescribed by Judge Manning and required by Rule 58, South Carolina Rules of Civil Procedure. (Pet. 17-19). Respondent critiques Lifepoint's argument on this point as "inconsistent" with Lifepoint's argument that under *Fields v. Regional Medical Center Orangeburg*, 363 S.C.19, 27-28, 609 S.E.2d 506, 510 (2005), the substance of a motion, rather than its label or form, should control its treatment. (Return to Pet. 8 n.1).

The critique is misplaced. Ms. Stuckey filed a motion to reconsider attacking Judge Manning's August 4 Order on multiple substantive grounds ***in addition*** to the fact that it was miscaptioned. In response, the circuit court denied the motion to reconsider and required that a new, revised order, supposedly attached to the November 29 Order, be entered, *nunc pro tunc* August 4, 2021. The actual filing of the required order in the docket is a separate, prescribed requirement for triggering the duty to appeal, not just a "form" issue as argued by Respondent. *See* Rule 203(b)(1), SCACR (prescribing three separate situations where the time for appeal begins to run from the written notice of the entry of a judgment or order). Particularly pertinent to the November 29 Order, "[w]hen a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment[,]" which never occurred in the Challenge Action. *Id.*

[3] Lifepoint raised this exact argument in its Petition when discussing the Court's holding in *Heffner*, noting that subsection 14-3-330(2)(b), provides a right of appeal under these factual circumstances and is similar to and not inconsistent with, subsection 15-48-200(5). (Pet.7 n.8).

Finally, Respondent's argument questioning the finality of the Challenge Action and relying on *Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993) is factually and statutorily distinguishable. Under the Arbitration Act, Lifepoint, as a party to the arbitration, had a right to be notified of any challenge to the award and to appear and present a defense, in conjunction with counsel of its choosing, in support of the award. However, the court system has no jurisdiction over the arbitration matter or parties absent the more formal filing of the petition and service on the parties as provided in Rule 4, SCRCP.[4] In an ordinary civil matter, however, the court system already has jurisdiction over the parties to the matter and the appeal is perfected by timely filing of only a notice of appeal with the circuit and appellate court and serving counsel that has appeared for that matter with the notice (or the party, if *pro se*) by regular mail, personal delivery, or electronic means as provided by Rule 262, SCACR. The Arbitration Act requires service on the party as if an entirely new action is being filed in the court system (which is in fact what is happening) to protect the parties basic rights to notice and an opportunity to defend. Under the Arbitration Act, the parties are being brought to court for the first time.[5] In a regular civil matter, as in the *Mid-State* case cited by Respondent, they are already before the court through formal service pursuant to Rule 4, SCRCP at the inception of the lawsuit.

In the absence of an immediate right to appeal, under the Arbitration Act the matter completely departs the court system once the circuit court vacates the arbitration award on "appeal" and remands for a new arbitration hearing. Once the circuit court vacates an arbitration award and sends the matter back to an arbitrator for a new arbitration hearing, it ceases entirely

[4] S.C. Code Ann. § 15-48-170.

[5] Assuming, as in this case, that there was no antecedent dispute about whether the dispute was arbitrable.

to have jurisdiction over the arbitration proceeding. *Cf. Main Corp. v. Bla*ck, 357 S.C. 179, 181, 592 S.E.2d 300, 302 (2004) ("the trial judge ordered the case sent to an arbitrator. At that point, the circuit court was divested of jurisdiction over the case"). Both the propriety of the circuit court's decision on the merits and the issue of the court's personal jurisdiction over the parties and provision of due process to enter the decision on the merits regarding the arbitration award is complete and final upon the circuit court's entry of such an order and, therefore, immediately ripe for challenge by appeal. The ability to defend (or challenge) ***that*** arbitration award and power of the circuit court to hear and resolve ***that*** defense or challenge to that award never arises again.

This distinguishes matters governed by the Arbitration Act from a regular civil matter brought in circuit court governed by the Court's holding in *Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993), cited by Respondent. In a regular civil action outside the purview of the Arbitration Act, the circuit court retains continuous jurisdiction over the parties (except perhaps during a permitted interlocutory appeal under S.C. Code Ann. 14-3-330 or other specialized appeal statute) from the start to a final decision in the matter as to all parties and all claims. This allows for the development of a complete record upon which to decide a question of proper service and personal jurisdiction. The matter does not pass in and out of the court system with only limited rights of review each time it enters and departs that system.

