THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2021-CP-10-02744

Appellate Case No. 2025-000286

William Haynes,
as Personal Representative of the Estate of Elizabeth Varner,

Respondent,

v.

Fundamental Administrative Services, LLC,
Fundamental Clinical and Operational Services, LLC, and
Jerrolyn Montgomery-Smalls,

Appellants.

INITIAL BRIEF OF APPELLANTS

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I. Did the circuit court err in denying Defendants'[1] Second Motion to Compel Arbitration and Stay[2] and granting Plaintiff's[3] Discovery Motion[4]?[5]

A. Did the circuit court erred in denying Defendants' Second Motion to Compel Arbitration and Stay?

1. Should the circuit court have enforced the Arbitration Order[6] and compelled Plaintiff to arbitrate any remaining claims against Montgomery-Smalls?

2. Should the circuit court have enforced the Arbitration Order and stayed this action as to FAS and FCOS until arbitration of Plaintiff's claims against Montgomery-Smalls is concluded?

B. Should the circuit court have denied Plaintiff's Discovery Motion?

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[1] "Defendants" refers, collectively, to Defendants/Appellants, Fundamental Administrative Services, LLC ("FAS"), Fundamental Clinical and Operational Services, LLC ("FCOS"), and Jerrolyn Montgomery-Smalls ("Montgomery-Smalls").

[2] "Defendants' Second Motion to Compel Arbitration and Stay" is defined below in the Statement of the Case.

[3] "Plaintiff" refers to Plaintiff/Respondent, William Haynes, as Personal Representative of the Estate of Elizabeth Varner ("Ms. Varner").

[4] "Plaintiff's Discovery Motion" is defined below in the Statement of the Case.

[5] To be clear, out of an abundance of caution, this issue, and the corresponding argument, includes not only Defendants' challenge to the circuit court's denial of their principal motion and grant of Plaintiff's but also their challenge to the circuit court's denial of reconsideration with respect to the same.

[6] The "Arbitration Order" is defined below in the Statement of the Case.

STATEMENT OF THE CASE

THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab (the "Facility") is a skilled nursing facility where Ms. Varner resided in October of 2019. (Complaint in the Facility Lawsuit, filed March 25, 2021 (the "Facility Complaint"), ¶ 4; Complaint in the Instant Lawsuit, filed June 11, 2021 (the "Instant Complaint"), ¶¶ 12– 13.) Montgomery-Smalls was the administrator of the Facility. (Montgomery-Smalls's Answer, filed July 16, 2021, ¶ 18.) Plaintiff alleges that FAS and FCOS provided various consulting services to the Facility. (Instant Complaint ¶¶ 8–9.)

On March 25, 2021, Plaintiff filed a wrongful death and survival action (the "Facility Lawsuit") against the Facility arising out of allegedly deficient care/treatment Ms. Varner received as a resident of the Facility. (Facility Complaint.)

On June 11, 2021, Plaintiff filed this separate wrongful death and survival action (the "Instant Lawsuit")[7] against Defendants based on the very same allegedly deficient care/treatment alleged in the Facility Lawsuit,[8] and supported by the very same expert affidavit as was filed with the complaint in the Facility

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[7] (Instant Complaint.)

[8] (*Compare* Facility Complaint ¶¶ 4–12 *with* Instant Complaint ¶¶ 13–21.)

Lawsuit,[9] asserting that Defendants are liable for the alleged deficient care/treatment under theories of corporate negligence, joint venture, and/or alter ego/piercing the corporate veil. (Instant Complaint ¶¶ 4, 8–10, 26–43.)

After timely answering subject to and without waiving her rights to compel arbitration,[10] on October 4, 2021, Montgomery-Smalls moved to compel Plaintiff's claims against her to arbitration based on the Arbitration Agreement that was signed in conjunction with Ms. Varner's admission to the Facility. (Montgomery-Smalls's Motion to Compel Arbitration, filed October 4, 2021.) The Facility did the same in the Facility Lawsuit, and FAS and FCOS made motions to stay the Instant Lawsuit pending the outcome of the arbitration that Montgomery-Smalls sought to compel. (FAS's Motion to Stay, filed October 4, 2021; FCOS's Motion to Stay, filed October 4, 2021.)

