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.

PETITIONER'S MEMORANDUM ADDRESSING ISSUE OF MOOTNESS

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Pursuant to the court's correspondence dated March 5, 2025, Petitioner Dr. Scott F. Duncan, M.D. ("Petitioner") respectfully submits this memorandum addressing the issue of mootness. For the reasons discussed herein, Petitioner respectfully submits the court should not dismiss this appeal on mootness grounds. Instead, the court should decide this appeal based on the exception to the mootness doctrine when the issues raised to the court are capable of repetition but evading review.

BACKGROUND

Petitioner was a party to two separate proceedings when he filed his Petition for a Writ of Certiorari with this court on May 17, 2024. First, Petitioner was and currently still is prosecuting claims against Respondents OrthoSC, LLC and Dr. Gene M. Massey, M.D. (collectively the "Respondents") in an action pending in the Horry County circuit court, assigned Case No. 2021-CP-26-07488. Second, Petitioner was also formerly prosecuting claims against other parties—Grand Strand Surgical Specialists, LLC ("GSSS"), Grand Strand Regional Medical Center, LLC ("GSRMC"), HCA Physician Services, Inc. ("HCA-PS"), and HCA Healthcare, Inc. ("HCA")—in a separate arbitration proceeding before the American Health Law Association (AHLA), assigned AHLA Claim No. 7029.

Petitioner had initially filed his claims against GSSS, GSRMC, HCA-PS, and HCA in the same circuit court action (Case No. 2021-CP-26-07488) in which he brought his claims against Respondents OrthoSC and Massey. *See* Exhibit 1 (Complaint). However, on January 14, 2022, GSSS, GSRMC, and HCA-PS moved to compel arbitration of Petitioner's claims against them pursuant to a written arbitration agreement. As a result, on April 1, 2022, the circuit court entered a consent order referring Petitioner's claims against those parties to binding arbitration to be conducted by the AHLA. *See* Exhibit 2 (Order). In that same order, the circuit court retained

jurisdiction over Petitioner's separate claims against HCA and Respondents OrthoSC and Massey. *Id.* ("… 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 …"). On May 2, 2022, the circuit court later denied a motion filed by Respondents OrthoSC and Massey seeking to stay Petitioner's claims against them until the separate arbitration against GSSS, GSRMC, and HCA-PS was concluded. *See* Exhibit 3 (Order).

Unlike GSSS, GSRMC, and HCA-PS, HCA did not initially move to compel arbitration. Instead, HCA chose to move to dismiss Petitioner's claims in the circuit court based on lack of personal jurisdiction. On March 31, 2023, after allowing the parties to engage in limited jurisdictional discovery, the circuit court entered an order denying HCA's motion to dismiss. *See* Exhibit 4 (Order). On September 25, 2023, the circuit court also denied HCA's motion to alter or amend this order. *See* Exhibit 5 (Order). HCA then advised Petitioner it would move to compel arbitration of his claims against it based on the arbitration agreement. On November 7, 2023, in lieu of further motions, Petitioner and HCA entered another consent order in the circuit court referring Petitioner's claims against HCA to arbitration, with those claims to be decided in the same arbitration proceeding pending before the AHLA (AHLA Claim No. 7029) involving Petitioner's claims against GSSS, GSRMC, and HCA-PS. *See* Exhibit 6 (Order). As a result, Petitioner's claims against GSSS, GSRMC, HCA-PS, and HCA were combined in the same arbitration proceeding.

Because of the above, Petitioner was forced to separate his claims against Respondents OrthoSC and Massey from his claims against GSSS, GSRMC, HCA-PS, and HCA and to proceed in two different forums. Respondents OrthoSC and Massey are defendants in the initial circuit court case, but they were not parties to the arbitration proceeding before the AHLA.

During the course of the arbitration proceeding, Petitioner desired to obtain records from Respondents OrthoSC and Massey for use in the AHLA arbitration. Because Respondents OrthoSC and Massey are not parties to that arbitration, Petitioner applied to the arbitrator for the issuance of nonparty document subpoenas directed to the Respondents. On August 3, 2022, the arbitrator issued nonparty document subpoenas to both Respondents pursuant to the authority granted in the South Carolina Uniform Arbitration Act (SCUAA), S.C. CODE ANN. § 15-48-80(a), and Section 5.8(a) of the AHLA's Rules for Employment Arbitration. *See* Exhibit 7 (Motion to Compel Compliance with Subpoenas) at Exhs. A & B.

