

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

The Honorable William H. Seals, Circuit Court Judge

Case No. 2016-CP-21-00369
APPELLATE CASE NO. 2017-000065

RECEIVED

JUL 26 2017

SC Court of Appeals

Samuel Barr on behalf of
Himself and all others similarly
situated,

Appellant,

v.

QHG of South Carolina, Inc.

d/b/a Carolinas Hospital System.....Respondent.

RESPONDENT'S MEMORANDUM

James Lynn Werner
Katon E. Dawson Jr.
Parker Poe Adams & Bernstein LLP
1221 Main Street, Suite 1100
Post Office Box 1509 (29202)
Columbia, South Carolina 29201

*Attorneys for Respondent QHG of South
Carolina, Inc. d/b/a Carolinas Hospital
System*

INTRODUCTION

Responding to the letter dated July 12, 2017, from the Honorable Jenny Abbott Kitchings, Clerk of the South Carolina Court of Appeals, Respondent QHG of South Carolina, Inc. d/b/a Carolinas Hospital System (“QHG”), by and through its undersigned counsel, respectfully submits the following memorandum addressing the appealability of the issues raised in Appellant Samuel Barr’s Initial Brief.

BACKGROUND

By way of background, on March 15, 2016, Barr filed a complaint against QHG in connection with the treatment he and his minor children received at QHG’s hospital following an automobile accident. In response to the complaint, QHG moved the circuit court to compel Barr’s claims to arbitration pursuant to the agreement between QHG and Blue Cross Blue Shield of South Carolina (the “Institutional Agreement”). The circuit court found that all of Barr’s claims arose out of or had a significant relationship to the Institutional Agreement and, therefore, compelled Barr to arbitration pursuant to the Institutional Agreement’s arbitration provision.

Barr filed a Rule 59(e) motion to alter or amend requesting the circuit court alter or amend its order staying the case and compelling arbitration. The circuit court denied Barr’s motion to alter or amend. Thereafter, on January 9, 2017, Barr filed a notice of appeal. On May 17, 2017, Barr filed his Initial Brief asserting that the circuit court erred in (1) compelling his claim of intentional interference with contractual relations to arbitration, (2) ruling that the McCarran-Ferguson Act’s reverse preemption provision does not apply, and (3) finding S.C. CODE ANN. 15-48-10(b)(4) is inapplicable in this case because the Institutional Agreement is not an insurance policy.

On July 12, 2017, the Court requested Barr and QHG submit memoranda addressing the appealability of the issues raised by Barr.

ARGUMENTS

I. An order compelling arbitration is not immediately appealable.

Barr's issues on appeal are all derived from the circuit court's order granting QHG's motion to compel arbitration. In South Carolina, an order compelling arbitration is not directly appealable. *See Heffner v. Destiny, Inc.* 321 S.C. 536, 537-38, 471 S.E.2d 135, 136 (1995) overruled in part by *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000); *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co.*, 355 S.C. 605, 610, 586 S.E.2d 581, 584 (2003) (holding an order compelling arbitration is not immediately appealable); *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C. 544, 558, 606 S.E.2d 752, 759 (2004) (holding an order compelling non-signatories to arbitration is not immediately appealable); *see also* S.C. CODE ANN. § 15-48-200 (excluding orders compelling arbitration from its list of immediately appealable issues under the South Carolina Arbitration Act).¹ Therefore, the issues raised in Barr's appeal are not ripe for this Court's review.

¹ The South Carolina decisions that have addressed the issue of whether an order compelling arbitration is immediately appealable only addressed whether the issue was appealable pursuant to S.C. CODE ANN. § 15-48-200. Those decisions did not address the argument that an order compelling arbitration should be appealable pursuant to section 14-3-330(2) of the South Carolina Code because an order compelling arbitration affects the mode of trial and the substantial rights of the parties as defined in section 14-3-330(2). *See Frampton v. S.C. Dep't of Transp.*, 406 S.C. 377, 385-86, 752 S.E.2d 269, 274 (Ct. App. 2013) ("Orders affecting the mode of trial affect a substantial right as defined in section 14-3-330(2) of the South Carolina Code (1976), 'and must, therefore, be appealed immediately.'" (quoting *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997)); *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 103, 431 S.E.2d 587, 590 (1993) ("Issues regarding mode of trial must be raised in the [circuit] court at the first opportunity, and the order of the [circuit court] is immediately appealable.").

II. The Court should remand the case to the circuit court to rule upon the issue of whether the Institutional Agreement's arbitration provision allows for class arbitration.