By order filed February 24, 2022 (the "Arbitration Order"), the circuit court, the Honorable Roger M. Young, Sr., presiding, granted the motions, compelling all of Plaintiff's claims against the Facility and Montgomery-Smalls to arbitration and staying both lawsuits pending the outcome of arbitration. (Order Granting Motions to Compel Arbitration and Related Motions to Stay, filed February 24, 2022.)[11]

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[9] (*Compare* Facility Complaint ¶ 15 *with* Instant Complaint ¶ 24.)

[10] (Montgomery-Smalls's Answer, filed July 16, 2021.)

[11] In granting the motions, the circuit court expressly ruled, among other things, that the Arbitration Agreement is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. (the "FAA") (*id.* at pp. 5–6); is valid and enforceable (*id.* at

The circuit court thereafter denied Plaintiff's motion for reconsideration by order filed March 24, 2022. (Order Denying Motion for Reconsideration Pursuant to Rule 59(e), filed March 24, 2022.)

Plaintiff, the Facility, and Montgomery-Smalls agreed upon retired circuit court judge Doyet A. Early III, as arbitrator,[12] and following a hearing held April 3–6, 2023, on May 16, 2023, the arbitrator issued an order awarding Plaintiff $87,007 against the Facility only, not against Montgomery-Smalls, for compensatory damages on Plaintiff's survival claim. (Arbitrator's Arbitration Order dated May 16, 2023.) The arbitrator rejected Plaintiff's wrongful death and punitive damages claims. (*Id.*) Additionally, on May 26, 2023, at the request of the parties, the arbitrator issued a supplemental order expressly confirming that "Plaintiff is not entitled to judgement against Jerrolyn Montgomery-Smalls." (Arbitrator's Supplemental Arbitration Order dated May 26, 2023.)

On December 7, 2023, Plaintiff petitioned the circuit court to enter a final order confirming the arbitrator's award and lifting the stay in the Instant Lawsuit.

10–11); applies to the Facility and its "'agents, employees, and servants;'" and covers all of Plaintiff's claims against the Facility and Montgomery-Smalls (*id.* at 9–10) and that, because it was compelling arbitration, it was "required" by § 3 of the FAA, i.e., 9 U.S.C. § 3, to grant FAS and FCOS's motions to stay. (*Id.* at pp. 18–19.) Besides being correct, these rulings were never appealed and are thus the law of the case. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance.")).

[12] (Arbitrator's Arbitration Order dated September 15, 2022.)

(Petition for Final Order, filed December 7, 2023.) By order filed February 12, 2024, the circuit court, the Honorable Roger M. Young, Sr., presiding, granted Plaintiff's petition for entry of a final order, entering the arbitration award (which it incorporated therein by reference) and lifting the stay of the Instant Lawsuit. (Final Order, filed February 12, 2024.)

On April 9, 2024, the Facility paid the arbitration award in full. (Evidence of Payment of Arbitration Award (redacted).)

After Plaintiff indicated that he intended to continue pursuing the Instant Case against Defendants, including Montgomery-Smalls, notwithstanding the outcome of the arbitration, on June 28, 2024, Defendants moved for summary judgment. (Defendants' Motion for Summary Judgment, filed June 28, 2024; *see also* Memorandum of Law in Support of Defendants' Motion for Summary Judgment, filed September 9, 2024.) Defendants argued, in part, that the arbitration award is res judicata and precluded Plaintiff from pursuing further claims against Montgomery-Smalls. (*Id.*)

In response to Defendants' motion for summary judgment, Plaintiff argued (incorrectly) that res judicata did not bar his claims for corporate negligence, joint venture, and alter-ego/veil-piercing liability against Montgomery-Smalls because he was prevented from raising them in arbitration because of the stay of the Instant Case as to Plaintiff's claims against FAS and FCOS, who were not participants in

the arbitration. (Plaintiff's Memo in Opposition to Defendants' Motion for Summary Judgment, filed September 8, 2024.)

On September 20, 2024, following a hearing on September 11, 2024, the circuit court, the Honorable William C. McMaster, III, presiding, entered a Form 4 order denying Defendants' motion for summary judgment. (Form 4 Order Denying Defendants' Motion for Summary Judgment, filed September 20, 2024.) While the Form 4 order contained no explanation for the ruling, it signaled the circuit court's intention to allow Plaintiff to continue pursuing claims against Montgomery-Smalls for corporate negligence, joint venture, and/or alter-ego/veil-piercing liability notwithstanding the arbitration award that absolved her of any liability.