By contrast, under the terms of the Arbitration Act, the only way the underlying dispute could ever come within the purview of the court system again would be through an entirely new action brought under S.C. Code Ann. § 15-48-130 to vacate the new arbitration award[6] and

[6] Review could also be sought to confirm (S.C. Code Ann. § 15-3-120) or modify/correct the arbitration award (S.C. Code Ann. § 15-3-140).

initiated as prescribed by S.C. Code Ann. § 15-48-170. However, the circuit court's review on the second trip back to the circuit court would be strictly circumscribed. "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 v. Visnapuu*, 351 S.C. 507, 516, 570 S.E. 2d 556 (Ct. App. 2002). The statutes allowing the court to confirm, vacate, or modify an arbitration award in a new action provide no readily discernable mechanism for the parties to obtain a ruling as to whether the circuit court, in the antecedent trip into and out of the court system to review the original arbitration award, had personal jurisdiction over the parties to entertain that action and vacate the prior award, such that the new, subsequent arbitration and resulting new award under review should be void. As stated in *Lauro*, in a second appeal from an arbitration award initiated in circuit court, review is limited to five stated statutory grounds and one non-statutory ground. *Id.* Thus, the limited role allowed to the circuit courts for review of arbitration awards each time the matter enters and exits the court system counsels that all of the legal issues appertaining to the circuit court's power to act upon the parties in the matter before it, as well as the propriety of the circuit court's decision to vacate or not vacate, should be subject to immediate review on appeal.

Worse yet, under Respondent's theory of finality, which Lifepoint addresses in the Petition, a circuit court could, without personal jurisdiction in the first instance to act, create an endless cycle of unreviewable vacaturs of arbitration awards. (Pet. 8-9); *See National Ave. Bldg. Co. v. Stewart*, 910 S.W.2d 334, 340-41 (Mo. Ct. App. 1995)(holding that the appellate provisions of the Missouri Arbitration Act, which are identical to the South Carolina Arbitration Act, should be construed to prevent potentially infinite unreviewable rulings trial court rulings regarding arbitration awards). The Court should grant the Petition, reverse the decision of the

Court of Appeals that Lifepoint's appeal is interlocutory, and remand the matter to the Court of Appeals for disposition on the merits.

III. RESPONDENT IMPROPERLY ADDRESSES THE MERITS OF THE MATTER. THIS APPEAL IS LIMITED TO THE COURT OF APPEALS' JURISDICTION IN THE FIRST INSTANCE.

Respondent quotes extensively from the May 31 Order arguing the circuit court correctly determined that Nelson Mullins, particularly its former attorney Ms. Stuckey, had apparent authority to act on behalf of Lifepoint in the Challenge Action and, therefore, the Petition should just be denied on the merits. (Return to Pet. 10-11). The problem with this argument is that there was no evidence in the record to support the circuit court's conclusion regarding apparent authority.

Under section 15-48-170, the Challenge Action was a separate proceeding from the arbitration that was required to be "served in the manner provided by law for the service of a summons in an action" unless "the parties have agreed otherwise[.]" S.C. Code Ann. § 15-48-170. It is undisputed that Respondent did not serve its petition initiating the Challenge Action "in the manner provide by law for the service of a summons in an action."

The sole basis for Respondent's ragument that it properly initiated the Challenge Action is a series of communications between counsel for Respondent and Ms. Stuckey (App. 112-16). No one at Lifepoint and no other person at Nelson Mullins was copied on those or other communications or filings until 2022, after Ms. Stuckey left Nelson Mullins and after Lifepoint first discovered the existence of the Challenge Action. All of the sworn testimony from Lifepoint – the only sworn evidence in the record-- and discovery responses produced by Nelson Mullins disavowed any communication from (1) from Lifepoint authorizing Ms. Stuckey (or anyone at Nelson Mullins) to represent Lifepoint in the Challenge Action or (2) from Ms. Stuckey (or anyone at Nelson Mullins) advising Lifepoint of the Challenge Action or inquiring

about representing Lifepoint in it. Nelson Mullins disclaimed any communications with Respondent or its associates in any way acknowledging or representing that Ms. Stuckey was acting for Lifepoint in the Challenge Action. Ms. Stuckey did not enter time, send bills, or have communications with Lifepoint regarding the Challenge Action. (App. 118-120).

As this Court has repeatedly stated, "[t]he basis of apparent authority is representations made ***by the principal*** to the third party and reliance by the third party on those representations[,]" a two-part inquiry. *Moore v. N. Am. Van Lines*, 310 S.C. 236, 239, 423 S.E.2d 116, 118 (1992) (emphasis added). As a full presentation on the merits of this appeal will demonstrate, Lifepoint – the "principal" in this situation -- never authorized or retained Ms. Stuckey (or anyone else at Nelson Mullins) to represent it in the Challenge Action. Ms. Stuckey did not inform Lifepoint that the Challenge Action existed, nor did Ms. Stuckey inform Lifepoint that she was purporting to act on its behalf in the Challenge Action so as to allow Lifepoint to plausibly agree to such an arrangement. Further, Lifepoint did not in any way communicate to Respondent or its counsel that Ms. Stuckey was designated to speak for or represent Lifepoint in the Challenge Action. Accordingly, there is simply no evidence to support a finding of "representations made by the principal" required to prove apparent authority. *Id.*

Conclusion

As set forth above, and in Lifepoint's other filings, this matter is ripe for appeal. The decision of the Court of Appeals to the contrary on appealability is wrong. Thus, this Court should grant the Petition, Reverse, and remand this matter to the Court of Appeals for disposition of Lifepoint's appeal on the merits.

Respectfully submitted,

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