Barr filed this action as an alleged class representative. However, Barr made no motion to certify a class and the circuit court made no determination whether the action may be maintained as a class action as of the time of the Order compelling the claim to arbitration. Thus, in granting QHG's Motion to Compel Arbitration the circuit court was not asked to consider, and did not address, whether the arbitration provision at issue in this case allowed for class proceedings or claims in the arbitration. Based upon the pleadings and arguments made by Barr's counsel, QHG believes that Barr will continue to pursue efforts to transform this matter into a class proceeding in the arbitration; however, QHG contends that class arbitration is inappropriate and not permitted, because the Institutional Agreement's arbitration provision is silent on the issue. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 664 (2010) (holding a party may not be compelled to submit to class arbitration when an arbitration clause is silent on the issue). The issue of whether the Institutional Agreement's arbitration provision allows for class arbitration will likely be an issue still to be decided in this case. While there is no South Carolina state court authority on the issue, the United States Court of Appeals for the Fourth Circuit has recently decided that the issue of whether an arbitration provision allows for class arbitration is an issue for the court to decide—not the arbitrator. *Dell Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 875 (4th Cir. 2016) (holding that when an arbitration provision is silent on class arbitration the issue of whether class arbitration is permitted is a procedural question for the court). Therefore, in the interest of justice and judicial efficiency and economy, it would be prudent for this case to be remanded to the circuit court to rule upon the issue of whether the arbitration to which the case has been compelled pursuant to the Institutional Agreement's

arbitration provision, may, or may not proceed as a class arbitration. Remanding this issue to the circuit court will prevent unnecessary motions and delays and promote efficiency and judicial economy.

Following ruling by the circuit court on the issue of class proceedings in the arbitration, it could be determined if any issue in the case at that time is immediately appealable.

CONCLUSION

Orders compelling arbitration are not immediately appealable pursuant to S.C. CODE ANN. §15-48-200. However, QHG respectfully requests the Court remand the action to the circuit court for a determination of whether the Institutional Agreement's arbitration provision allows for class arbitration.



James Lynn Werner
Katon E. Dawson Jr.
Parker Poe Adams & Bernstein LLP
1221 Main Street, Suite 1100
Post Office Box 1509 (29202)
Columbia, South Carolina 29201

*Attorneys for Respondent QHG of South
Carolina, Inc. d/b/a Carolinas Hospital System*

July 24, 2017
Columbia, SC

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

The Honorable William H. Seals, Circuit Court Judge

Case No. 2016-CP-21-00369
APPELLATE CASE NO. 2017-000065

RECEIVED

JUL 26 2017

SC Court of Appeals

Samuel Barr on behalf of
Himself and all others similarly
situated,Appellant,

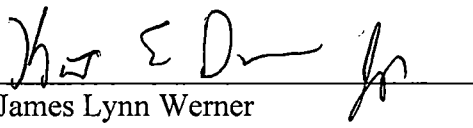
v.

QHG of South Carolina, Inc.
d/b/a Carolinas Hospital SystemRespondent.

PROOF OF SERVICE

The undersigned hereby certifies that on July 24, 2017, he served the foregoing
RESPONDENT'S MEMORANDUM on all parties listed below by placing a copy of it in the
United States Mail, first class postage prepaid, addressed as follows:

J. Preston Strom, Jr. Esq.
Jessica L. Fickling, Esq.
Strom Law Firm, LLC
2110 N. Beltline Blvd.
Columbia, SC 29204



James Lynn Werner
Katon E. Dawson Jr.
Parker Poe Adams & Bernstein LLP
1221 Main Street, Suite 1100
Post Office Box 1509 (29202)
Columbia, South Carolina 29201
Tel: 803-255-8000
Fax: 803-255-8017
jimwerner@parkerpoe.com
katondawson@parkerpoe.com

*Attorneys for Respondent QHG of South Carolina,
Inc. d/b/a Carolinas Hospital System*



Katon E. Dawson, Jr.
Associate
Telephone: 803.253.6854
Direct Fax: 803.255.8017
katondawson@parkerpoe.com

Atlanta, GA
Charleston, SC
Charlotte, NC
Columbia, SC
Greenville, SC
Raleigh, NC
Spartanburg, SC

July 24, 2017

Via U.S. Mail

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street,
Columbia, SC 29201

RECEIVED

JUL 26 2017

SC Court of Appeals

RE: Samuel Barr, etc. v. QHG of South Carolina, Inc., etc.
Appellate Case No.: 2017-000065

Dear Mrs. Kitchings:

Enclosed please find the original and one (1) copy of Respondent's Memorandum regarding the above-referenced matter.

Please return a filed-stamped copy in the enclosed stamped, self-addressed envelope. As evidenced by the attached Proof of Service and by copy of this letter, we are providing counsel of record with a copy of same.

With kindest regards,

Sincerely,

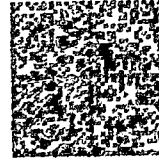
A handwritten signature in black ink that reads 'Katon E. Dawson, Jr.'.

Katon E. Dawson, Jr.

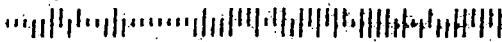
JLW:bg
Enclosures

cc: J. Preston Strom, Jr., Esq.
Jessica L. Fickling, Esq.

PPAB 3813570v1



UNITED STATES POSTAGE
02 1P
0000883125 JUL 24 2017
MAILED FROM ZIP CODE 29201
\$ 001.61⁰
PITNEY BOWES



Parker Poe

1221 Main Street, Suite 1100
Columbia, SC 29201

To: The Honorable Jenny Abbott
Kitchings
Clerk, South Carolina Court of
Appeals
1220 Senate Street,
Columbia, SC 29201

RECEIVED

JUL 26 2017

SC Court of Appeals