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

Appellate Case No. 2024-000808
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.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioner Dr. Scott F. Duncan, M.D. ("Petitioner") respectfully submits this reply in support of his petition for a writ of certiorari.

Petitioner seeks this court's review of the circuit court's orders denying his application or motion pursuant to the South Carolina Uniform Arbitration Act (SCUAA), S.C. CODE ANN. § 15-48-80(a), for an order requiring Respondents OrthoSC, LLC and Dr. Gene M. Massey, M.D. (collectively the "Respondents") to comply with nonparty document subpoenas served on them in an arbitration proceeding conducted by the American Health Law Association (AHLA). The petition shows the circuit court's orders ended a "special proceeding" within the meaning of S.C. CODE ANN. § 14-3-330(3)—which authorizes appeals from a "final order affecting a substantial right made in any special proceeding"—because the orders concluded a self-contained proceeding and completely disposed of the proceeding, leaving nothing more for the circuit court to do with respect to the arbitrator's subpoenas or the arbitration.

Respondents now claim for the first time that "[t]here was no special proceeding, nor was there a 'self-contained court proceeding' relating to the subpoenas" because Petitioner filed his motion to enforce the subpoenas "in this Horry County Case and not in a separate proceeding." *See* Return p.2.[1] Because Petitioner did not file a new circuit court case when he applied for an order enforcing the arbitrator's subpoenas and, instead, filed his motion in an existing circuit court case already pending between Petitioner and Respondents, Respondents argue this means his application cannot constitute a "special proceeding." *Id.* p.5 (Petitioner did not "file a separate action or application seeking a special remedy," "[i]nstead, he filed a motion in the pending Horry County Case," thus "there has been no 'special proceeding' as contemplated

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[1] To avoid duplicative filings, Petitioner will refer to the exhibits attached to Respondents' return filed with this court.

under S.C. CODE ANN. § 14-3-330(3).”). Respondents assert the circuit court’s orders constitute routine discovery orders issued in a pending or ongoing circuit court case.

A major flaw with Respondents’ argument is that it assumes a special proceeding cannot be connected with or brought as part of a pending action. This assumption is incorrect because a special proceeding can be connected with or brought in a pending action. Moreover, the fact a special proceeding may have been connected with or brought in an action that remains pending does not determine whether the special proceeding is “final” for appeal purposes. When the court enters an order disposing of the special proceeding, that order is final and appealable even though there may be other claims in the pending action which have yet to be adjudicated.

A complete understanding of the background of these proceedings is crucial to appreciate the basis for Petitioner’s petition. Petitioner is a party to two separate proceedings. First, Petitioner is prosecuting claims against Respondents in an action pending in the Horry County circuit court. Second, Petitioner is prosecuting claims against other parties—Grand Strand Surgical Specialists, LLC, Grand Strand Regional Medical Center, LLC, and HCA Physician Services, Inc. (collectively the “HCA Defendants”)—in a separate arbitration proceeding.

On November 11, 2021, Petitioner had initially filed his claims against Respondents and the HCA Defendants in the same Horry County circuit court action. *See* Return Exh. 3. However, on January 14, 2022, the HCA Defendants moved to compel arbitration of Petitioner’s claims against them pursuant to a written arbitration agreement. Respondents are not parties to the arbitration agreement. They asserted the arbitration agreement is not binding on them.

On April 1, 2022, the circuit court entered an order referring Petitioner’s claims against the HCA Defendants to binding arbitration to be conducted by the AHLA. *See* Return Exh. 4. The circuit court was thus divested of jurisdiction over Petitioner’s claims against the HCA

Defendants. *Main Corp. v. Black*, 357 S.C. 179, 181, 592 S.E.2d 300, 301-02 (2004) ("In the case at hand, the parties consented to arbitration, and the trial judge ordered the case to be sent to an arbitrator. At that point, the circuit court was divested of jurisdiction over the case."). In that same order, the circuit court retained jurisdiction over Petitioner's claims against Respondents. *See* Return Exh. 4 p.2 ("… 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 …").