Respondents OrthoSC and Massey subsequently failed to respond or comply with the arbitrators' subpoenas. Because the arbitrator lacked the ability to enforce his subpoenas, on September 8, 2022, Petitioner had to file an application or motion in the circuit court in accordance with the provisions of S.C. CODE ANN. § 15-48-80(a) and S.C. R. CIV. PRO. 37 and 45 to enforce Respondents' compliance with the subpoenas. *See* Exhibit 7 (Motion to Compel Compliance with 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). 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.

Purely for convenience reasons and to avoid filing yet a third proceeding, Petitioner filed his "application" or "motion" to enforce the arbitrator's subpoenas in the existing circuit court action (Case No. 2021-CP-26-07488) where Respondents OrthoSC and Massey were already

parties. This motion or application came before the circuit court for a hearing on November 30, 2022. The circuit judge subsequently entered an order on February 24, 2023, initially holding it lacked authority to enforce the arbitrator's subpoenas notwithstanding § 15-48-80(a). *See* Exhibit 8 (Order). The circuit judge 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. The circuit judge held that Petitioner's motion "is left to the determination of the Arbitrator." *Id.* p.5.

On March 6, 2023, Petitioner timely moved the circuit court to alter or amend its order pursuant to S.C. R. CIV. PRO. 54 and 59(e) so as to require Respondents "to fully comply with the Arbitrator's subpoenas and to produce the documents described therein." *See* Exhibit 9 (Motion to Alter or Amend). As part of that motion, Petitioner attached a copy of an order dated March 2, 2023, which the arbitrator had just recently issued after being presented with a copy of the circuit court's February 24, 2023, order. *Id.* 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.*; *see also* Exhibit 10 (letter to court).

Despite the above, the circuit court entered an order on September 25, 2023, denying Petitioner's motion to alter or amend. *See* Exhibit 11 (Order). While 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" but that he lacked the practical ability to do so, the circuit court nevertheless refused to enforce the subpoenas. *Id.*

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 to the parties' counsel dated October 27, 2023. On January 2, 2024, after the parties filed memoranda addressing the issue of appealability, Judge Letitia H. Verdin entered an order dismissing Petitioner's appeal. Her 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 Exhibit 12 (Order).

On January 10, 2024, Petitioner filed a Petition for Rehearing *En Banc* in the court of appeals. On April 30, 2024, the court of appeals denied this petition. *See* Exhibit 13 (Order). On May 17, 2024, Petitioner filed his Petition for a Writ of Certiorari in this court. On June 17, 2024, Respondents filed a Return in Opposition to the Petition for a Writ of Certiorari. On June 24, 2024, Petitioner filed a Reply in Support of Petition for a Writ of Certiorari.

On September 10, 2024, while Petitioner's Petition was pending before this court, the arbitrator in AHLA Claim No. 7029 notified the parties to the arbitration that he will proceed to conduct a final arbitration hearing scheduled to commence on November 20, 2024. The arbitrator scheduled a final arbitration hearing to take place despite the pendency of this appeal involving

enforcement of the arbitrator's subpoenas against the Respondents. The arbitrator refused to delay or await scheduling a final arbitration hearing until after this appeal was decided.

The parties in the arbitration eventually resolved the claims in the arbitration before the final hearing was held. Accordingly, on October 16, 2024, the arbitrator dismissed the arbitration proceeding. On that same date, Petitioner also filed a Stipulation of Dismissal in the circuit court case dismissing his claims against the HCA-related entities. *See* Exhibit 14 (Stip. Of Dismissal). Although the arbitration proceeding against GSSS, GSRMC, HCA-PS, and HCA has been ended, Petitioner's claims against Respondents OrthoSC and Massey remain pending in the circuit court and have not yet been resolved or adjudicated.

On February 12, 2025, this court granted Petitioner's Petition for a Writ of Certiorari. On that same date, Respondents' counsel advised Petitioner's counsel that her position is this appeal should be dismissed as moot. Petitioner's counsel notified the court of the potential mootness issue via correspondence on February 13, 2025, and advised that Petitioner's position is this appeal should be considered based on the exception to the mootness doctrine when the issues raised to the court are capable of repetition but evading review. On March 5, 2025, the court directed the parties to submit detailed memorandum addressing the issue of mootness.

