

RECEIVED

Mar 17 2025

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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

Case No. 2021-CP-26-07488  
Appellate Case No. 2024-000808

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,

Of which OrthoSC, LLC, a South Carolina limited liability company, and Dr. Gene M. Massey, M.D are the ..... Respondents.

**MEMORANDUM REGARDING MOOTNESS**

As directed by the Court’s letter of March 5, 2025, Respondents submit this memorandum addressing the issue of mootness. Petitioner concedes the matter is moot, but asks that the Court find that an exception to the mootness doctrine applies. Respondents contend that there is an actual case or controversy pending between these parties in the circuit court and that the resources of the judicial branch and the parties are best served by focusing on that matter rather than this now-moot appeal.

**BACKGROUND**

Petitioners filed an action in the Horry County Court of Common Pleas in 2021, naming OrthoSC, LLC, Dr. Gene Massey, Grand Strand Surgical Specialists, LLC, HCA Physician Services, Inc., Grand Strand Regional Medical Center, LLC, and HCA Healthcare, Inc. as

defendants (“Horry Case”). (Complaint attached as Exhibit 3).<sup>1</sup> By order dated April 1, 2022, the claims against Grand Strand Surgical Specialists, LLC, HCA Physician Services, Inc., and Grand Strand Regional Medical Center, LLC were stayed pending the outcome of an American Health Lawyers Association arbitration (“AHLA Arbitration”), which was to be administered “pursuant to the rules and procedures established by the Alternative Dispute Resolution Service of the AHLA.” (4/1/2022 Order attached as Exhibit 4). The order expressly provided that the claims against the remaining defendants were not to be stayed or otherwise affected. (*Id.*). The Respondents here, Ortho SC and Dr. Gene Massey, are not parties to the AHLA Arbitration.

Several months later, Petitioner filed a motion to compel compliance with or enforce arbitration subpoenas in the AHLA Arbitration and/ or for order of contempt in the Horry Case. (Motion attached as Exhibit 2). Respondents filed a memorandum opposing the motion on the grounds that the Horry Case was not the correct vehicle for enforcement of the AHLA subpoenas. (Memorandum attached as Exhibit 5). This motion was heard together with the Respondents’ motion to dismiss, Respondents’ motion for protective order and stay, and Petitioner’s motion to compel. (2/24/23 Order attached as Exhibit 6). The circuit court entered one order denying the Respondents’ motion to dismiss, denying the Respondents’ motion for protective order and stay, granting Petitioner’s motion to compel, and denying the Petitioner’s motion with respect to the arbitration subpoenas “*at this time.*” (*Id.* (emphasis added)). Petitioner moved to alter or amend raising its concerns that the circuit court had the power to enforce the AHLA Arbitration subpoenas. (Motion attached as Exhibit 7). The circuit court denied the motion. (9/25/23 Order attached as Exhibit 8).

---

<sup>1</sup> Unless otherwise noted, all exhibit references are to the exhibits attached to Respondent’s Return to the Petition for a Writ of Certiorari.

Petitioner then noticed this appeal. The court of appeals promptly directed the parties to brief the issue of appealability. After considering the parties' memoranda, the court dismissed the appeal by order dated January 2, 2024 on the basis that the orders in question were discovery orders in a pending case and not immediately appealable.

Petitioner sought a writ a certiorari on May 17, 2024 based on this question:

- 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?

On February 12, 2025, the Court granted the petition as to the question presented as well as the following questions:

- (1) Whether subsection 15-48-80(a) of the South Carolina Code (2005) and other provisions of the Uniform Arbitration Act give an arbitrator the authority to enforce its own non-party discovery orders, such as a subpoena; and
- (2) Whether subsection 15-48-80(a) of the South Carolina Code (2005) and other provisions of the Uniform Arbitration Act give the circuit or family court the authority to enforce an arbitrator's non-party discovery, such as a subpoena.

In the meantime, however, the parties to the AHLA Arbitration reached a settlement and the arbitration was dismissed on October 16, 2024. On that same date, counsel for the Petitioner and HCA Healthcare, Inc. filed a stipulation of dismissal in this action. (Pet. Memorandum at Exhibit 14). The stipulation does not mention the AHLA Arbitration. Petitioner did not inform Respondents or this Court that the AHLA Arbitration had been resolved until after the petition was granted.

## ARGUMENT

The AHLA Arbitration is complete. This action remains pending for a determination on the merits. Petitioner may engage and has engaged in discovery consistent with the scope set forth in Rule 26, SCRCP in this action. And yet, he seeks to continue to pursue this appeal relating to discovery sought in the AHLA Arbitration even after admitting in the first sentence of his argument in his memorandum addressing the issue of mootness that “the arbitrator’s subpoenas to [Respondents] can no longer be enforced given that Petitioner’s claims in the arbitration have now been resolved[.]”

“South Carolina courts, like the federal courts, require a justiciable case or controversy before any decision on the merits can be reached.” *Lennon v. S.C. Coastal Council*, 330 S.C. 414, 417–18, 498 S.E.2d 906, 908 (Ct. App. 1998). “A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute.” *Peoples Fed. Sav. & Loan Ass’n of S.C. v. Res. Plan. Corp.*, 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004) (internal citations omitted).