Due to the above, Petitioner was forced to separate his claims against Respondents from his claims against the HCA Defendants and to proceed in two different forums. Respondents are parties only to the circuit court action. They are not parties to the arbitration before the AHLA. No claims have been asserted against Respondents in the arbitration. Likewise, there are no claims pending against the HCA Defendants in the circuit court. These two proceedings are separate. The outcome of either does not depend on the outcome of the other. Indeed, the circuit court denied Respondents' motion to stay Petitioner's claims against them until the separate arbitration against the HCA Defendants is concluded. *See* "Exhibit A" attached hereto.

While Respondents are parties to the circuit court action, the arbitrator issued *nonparty document subpoenas* to Respondents *in the separate arbitration proceeding*. The subpoenas were issued by the arbitrator, not by the circuit court. It is these subpoenas that are the subject of the present appeal. Because the arbitrator lacked the ability to enforce the subpoenas once Respondents failed to comply with them, Petitioner had to file an application or motion in the circuit court in accordance with § 15-48-80(a) to enforce compliance with the arbitrator's subpoenas.

Section 15-48-80(a) confers a right and authorizes a special application to the court to enforce it which may be commenced by application or motion. The statute provides:

> (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).

The SCUAA further provides that 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." *Id.* § 15-48-170 (emphasis added); *see* S.C. R. CIV. PRO. 7(b)(1) ("An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.").

Purely for convenience reasons and to avoid the filing of yet a third proceeding, Petitioner filed his "application" or "motion" to enforce the arbitrator's subpoenas against Respondents in the existing circuit court action where Respondents already are parties. *See* Return Exh. 2. On February 23, 2023, the circuit court later entered an order holding it could not enforce the arbitrator's subpoenas notwithstanding § 15-48-80(a). *See* Return Exh. 6. The circuit court ruled that "[b]ecause 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" and the court "does not have the authority to compel [Respondents] to comply with the subpoenas at this time." *Id.* pp.4-5. Accordingly, the circuit court held that Petitioner's motion "is left to the determination of the Arbitrator." *Id.* p.5.

Petitioner timely moved the circuit court to reconsider its order and to require Respondents "to fully comply with the Arbitrator's subpoenas and to produce the documents described therein." *See* Return Exh. 7; *see also* "Exhibit B" attached. As part of that motion, Petitioner attached a copy of an order dated March 2, 2023 which the arbitrator had issued after being presented with the circuit court's February 23, 2023 order. *See* Return Exh. 7 at Exh. B. The arbitrator's order acknowledged the circuit court's prior order and stated that "although the arbitrator intends for the subpoenas to be enforced in the manner provided by law, the arbitrator lacks authority or practical ability to enforce the subpoenas." *Id.* The arbitrator's order further "authorizes the Petitioner to apply to the Circuit Court for enforcement of the subpoenas pursuant to the authority granted in S.C. CODE ANN. § 15-48-80(a)." *Id.*

Despite the above, the circuit court entered an order on September 25, 2023, denying Petitioner's motion for reconsideration and continued to refuse to enforce the arbitrator's subpoenas. *See* Return Exh. 8. Although the circuit court had initially ruled that enforcement of the subpoenas "is left to the determination of the Arbitrator" and the arbitrator had made clear he "intends for the subpoenas to be enforced," the circuit court still refused to enforce them.

At that point, the circuit court resolved with finality the special proceeding between Petitioner and Respondents relating to enforcement of the arbitrator's subpoenas. There is nothing left pending in the circuit court involving the arbitration or the arbitrator's subpoenas. Once the circuit court ruled that Respondents do not have to comply, there was nothing remaining for the circuit court to do with respect to the arbitration or the arbitrator's subpoenas. The circuit court's orders do not contemplate any further proceedings between Petitioner and Respondents involving the subpoenas or the arbitration. Those matters are done and ended.