ARGUMENT

While Petitioner agrees that the arbitrator's subpoenas to Respondents OrthoSC and Massey can no longer be enforced given that Petitioner's claims in the arbitration have now been resolved, this does not warrant dismissal of Petitioner's appeal on mootness grounds.

In *Curtis v. State,* 345 S.C. 557, 549 S.E.2d 591 (2001), this court summarized the primary exceptions to the mootness doctrine as follows:

> In the civil context, there are three general exceptions to the mootness doctrine. First, an appellate court can take jurisdiction, despite mootness, if the issue raised

> is capable of repetition but evading review. Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. Finally, if a decision by the trial court may affect future events, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.

Id. at 568, 549 S.E.2d at 596 (citations omitted).

In the case of *In re Darlene C.*, 278 S.C. 664, 301 S.E.2d 136 (1983), this court announced that when an issue is "capable of repetition but evading review" the court will not refuse to consider the issue based on mootness. When asserting the controversy falls under this exception, "[t]he party bringing the action need only show the issue raised is *capable* of repetition and is not required to prove there is a 'reasonable expectation' the issue will arise again." *Sloan v. Greenville Cnty.*, 356 S.C. 531, 554–55, 590 S.E.2d 338, 351 (Ct. App. 2003). In *In re Darlene C.*, the court considered a juvenile's appeal from a family court order committing her to the Department of Youth Services even though she was no longer in detention. *Id.* at 665, 301 S.E.2d at 137.

In *Byrd v. Irmo High School*, 321 S.C. 426, 468 S.E.2d 861 (1996), this court further clarified that our state follows the more lenient or "less restrictive approach" to this exception to mootness, which "does not require a reasonable expectation that the same complaining party be subjected to the action again," but merely requires that the issue be one that "is capable of repetition, but which will evade review." *Id.* at 432, 468 S.E.2d at 864; *see Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 27, 630 S.E.2d 474, 478 (2006) ("In evaluating whether a moot issue is capable of repetition, yet evading review the Court does not require that the complaining party be subject to the action again."). Thus, it is unnecessary for Petitioner to show there is a reasonable expectation he will be faced with a similar issue in the future involving enforcement of an arbitrator's subpoena.

In numerous cases, our appellate courts have declined to dismiss appeals on mootness grounds when the issues raised to the court were capable of repetition but evading review. *See*, *e.g.*, *Byrd*, 321 S.C. at 432, 468 S.E.2d at 864 (holding that student's appeal from school's suspension order fell within the exception since "[s]hort-term student suspensions, by their very nature, are completed long before an appellate court can review the issues they implicate"); *Baddourah v. McMaster*, 433 S.C. 89, 95-96, 856 S.E.2d 561, 564-65 (2021) (declining Governor's suggestion that appeal should be dismissed on mootness grounds even though city councilmember's suspension and term of office had already ended when councilmember had promptly challenged the Governor's Executive Order when he was first suspended, but the litigation had continued over an extended period before the court certification of the appeal; the court held the appeal concerns issues that are capable of repetition, yet evading review); *Charleston Cnty. Sch. Dist. v. Charleston Cnty. Election Comm'n*, 336 S.C. 174, 180, 519 S.E.2d 567, 571 (1999) ("We choose to decide this appeal even though this particular case is moot. The same situation could arise again and it is unlikely an appellate court would resolve such a case before an election was held."); *Nelson v. Ozmint*, 390 S.C. 432, 434-35, 702 S.E.2d 369, 370 (2010) (applying exception to inmate's appeal of statute imposing mandatory one-year sentence even though prisoner had been released from prison when the issue was one that is capable of repetition, yet will usually evade review, because most inmates will have served the year required by the statute before the lawfulness of the statutory interpretation can be reviewed); *State v. Passmore*, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005) (applying exception to family court litigant's appeal of one-year contempt sentence when the sentence was too brief to be fully litigated through appeal prior to its expiration and the alleged constitutional violation suffered by the appellant could be inflicted on a contemnor in the future); *South Carolina Dep't*

of Mental Health v. State, 301 S.C. 75, 390 S.E.2d 185 (1990) (although specific case is moot, appeal allowed because it raises a question that is capable of repetition, but which usually becomes moot before it can be reviewed); *Evans v. South Carolina Dep't of Social Servs.,* 303 S.C. 108, 399 S.E.2d 156 (1990) (although development renders case moot, controversy presents a recurring dilemma which the Court will address to clarify the law).