On September 30, 2024, Montgomery-Smalls timely moved for reconsideration because: (1) the Arbitration Order required Plaintiff to arbitrate all of his claims against Montgomery-Smalls, and (2) nothing about the Arbitration Order's stay of the Instant Lawsuit as to FAS and FCOS had prevented Plaintiff from litigating his corporate negligence, joint venture, and alter ego/veil-piercing claims against Montgomery-Smalls in the now-concluded arbitration. (Defendants' Motion to Alter, Amend, and/or Reconsider Order Denying Motion for Summary Judgment, filed September 30, 2024.) Via another Form 4 order, filed October 4, 2024, the circuit court denied Defendants' motion without a

hearing. (Form 4 Order Denying Defendants' Motion to Alter, Amend, and/or Reconsider Order Denying Motion for Summary Judgment, filed October 4, 2024.)

On November 14, 2024, Montgomery-Smalls moved to compel arbitration of any claims supposedly remaining against her, and pursuant to § 3 of the FAA, FAS and FCOS moved for a stay of the Instant Lawsuit pending the outcome of the arbitration of any claims supposedly remaining against Montgomery-Smalls ("Defendants' Second Motion to Compel Arbitration and Stay"). (Defendants' Motion to Compel Arbitration and Stay Proceedings, filed November 14, 2024; *see also* Declaration of Matthew O. Riddle, Esq., filed November 14, 2024; Memorandum of Law in Support of Defendants' Motion to Compel Arbitration and Stay Proceedings, filed November 14, 2024.)

Prior to the filing of Defendants' Second Motion to Compel Arbitration and Stay, on October 22, 20224, Plaintiff had filed a motion for a rule to show cause relating to the lack of certain discovery responses from Defendants ("Plaintiff's Discovery Motion"). (Plaintiff's Notice of Rule to Show Cause, filed October 22, 2024.) In opposition to the motion, Defendants argued that, to the extent there were any remaining claims against Montgomery-Smalls, they (along with any associated discovery) had to proceed in arbitration and that, while any such claims against Montgomery-Smalls proceeded in arbitration, the Instant Lawsuit (along with any associated discovery) had to be stayed as to FAS and FCOS.

(Memorandum in Opposition to Plaintiff's Notice of Rule to Show Cause, filed January 26, 2025.)

Following a hearing on January 27, 2025,[13] via Form 4 order filed February 3, 2024, the circuit court, the Honorable Jennifer B. McCoy presiding, denied Defendants' Second Motion to Compel Arbitration and Stay and granted Plaintiff's Discovery Motion in part. (Form 4 Order Denying Defendants' Motion to Compel Arbitration and Stay Proceedings and Granting Plaintiff's Rule to Show Cause, filed February 3, 2025.)[14] The circuit court thereafter denied Defendants' timely motion for reconsideration[15] without a hearing via another Form 4 order, filed February 7, 2025. (Order Denying Defendants' Motion for Reconsideration of Order Denying Defendants' Motion to Compel Arbitration and Stay Proceedings and Granting in part Plaintiff's Rule to Show Cause, filed February 7, 2025.)

This appeal timely follows by notice of appeal served/filed February 18, 2025. (Notice of Appeal and Proof of Service.)

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[13] (Transcript of Motion Hearing held January 27, 2025.)

[14] The order is said to have granted Plaintiff's Discovery Motion "in part" because, while it requires Defendants to respond to Plaintiff's interrogatories and requests for production within fifteen (15) days, it does not grant Plaintiff's request for sanctions to be imposed against Defendants. Defendants, of course, take no exception to the court not granting Plaintiff's request for sanctions.

[15] (Defendants' Motion to Alter, Amend, and/or Reconsider Order Denying Defendants' Motion to Compel Arbitration and Stay Proceedings and Granting Plaintiff's Rule to Show Cause, filed February 4, 2025.)