Respondents now claim for the first time that Petitioner should have commenced a new case against them in the circuit court to enforce the arbitrator's subpoenas rather than move the circuit court to enforce the subpoenas in the existing circuit court case to which Respondents already were parties.[2] Respondents apparently agree the circuit court's orders refusing to enforce the arbitrator's subpoenas would be "final" and appealable if Petitioner had commenced a new circuit court case and asked the circuit court to enforce the subpoenas in that new case. However, simply because Petitioner chose to file his application or motion in the existing circuit court case, Respondents say the circuit court's orders refusing to enforce the arbitrator's subpoenas are not "final" and cannot be appealed because the rest of the circuit court case (which does not involve the arbitration) is "pending" and discovery orders issued in a pending case ordinarily are "interlocutory" and not appealable. *Id.* p.4 ("Petitioner seeks to appeal a discovery order in a pending case" in the circuit court.). According to Respondents, it is irrelevant that the circuit court disposed of all issues involving enforcement of the arbitrator's subpoenas and that the pending circuit court case does not concern Petitioner's claims in the arbitration.

While § 14-3-330(3) traces back for over a century and a half, there is scant South Carolina case law discussing what constitutes a "special proceeding." Other states with nearly identical statutes have developed a considerable body of case law explicating what this phrase means. These cases demonstrate that Petitioner's application for an order enforcing the arbitrator's subpoenas pursuant to § 15-48-80(a) involves a "special proceeding" for purposes of

[2] Respondents never argued in the circuit court or court of appeals that Petitioner could not seek enforcement of the arbitrator's subpoenas in the pending circuit court case, thus depriving Petitioner of the opportunity to address or correct this issue in the courts below. Case law holds that a party's failure to object to a court's authority to consider an issue while simultaneously participating in the court's determination of the issue acts as a waiver of any such objection. *See Karl Sitte Plumbing Co. v. Darby Dev. Co. of Columbia*, 295 S.C. 70, 72-73, 367 S.E.2d 162, 163-64 (Ct. App. 1988); *Garrell v. Blanton*, 316 S.C. 186, 188, 447 S.E.2d 840, 841 (1994).

§ 14-3-330(3). Moreover, the simple fact that Petitioner made his application in the pending circuit court action is not conclusive of whether the special proceeding is now "final."

SOUTH CAROLINA JURISPRUDENCE discusses § 14-3-330(3) and notes the following:

> Few reported decisions address this subsection. The term "special proceeding" has been defined, however, as follows:
>
> > [A] collateral proceeding in aid of a remedy prosecuted by action or otherwise, but it is so far independent that a final order in such proceeding is in the nature of a judgment and may be appealed from at any time, without regard to the state of proceedings on an action to which it may be collateral.

15 S.C. JUR. *Appeal and Error* § 14 n.11 (2024) (quoting *Emory v. Davis*, 4 S. C. 23, 36 (1872)). This treatise further explains that "if an order addressing preliminary relief occurs in a proceeding collateral to the main action, it may be considered a final order in a 'special proceeding' and hence appealable under the statute." *Id.* § 22.

Courts applying statutes substantially the same as § 14-3-330(3) have explained that "special proceedings are those which were not actions in law or suits in equity under common law, and which may be commenced by motion or petition upon notice for the purpose of obtaining relief of a special or distinct type." *State in Int. of C*, 638 P.2d 165, 168 (Wyo. 1981). "They result from a right conferred by law together with authorization of a special application to the courts to enforce it." *Id.* "A proceeding is special, within the ordinary meaning of the term special proceeding, when the law confers a right, and authorizes a special application to a court to enforce it." *Fiduciary Found., LLC ex rel. Rothfusz v. Brown*, 834 N.W.2d 756, 761 (Minn. Ct. App. 2013) (citing *Schuster v. Schuster*, 87 N.W. 1014 (Minn. 1901)); *Saint James Apartment Partners, LLC v. Universal Sur. Co.*, 5 N.W.3d 179, 189 (Neb. 2024) ("A special proceeding occurs where the law confers a right and authorizes a special application to a court to enforce it; it includes every special statutory remedy that is not itself an action."); *State v.*

Collins, 265 N.E.2d 261, 263 (Ohio 1970) ("Where the law confers a right, and authorizes a special application to a court to enforce it, the proceeding is special, within the ordinary meaning of the term 'special proceedings.'"); *Harryman v. Bowlin*, 4 P.2d 1011, 1012 (Okla. 1931) (same).

