

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case Nos. 2023-001587 & 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.,
Appellant,
v.

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

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

APPELLANT’S MEMORANDUM IN OPPOSITION TO MOTION FOR COSTS

Appellant Dr. Scott F. Duncan, M.D. (hereinafter “Appellant”) respectfully submits this memorandum in opposition to the Motion for Costs filed by Respondents OrthoSC, LLC and Dr. Gene M. Massey, M.D. (hereinafter collectively “Respondents”). For the reasons stated herein, Respondents’ motion should be denied.

Respondents were not “prevailing parties” as argued in their motion. See JEAN H. TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 369 (3rd ed. 2016) (“The prevailing party in an appeal or in a certiorari proceeding regarding a decision of the Court of Appeals may seek costs under Rule 222 or 242(j).”). This Court never addressed or ruled on the merits of Appellant’s

appeal. Instead, after the appeal was filed and before any briefing occurred involving the merits, the Court *sua sponte* directed the parties to submit memoranda addressing the issue of the appealability of the Circuit Court’s orders. On January 2, 2024, the Court entered an Order dismissing the appeal on the grounds that the Circuit Court’s orders are interlocutory and not immediately appealable. On January 10, 2024, Appellant filed a Petition for Rehearing *En Banc*, which this Court denied by Order filed on April 30, 2024.

On May 17, 2024, Appellant filed a Petition for a Writ of Certiorari in the South Carolina Supreme Court. On February 12, 2025, the Supreme Court issued its Order granting the Appellant’s Petition for a Writ of Certiorari. See Exhibit A attached hereto. However, because the underlying matter which was the subject of the appeal had been settled, the Supreme Court later issued another Order on April 23, 2025, which held that the Petition for Writ of Certiorari is now moot. Accordingly, the Court vacated its prior Order granting Appellant’s Petition for a Writ of Certiorari. See Exhibit B attached hereto.

“[I]t is within this Court’s discretion whether to award fees and costs under Rule 222.” Austin v. Stokes-Craven Holding Corp., 406 S.C. 187, 199, 750 S.E.2d 78, 84 (2013). Our Courts have declined to award costs or attorneys’ fees in similar situations. In Johnson v. Paraplane Corp., 321 S.C. 316, 468 S.E.2d 620 (1996), the South Carolina Supreme Court vacated this Court’s opinion and dismissed the appeal on the grounds that the Circuit Court’s order denying a motion for summary judgment was not directly appealable. In addition to dismissing the appeal, the Court held that “[n]o costs or attorneys’ fees pursuant to Rule 222, SCACR, shall be assessed.” Id. at 321 S.C. at 317, 468 S.E.2d at 620; see also Ballenger v. Bowen, 313 S.C. 476, 478, 443 S.E.2d 379, 380 (1994) (same).

Similarly, in Peterkin v. Brigman, 319 S.C. 367, 461 S.E.2d 809 (1995), the Supreme Court granted a motion to dismiss the appeal on the grounds the Circuit Court’s order was not directly appealable and ordered that no costs or attorneys’ fees be assessed against either party. Id. at 369, 461 S.E.2d at 810 (“Accordingly, this appeal is dismissed without prejudice. No costs or attorneys fees shall be assessed against either party under Rule 222, SCACR.”); see also Duncan v. Gov’t Emps. Ins. Co., 331 S.C. 484, 486, 449 S.E.2d 580, 580 (1994) (same); McLendon v. S.C. Dep’t of Highways & Pub. Transp., 313 S.C. 525, 526, 443 S.E.2d 539, 540 (1994) (same).

In summary, Respondents did not prevail in the appeal. There was no adjudication of the merits of the appeal. Rather, the matter was deemed to be moot because of the settlement that was reached. Additionally, Respondents did not timely make a motion for costs in the Supreme Court pursuant to SCACR 242(j).

For the forgoing reasons, Appellant respectfully requests the court to deny the Respondents’ Motion for Costs.