STANDARD OF REVIEW

A circuit court's determination of whether a claim is subject to arbitration is reviewed de novo on appeal. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). This includes de novo review of the determination of whether an arbitration agreement is enforceable against a nonsignatory. *Wilson v. Willis*, 426 S.C. 326, 334, 827 S.E.2d 167, 172 (2019). "Under de novo review, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Id.* Issues of law, however, are reviewed without any particular deference to the circuit court. *See, e.g., Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 782 S.E.2d 590 (2016). Even where a ruling is on a matter within circuit court's discretion, if the ruling is based on a misunderstanding of the law, rather than upon the exercise of discretion, the question presented on appeal is one of law. *See Bain v. Self Mem'l Hosp.*, 281 S.C. 138, 152, 314 S.E.2d 603, 611 (Ct. App. 1984).

ARGUMENT

I. The circuit court erred in denying Defendants' Second Motion to Compel Arbitration and Stay and granting Plaintiff's Discovery Motion.

A. The circuit court erred in denying Defendants' Second Motion to Compel Arbitration and Stay.

1. The circuit court should have enforced the Arbitration Order and compelled Plaintiff to arbitrate any remaining claims against Montgomery-Smalls.

The Arbitration Order could not be clearer: The Arbitration Agreement is governed by the FAA,[16] the Arbitration Agreement is valid and enforceable,[17] and "[w]ithout question, Plaintiff's claims against . . . Montgomery-Smalls are within the scope of the Arbitration Agreement." (*Id.* at p. 9.) And besides being correct, in any event, these rulings were never appealed and are thus the law of the case. *Shirley's Iron Works*, 403 S.C. at 573, 743 S.E.2d at 785 ("An unappealed ruling is the law of the case and requires affirmance."). Accordingly, Plaintiff is plainly required to assert all of his claims against Montgomery-Smalls in arbitration.

Plaintiff has argued that his corporate negligence, joint venture, and alter ego/veil-piercing claims against Montgomery-Smalls somehow were excluded from the now-concluded arbitration due to the stay of proceedings as to FAS and FCOS. (*See, e.g.,* Plaintiff's Memo in Opposition to Defendants' Motion for

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16 (Arbitration Order pp. 5–6.)

17 (*Id.* at pp. 10–11.)

Summary Judgment, filed September 8, 2024, pp. 3–4 ("The corporate negligence claims asserted against [Montgomery-Smalls, FAS, and FCOS] in the instant case were stayed at Defendants' request and Plaintiff was barred from litigating them at arbitration."); *id.* at p. 10 ("The arbitrator could not determine any issue relating to joint venture because that issue was stayed and therefore not part of the arbitration agreement.").) But even assuming, *arguendo*, this was true—which it is not[18]—the Arbitration Order (and the law of the case created thereby) nonetheless requires that these claims against Montgomery-Smalls be arbitrated, not litigated. In other words, even assuming, *arguendo*, these claims against Montgomery-Smalls were not included in the prior arbitration, that would not mean that they can now

[18] The Arbitration Order neither says nor in any way implies (nor logically could it) that Plaintiff's corporate negligence, joint venture, and alter ego/veil-piercing claims against Montgomery-Smalls were excluded from the now-concluded arbitration. Rather, the Arbitration Order found that all of Plaintiff's claims against Montgomery-Smalls were within the scope of the Arbitraiton Agreement and compelled all of those claims to arbitration. (Arbitration Order p. 9 ("Without question, Plaintiff's claims against . . . Montgomery-Smalls are within the scope of the Arbitration Agreement."); *id.* at p. 20 ("[The Instant Case] is stayed in favor of arbitration between Plaintiff and Ms. Montgomery-Smalls, with Plaintiff's claims against FAS and FCOS stayed pending the ultimate outcome of arbitration between Plaintiff, the Facility, and Ms. Montgomery-Smalls.").) Montgomery-Smalls maintains that Plaintiff was required to present all of his claims against her in the arbitration, where she prevailed on the merits (Arbitrator's Order dated May 16, 2023; Arbitrator's Supplemental Order dated May 26, 2023); thus, the arbitration award conclusively resolved all of Plaintiff's causes of action against her that were or could have been presented in arbitration. But at a minimum, since Defendants' motion for summary judgment was denied, any remaining claims against Montgomery-Smalls should be sent back to the arbitrator for resolution.

proceed in litigation—they still have to be arbitrated pursuant to the Arbitration Order.