"A special proceeding usually means such a proceeding as may be commenced independently of a pending action by petition or motion, upon notice, in order to obtain special relief." *Chapman v. Dorsey*, 41 N.W.2d 438, 441 (Minn. 1950). "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." *Willeck v. Willeck*, 176 N.W.2d 558, 560 (Minn. 1970). "It adjudicates by final order a substantial right distinct from any judgment entered upon the merits of the original action." *Id.*

Even though a special proceeding may be commenced independently of a pending action, courts long ago rejected the contention "that there can be no special proceeding which grows out of, or is connected with, a pending action." *Witter v. Lyon*, 34 Wis. 564, 574 (1874). A "special proceeding may be 'connected with' an action in the sense that the application for the benefit of it and the other papers and orders concerning it may be filed in the case where the record of the filings in the action are made." *Tegra Corp. v. Boeshart*, 976 N.W.2d 165, 182 (Neb. 2022); *see Cureton v. Hutchinson*, 3 S.C. 606, 607 (1872) (right to appeal is provided "[w]here matters, either of an independent nature or collateral to an action, arise upon a special proceeding").

Cases hold "a proceeding may be special, even if the proceeding is connected with a pending action." *State v. Jacques*, 570 N.W.2d 331, 336 (Neb. 1997); *In re Claim of Roberts for Att'y Fees*, 949 N.W.2d 299, 311 (Neb. 2020) (same); *Sullivan v. Storz*, 55 N.W.2d 499, 502 (Neb. 1952) ("a proceeding may be special, within the meaning of the statute governing appeals,

although connected with a pending action" (quoting *Anderson v. Englehart*, 105 P. 571 (Wyo. 1909))). In *Anderson*, after noting that "a proceeding may be special, within the meaning of the statute governing appeals, although connected with a pending action," the court held "there appears to us to be no good reason for denying to a provisional remedy, which may be disposed of by an order independent of the ultimate determination of the cause, the character of a 'special proceeding' with respect to what constitutes a final order under the statute." 105 P. at 575.

A "special proceeding" may be filed as part of a pending "action." In *Deuster v. Zillmer*, 97 N.W. 31 (Wis. 1903), the court explained that in determining whether an order was made in a "special proceeding," "[w]hile all the papers on which the motion was founded, as well as the order itself, are properly entitled in the action, this fact is not at all conclusive." *Id.* at 33. "There may doubtless be many proceedings springing out of a pending action—such, for instance, as an application by one not a party to be allowed to interplead—which may very properly be entitled in the action, but are none the less true special proceedings." *Id.* Our own state supreme court followed this very reasoning in *Emory*. In that case, the court explained that although the order appealed from was "entitled in the original action," that "is not decisive of the character of the proceeding." *Emory*, 4 S.C. at 36.

Likewise, in *In re Bingaman's Est.*, 59 N.W.2d 614 (Neb. 1953), the court held that "[a] special proceeding may be connected with an action in the sense that the application for the benefit of it and the other papers and orders concerning it may be filed in the case where the record of the filings in the action are made—as for instance garnishment or attachment—but it is not an integral part of or a step in the action or as it is sometimes referred to in such a situation a part of the 'main case.'" *Id.* at 621; see *O'Connor v. Kaufman*, 582 N.W.2d 350, 353 (Neb. 1998) (same).

In *Sullivan*, for instance, the plaintiff sued the defendant for seduction and for breaching his promise to marry her. 55 N.W.2d at 502. The trial court subsequently stayed the action for approximately two years pursuant to a federal statute, the Soldiers' and Sailors' Civil Relief Act. The plaintiff later moved to vacate the stay. After the trial court denied the motion, the plaintiff appealed. The appellate court held the order denying the motion to vacate the stay granted in the original action was appealable because it had been made in a "special proceeding." *Id.* ("We think it clear that the order here involved is one made in a special proceeding.").

The above indicates a "special proceeding" occurs where the law confers a right and authorizes a special application to a court to enforce the right. Such a special proceeding may be commenced independently of a pending action or it may be connected with a pending action or brought in a pending action. The form by which the right is sought to be enforced is not conclusive of whether the proceeding is a "special proceeding."