Respectfully submitted,

ROSEN HAGOOD, LLC

By: /s/ Daniel F. Blanchard, III

Daniel F. Blanchard, III (SC Bar 65342)

James A. Bruorton, IV (SC Bar 71300)

Mary Harriet Moore (SC Bar 105312)

40 Calhoun Street, Suite 450

Charleston, SC 29401

(843) 577-6726 telephone

dblanchard@rosenhagood.com

cbruorton@rosenhagood.com

mhmoore@rosenhagood.com

ATTORNEYS FOR APPELLANT

Charleston, South Carolina
July 31, 2025.

The Supreme Court of South Carolina

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.

Appellate Case No. 2024-000808

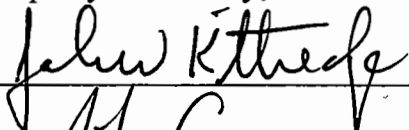


ORDER


Based on the vote of the Court, the petition for a writ of certiorari is granted. The parties shall brief the question presented in this petition 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

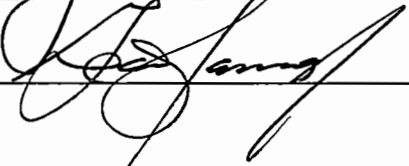
(2) Whether subsection 15-48-80(a) of the South Carolina Code (2005) and other provisions of the Uniform Arbitration Act give the circuit or family court the authority to enforce an arbitrator's non-party discovery, such as a subpoena.



C.J.



J.



J.

How In

J.

Verdin, J., not participating

Columbia, South Carolina
February 12, 2025

cc:

Daniel Francis Blanchard, III
James Atkinson Bruorton, IV
Mary Harriet Moore
Charles Epps Ipock
Jonathan David Klett
Stafford J McQuillin, III
Sarah P. Spruill

The Supreme Court of South Carolina

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,

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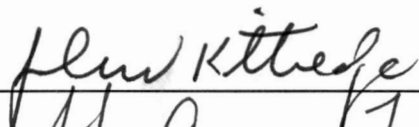
Appellate Case No. 2024-000808



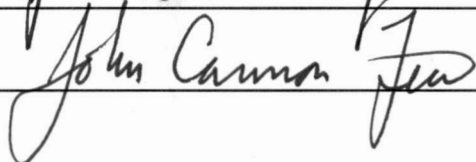
ORDER

On February 12, 2025, this Court granted the petition for a writ of certiorari and ordered the parties to brief specified questions. The following day, Petitioner informed this Court that a final arbitration hearing had been scheduled by the arbitrator and the parties ultimately resolved their claims.

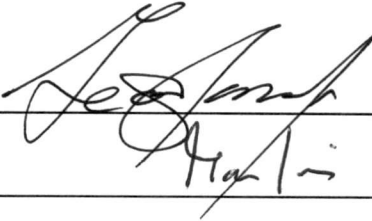
We asked the parties to address the issue of whether the settlement rendered the petition for a writ of certiorari moot. After reviewing the parties' memoranda, we vacate the order granting certiorari and deny the petition for a writ of certiorari as moot.



C.J.



J.



J.
J.

Verdin, J., not participating

Columbia, South Carolina
April 23, 2025

cc:
Daniel Francis Blanchard III
James Atkinson Bruorton IV
Mary Harriet Moore
Charles Epps Ipock
Jonathan David Klett
Stafford J McQuillin III
Sarah P. Spruill
The Honorable Jenny Abbott Kitchings

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PROOF OF SERVICE

I certify that I have served the Appellant's Memorandum in Opposition to Motion for Costs on the Respondents by mailing a copy of it to their attorneys of record on July 31, 2025, by United States first-class mail, with sufficient postage affixed thereto, and addressed as follows:

Charles E. Ipock, Esquire
Haynsworth Sinkler Boyd, P.A.
P.O. Box 6617
Florence, SC 29502

Stafford John McQuillin, III, Esquire
Haynsworth Sinkler Boyd, P.A.
P.O. Box 340
Charleston, SC 29402

Sarah P. Spruill, Esquire
Jonathan D. Klett, Esquire
Haynsworth Sinkler Boyd, P.A.
P.O. Box 2048
Greenville, SC 29602

ROSEN HAGOOD, LLC

By: /s/ Daniel F. Blanchard, III
Daniel F. Blanchard, III, Esquire
ATTORNEYS FOR APPELLANT