Moreover, Plaintiff's contention that he could not raise his corporate negligence, joint venture, and alter ego/veil-piercing claims as to Montgomery-Smalls in the now-concluded arbitration in light of the stay of proceedings as to FAS and FCOS wrongly presumes that, because these claims are asserted against all three Defendants (Montgomery-Smalls, FAS and FCOS), they only can be adjudicated in a forum in which all three Defendants are present. (*E.g.* Plaintiff's Memo in Opposition to Defendants' Motion for Summary Judgment p. 8 ("[T]he corporate negligence claims were barred from inclusion [in the arbitration] due to the stays requested by these Defendants.").) The United States Supreme Court specifically has held the FAA "leaves no place for the exercise of discretion" by the courts; "when a complaint contains both arbitrable and nonarbitrable claims, the [FAA] requires courts to 'compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.'" *KPMG LLP v. Cocchi*, 565 U.S. 18, 22 (2011) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985)); *see id.* at 19 ("The [FAA] has been interpreted to require that if a dispute presents multiple claims, some arbitrable and some not,

the former must be sent to arbitration even if this will lead to piecemeal litigation.").

In his complaint in the Instant Lawsuit, every cause of action that Plaintiff has asserted against FAS and FCOS also is asserted against Montgomery-Smalls, including his claims for corporate negligence, joint venture, and alter ego/veil-piercing liability. (Instant Lawsuit Complaint ¶¶ 26-43.) Thus, under *Cocchi* and *Dean Witter*, and pursuant to the Arbitraiton Order, those claims are arbitrable and must be arbitrated against Montgomery-Smalls. By the same token, those claims are not arbitrable as to FAS and FCOS (who are not parties to the Arbitration Agreement) and must be stayed under the Arbitration Order.

Accordingly, the circuit court should have enforced the Arbitration Order and compelled Plaintiff to arbitrate any remaining claims against Montgomery-Smalls.

2. Because the circuit court should have enforced the Arbitration Order and compelled Plaintiff to arbitrate any remaining claims against Montgomery-Smalls, it also should have stayed the Instant Lawsuit as to FAS and FCOS until arbitration of Plaintiff's claims against Montgomery-Smalls is concluded.

Here again, the Arbitration Order could not be clearer in finding both that stay of the Instant Lawsuit as to FAS and FCOS is "required" by § 3 of the FAA and that, even, assuming, *arguendo*, such a stay is not mandatory, a discretionary stay is warranted. (Arbitration Order pp. 18–19.) And here again, besides being

correct,[19] in any event, these rulings were never appealed and are thus the law of the case. *Shirley's Iron Works*, 403 S.C. at 573, 743 S.E.2d at 785 ("An unappealed ruling is the law of the case and requires affirmance."). Accordingly, because (as explained above) the circuit court should have enforced the Arbitration Order and compelled Plaintiff to arbitrate any remaining claims against Montgomery-Smalls, it also should have stayed the Instant Lawsuit as to FAS and FCOS until arbitration of Plaintiff's claims against Montgomery-Smalls is concluded.

B. Because the circuit court should have granted Defendants' Second Motion to Compel Arbitration and Stay, it also should have denied Plaintiff's Discovery Motion.

For the reasons already stated above, any remaining claims against Montgomery-Smalls have to proceed in arbitration and the Instant Lawsuit has to be stayed as to FAS and FCOS. Accordingly, any discovery associated with Plaintiff's remaining claims against Montgomery-Smalls is a matter for the

[19] *See* 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties *stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.") (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) ("[The] FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties.").

arbitrator to address, not the circuit court, and any discovery associated with Plaintiff's claims against FAS and FCOS in the Instant Lawsuit is not a matter for the circuit court to address at this time, because the Instant Lawsuit must be stayed. Therefore, in granting the part of Plaintiff's Discovery Motion that it granted (by requiring Defendants to respond to discovery within 15 days), the circuit court erred.

CONCLUSION

For the foregoing reasons, the circuit court's denial of Defendants' Second Motion to Compel Arbitration and Stay should be reversed, the circuit court's partial grant of Plaintiff's Discovery Motion should be reversed, Plaintiff's claims against Montgomery-Smalls (and any associated discovery matters) should be compelled (back) to arbitration, and the Instant Lawsuit (and any associated discovery matters) should be stayed pending the outcome of arbitration between Plaintiff and Montgomery-Smalls.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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