Section 15-48-80(a) of the SCUAA authorizes a "special proceeding" that is within the scope of § 14-3-330(3). As noted above, the SCUAA provides that an "application to the court" under § 15-48-80(a) for an order enforcing an arbitrator's subpoena "*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. On September 8, 2022, Petitioner filed such an "application" or "motion" with the circuit court to enforce Respondents' compliance with the arbitrator's subpoenas issued in the arbitration. *See* Return Exh. 2.

Nothing in the SCUAA indicates that Petitioner needed to file a completely new lawsuit in which to make his application or motion to the circuit court for an order enforcing the arbitrator's subpoenas. All the statute requires is that Petitioner make an "application to the court" which "shall be by motion," which is exactly what Petitioner did. S.C. CODE ANN. §§ 15-

48-80(a), -170. The circuit court disposed of that application and ended the matter via a final order. Petitioner has appealed from that final order.

Petitioner's application made in the circuit court was separate and district from his claims against Respondents in the original action. Petitioner's original action filed against the Respondents on November 11, 2021 alleges that Respondents improperly interfered with Petitioner's contract and prospective contractual relations with the HCA Defendants. *See* Return Exh. 3. In contrast, Petitioner's application or motion filed on September 8, 2022 seeks to enforce arbitration subpoenas issued to Respondents in a separate arbitration proceeding. *See* Return Exh. 2. The right determined by the circuit court's denial of the application is altogether separate from the merits of Petitioner's claims against Respondents in the original action. The application and subsequent ruling clearly constitute a "special proceeding."

In arguing that Petitioner should have made his application or motion in a new lawsuit rather than filing this motion in the existing action, Respondents seek to elevate form over substance. They contend the manner or form in which Petitioner sought his relief (motion in pending action versus filing new lawsuit) is more important than the substance of what occurred (circuit court orders refusing to enforce arbitrator's subpoenas). Our rules mandate that "[t]he court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." S.C. R. CIV. PRO. 61.

Our courts have also repeatedly ruled it is the substance that matters, not the form in which a request for relief is framed. In *Sanford v. South Carolina State Ethics Com'n*, 385 S.C. 483, 685 S.E.2d 600 (2009), our governor had initiated an action seeking a writ of mandamus. Despite holding that a writ of mandamus was not available to the governor, the court still ruled that "[b]ecause it is 'the substance of the requested relief that matters' and not the form in which

the petition for relief is framed, we may construe the Governor's request as one for injunctive relief if that is substantively what he is requesting." *Id.* at 495-96, 685 S.E.2d at 607 (citations omitted); *see also Richland County v. Kaiser*, 351 S.C. 89, 567 S.E.2d 260, 262 (Ct. App. 2002) ("It is the substance of the requested relief that matters 'regardless of the form in which the request for relief was framed.'"); *Standard Fed. Sav. & Loan Ass'n v. Mungo*, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991) ("Although the better practice under the Rules would have been to make a Rule 60(b) motion, the substance of the relief sought was the same regardless of the form in which the request for relief was framed.").

The true nature and purpose of Petitioner's motion filed on September 8, 2022 was clear. Petitioner explicitly moved the circuit court for an order in accordance with S.C. CODE ANN. § 15-48-80(a) to enforce compliance with the subpoenas issued by the arbitrator in the separate arbitration proceeding. The circuit court entered orders denying Petitioner's motion and refused to enforce the arbitrator's subpoenas, thus ending the matter. There is no principled reason to hold the circuit court's orders denying enforcement of the arbitrator's subpoenas are not appealable in this instance simply because Petitioner happened to move for the relief in the same circuit court case in which the Respondents are parties (and where Petitioner's claims against the HCA Defendants were initially filed but were later referred to arbitration) rather than filing his motion in a newly commenced lawsuit against the Respondents.

Aside from arguing that Petitioner brought his special proceeding to enforce the arbitrator's subpoenas in a "pending" action in the circuit court, Respondents do not give any other reason for this court to deny Petitioner's petition. 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.

Respectfully submitted,

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