As discussed in Petitioner's Petition, this appeal raises novel and important issues under state law, including whether § 15-48-80(a) of SCUAA gives an arbitrator the authority to enforce its own non-party subpoena and whether the SCUAA gives the circuit court authority to enforce an arbitrator's non-party subpoena. The nature of arbitration proceedings is that they are short-lived. Arbitration is intended to be faster than litigation as its purpose is "to achieve streamlined proceedings and expeditious results." *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 428 S.C. 261, 834 S.E.2d 204 (Ct. App. 2019), *aff'd as modified*, 432 S.C. 633, 856 S.E.2d 150 (2021); *see Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 550, 575 S.E.2d 74, 76 (Ct. App. 2003) ("Arbitration laws are passed in order to expedite the settlement of disputes and should not be used as a means of furthering and extending delays....").

Because arbitration proceedings typically proceed on an expedited schedule and are decided much faster than litigation in the courts, the arbitration usually will be concluded before an appellate court has an opportunity to review and rule on issues like those presented in the instant case. An appeal from a circuit court order refusing to enforce an arbitrator's subpoena clearly fits into the evading review exception to the mootness doctrine. The same situation could arise again in a future arbitration and it is unlikely an appellate court would resolve such a case before the final arbitration hearing is held.

Indeed, in this very case, notwithstanding Petitioner's pending appeal in this court involving his attempt to enforce the arbitrator's subpoenas issued to Respondents, the arbitrator nevertheless scheduled the final arbitration hearing to occur on a date before this appeal could be determined. Even if Petitioner had not resolved his claims in the arbitration and had instead gone through an arbitration hearing and received a final award, it is highly doubtful that Petitioner could even appeal the circuit court's orders refusing to enforce the arbitrator's subpoenas after a final award was issued or, even if so, that an appellate court would be able to grant any meaningful remedy to Petitioner even if it later reversed the circuit court's orders.

There is no right to appeal a final arbitration award. *Main Corp. v. Black*, 357 S.C. 179, 180-81, 592 S.E.2d 300, 301 (2004) (dismissing appeal of arbitration order made to court of appeals). Instead, a party to an arbitration may merely file an action in the circuit court seeking to vacate or modify an adverse arbitration award based on limited grounds. The scope of judicial review in such an action is far more restricted than appellate review of a trial court's decision. *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."). "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.

Even if Petitioner had not settled with the defendants in the arbitration and later sought to vacate or modify an adverse arbitration award on the grounds that the circuit court improperly refused to enforce the arbitrator's subpoenas, § 15-48-120 does not seem to permit a court to vacate or modify an award for this reason. The statutory grounds for vacating or modifying an arbitration award are directed to errors committed by the arbitrator, not the circuit court. In this case, the arbitrator did not err in refusing to issue the subpoenas. Rather, the circuit court erred in refusing to enforce them. Thus, even if the appellate court later reversed the circuit court's orders which refused to enforce the subpoenas, it is doubtful the court could vacate or modify the arbitrator's final award for that reason. Moreover, even if this were a legally sufficient basis on which to vacate or modify a final award, how would Petitioner ever be able to show that the circuit court's failure to enforce the arbitrator's subpoenas justifies vacating or modifying the award? Until the subpoenas are enforced, there is no way to know how their lack of enforcement impacted the arbitration proceeding.

In sum, if the court will not consider Petitioner's appeal of the circuit court's order refusing to enforce compliance with the arbitrator's subpoenas in this case, it will be almost impossible for any party to ever be able to appeal from a similar order given the short-lived nature of arbitration proceedings and the limited grounds upon which to vacate or modify an

adverse final arbitration award. This issue will evade appellate review. Despite the fact that this particular case may now be moot, the court should still decide the appeal because the same situation could arise again in future arbitrations, yet it will evade review.

Additionally, this appeal involves questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. Given the proliferation of arbitration agreements and the increase in arbitration hearings, the court should provide clarity to state law involving the enforceability of arbitrator subpoenas to non-parties and who has authority to enforce such subpoenas. Finally, even though the court cannot give complete relief to Petitioner in the present case, the court's decision may affect future cases in which parties seek to enforce arbitration subpoenas against non-parties.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this court to consider this appeal even though the arbitration proceeding has been concluded.

Respectfully submitted,

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