South Carolina appellate courts will not issue advisory opinions of the type Petitioner now seeks. *See In Int. of Kaundra C.*, 318 S.C. 484, 486, 458 S.E.2d 443, 444 (Ct. App. 1995); *Booth v. Grissom*, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975). Nor will they decide purely academic questions. *Seabrook v. Knox*, 369 S.C. 191, 197, 631 S.E.2d 907, 910 (2006) (“If there is no actual controversy, this Court will not decide moot or academic questions.”); *Wallace v. City of York*, 276 S.C. 693, 694, 281 S.E.2d 487, 488 (1981) (“The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation. Accordingly, cases or issues which have become moot or academic in nature are not a proper subject of review.”). Very simply, “[a] case becomes moot when judgment, if rendered, will have no practical legal effect upon existing

controversy.” *Leventis v. S.C. Dep’t of Health & Env’t Control*, 340 S.C. 118, 137–38, 530 S.E.2d 643, 654 (Ct. App. 2000) (quoting *Mathis v. S.C. State Highway Dep’t*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)). In the context of an appeal, “moot appeals result when intervening events render a case nonjusticiable.” *Sloan v. Greenville Cnty.*, 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003). Here, Petitioner admits that any judgment in this appeal will have no effect because the AHLA Arbitration has been fully resolved. This should end the inquiry.

Instead, Petitioner argues that this Court should apply a discretionary exception to the mootness doctrine. “The utilization of an exception under the mootness doctrine is flexible and discretionary pursuant to South Carolina jurisprudence, not a mechanical rule that is automatically invoked.” *Sloan v. Greenville Cnty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009).

The bulk of Petitioner’s memorandum focuses on the “capable of repetition but evading review” exception. Contrary to Petitioner’s argument, the fact pattern here seems unlikely to recur. This case presents the unusual situation where a party to an arbitration sought compliance with *pre-hearing*, third-party arbitration subpoenas *in a pending circuit court action*. In the normal course, a party seeking to enforce an arbitration subpoena would bring a separate action or application, any decision on that separate action or application would be final and immediately appealable, and any interim timing pressures could be addressed through the Court’s powers to stay or supersede found in Rule 241, SCACR.<sup>2</sup> Nor does Petitioner’s memorandum consider that a later application could have been made to enforce arbitration subpoenas compelling attendance or document production *at the arbitration hearing* pursuant to S.C. Code Ann. § 15-48-80(a). As a result, this case does not present a scenario that is likely to be repeated without an opportunity for review.

---

<sup>2</sup> Petitioner did not seek relief under Rule 241, SCACR in this case.

Petitioner also devotes a single paragraph to a request for the Court to “decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest.” *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001). This is a private case between private parties and, as such, it does not lend itself to this exception. *See Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 96, 44 S.E.2d 88, 96–97 (1947) (“If this were an ordinary case, our opinion might well stop here.... But the case is not an ordinary one; it is not a private controversy between individuals, as such. On the contrary, it is defended by an intended governmental agency which the legislature undertook to create by their enactments; and raised on the record are earnestly argued public questions of importance.”); *Sloan*, 356 S.C. at 553–54, 590 S.E.2d at 350 (citing *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 622, 104 N.E.2d 769, 772 (1952) (“Among the criteria considered in determining the existence of the requisite degree of public interest are the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question.”))).

As described above, this case presents an unusual procedural posture, and the Court is well-equipped to deal with future questions stemming from S.C. Code Ann. § 15-48-80 as they arise. Accordingly, this case does not present any question of “imperative or manifest urgency” nor does it raise any issue of “important public interest” so as to implicate discretionary review under this exception.

### **CONCLUSION**

For these reasons, this Court should find that this appeal is moot and should decline to exercise its discretion to apply an exception to the mootness doctrine. Accordingly, the writ should be dismissed as improvidently granted.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

*s/ Sarah P. Spruill*

---

Sarah P. Spruill (S.C. Bar No. 68337)

[sspruill@hsblawfirm.com](mailto:sspruill@hsblawfirm.com)

Jonathan D. Klett (SC Bar No. 103208)

[jklett@hsblawfirm.com](mailto:jklett@hsblawfirm.com)

P. O. Box 2048

Greenville, SC 29602

864.240.3200

Stafford J. McQuillin III (SC Bar No. 78203)

[mmcquillin@hsblawfirm.com](mailto:mmcquillin@hsblawfirm.com)

P.O. Box 340

Charleston, SC 29402-0340

843.722.3366

Charles E. Ipock (SC Bar No. 101258)

[cipock@hsblawfirm.com](mailto:cipock@hsblawfirm.com)

135 S. Dargan Street, Suite 300

Florence, SC 29506

843.669.6002

*Attorneys for Respondents, OrthoSC, LLC, a South Carolina limited liability company, and Dr. Gene M. Massey, M.D.*

March 17, 2025  
Greenville, South Carolina