

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

**APPEAL FROM SUMTER COUNTY
Court of Common Pleas**

W. Jeffrey Young, Circuit Court Judge

Appellate Case No. 2013-000350

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APR 29 2013

S.C. Supreme Court

Diane B. Sprott as Personal Representative
of the Estate of Gladys Hanna Brown, Petitioner,

v.

Brookdale Senior Living, Inc.; FEBC-ALT
Investors, LLC; FEBC-ALT Holdings, Inc.;
and Brookdale Senior Living Communities, Inc.,
d/b/a Sterling House of Sumter, Respondents.

**RESPONDENTS' RETURN TO THE
PETITION FOR A WRIT OF CERTIORARI**

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STATUTES AND RULES

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Rule 242(b), SCACR6

S.C. Code Ann. § 39-5-150 (2012)12

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STATEMENT OF ISSUES ON APPEAL

- I. **PETITIONER HAS NOT SATISFIED THE STANDARD FOR REVIEW BY THE SUPREME COURT.**

- II. **THE COURT OF APPEALS PROPERLY CONCLUDED THAT PETITIONER FAILED TO PRESERVE THE ISSUE FOR APPEAL.**

- III. **THE CIRCUIT COURT PROPERLY DISMISSED THE LITIGATION INSTEAD OF ISSUING A STAY WHEN IT COMPELLED ARBITRATION.**

This matter is before the Court on a Petition for a Writ of Certiorari. Respondents respectfully request that the Court deny the Petition. The per curiam decision by the Court of Appeals is supported by sound legal precedent and long-standing rules regarding the preservation of issues for appellate review, and Petitioner has offered no special and important reason that would justify this Court's exercise of discretionary review.

STATEMENT OF THE CASE

Diane B. Sprott, as Personal Representative of the Estate of Gladys Hanna Brown ("Petitioner") initiated this action against Respondents, Brookdale Senior Living, Inc., FEBC-ALT Investors, LLC, FEBC-ALT Holdings, Inc., and Brookdale Senior Living Communities, Inc. d/b/a Sterling House of Sumter (collectively "Brookdale"), by filing a summons and complaint in the Sumter County Court of Common Pleas on July 16, 2010, asserting various causes of action for negligence. (App. pp. 54-63). On October 7, 2010, Brookdale filed a Notice of Motion and Motion to Dismiss and to Compel Arbitration, or Alternatively, to Stay the Action Pending Arbitration, pursuant to the terms of a Residency Agreement entered into between the parties on July 10, 2006 ("Residency Agreement"). (App. pp. 64-102). Brookdale also submitted a Memorandum of Law in support of this motion on March 3, 2011. (App. pp. 116-127). In turn, Petitioner filed a Memorandum of Law opposing this motion. (App. pp. 103-115).

A hearing on Brookdale's motion was held on July 6, 2011 before the Honorable W. Jeffrey Young in Sumter, South Carolina. (App. pp. 128-139). Following arguments from both parties, Judge Young took the motion under advisement. (App. p. 138). Subsequently, he granted Brookdale's motion by Order dated August 23, 2011 ("Order"). (App. p. 53). In compelling arbitration, Judge Young also dismissed the pending lawsuit. (App. p. 53).

Rather than filing a Motion to Alter or Amend pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Petitioner served a Notice of Appeal from the Order to the South Carolina Court of Appeals on September 21, 2011. After briefing, the Court of Appeals affirmed the Order in a per curiam decision on December 28, 2012, holding that Petitioner failed to preserve the issue of which remedy was appropriate. (App. pp. 1-2). On January 14, 2013, Petitioner petitioned the Court of Appeals for rehearing, requesting the court withdraw its prior opinion and reverse the circuit court. (App. pp. 3-7) On January 25, 2013, the Court of Appeals unanimously denied the rehearing petition, concluding there was no material fact or principle of law which was overlooked or disregarded justifying a rehearing. (App. p. 8).

STATEMENT OF FACTS

From July 10, 2006 until May 29, 2009, Mrs. Brown resided at Sterling House of Sumter, a Community Residential Care Facility, pursuant to the terms of the Residency Agreement, which was signed by both Petitioner and Mrs. Brown on July 10, 2006.¹ (App. pp. 72-102).

The first page of the Residency Agreement provides, “THIS AGREEMENT IS SUBJECT TO ARBITRATION”. (App. p. 72). Section V. of the Residency Agreement is titled “**ARBITRATION AND LIMITATION OF LIABILITY PROVISION**” and provides, among other terms, that:

[a]ny and all claims or controversies arising out of or in any way relating to [the Residency Agreement] or the Resident’s stay . . . shall be submitted to binding arbitration, as provided below, and shall not be filed in a court of law.

(App. p. 83). The claims covered by the Residency Agreement include:

statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties, irrespective of the basis for the duty or the legal theories upon which the claim is asserted.

(App. p. 83). Petitioner’s initials are on the Residency Agreement at the end of Subsection V.A., entitled “ARBITRATION PROVISION” indicating that she “read and understood [these] provisions...” (App. p. 86). Her initials are found again at the end of Subsection V.B. entitled “LIMITATION OF LIABILITY PROVISION: Read carefully before signing” and Subsection V.C. titled “BENEFITS OF ARBITRATION AND LIMITATION OF LIABILITY PROVISIONS” indicating that she read and understood the provisions of these subsections. (App. pp. 86-87). The presence of her initials also indicates that Petitioner read and

¹ The Residency Agreement is between Petitioner, Mrs. Brown and Alterra Heathcare Corporation, which was the lessee, manager, and license holder of Sterling House when Mrs. Brown was admitted to Sterling House. In February, 2009, Alterra formerly changed its name to Brookdale Senior Living Communities, Inc., one of the Respondents. (App. pp. 62-70). Petitioner has not challenged Brookdale’s ability to enforce this Residency Agreement.

understood the following sentence in Subsection V.C.: **“The undersigned acknowledges that he or she has been encouraged to discuss this Agreement with an attorney.”** (App. p. 87).

Despite the plain language of the Residency Agreement requiring that claims arising out of or in any way connected to Mrs. Brown’s residency at Sterling House be arbitrated, Petitioner filed a complaint alleging Brookdale was negligent in the care and treatment of Mrs. Brown in connection with a fall which occurred at Sterling House on May 29, 2009. (App. pp. 54-63). Because Petitioner would not consent to arbitrate after the institution of the litigation, Brookdale filed a Motion to Compel Arbitration of all claims Petitioner raised in her complaint which was granted. (App. pp. 53, 64-102).

ARGUMENT

I. PETITIONER HAS NOT SATISFIED THE STANDARD FOR REVIEW BY THE SUPREME COURT.

“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242(b), SCACR. While there is no steadfast rule for what this Court may consider in evaluating whether to grant certiorari, the Rules provide guidance. Specifically, the Court should consider whether there exists: 1) novel questions of law; 2) dissent in the Court of Appeals; 3) a conflict of law between this Court and the Court of Appeals; 4) substantial constitutional questions; and 5) federal questions are presented and the Court of Appeals’ decision conflicts with the United States Supreme Court. Rule 242(b)(1-5), SCACR.

In the case at bar, none of these issues are present. The Petition does not present a novel issue of law. There was no dissent within the Court of Appeals’ decision. No conflict between Supreme Court precedent and the Court of Appeals’ decision is cited. There are no constitutional issues argued. There are no federal questions presented or conflicts between state and federal authority. In sum, there are no “special and important reasons” cited which justify granting certiorari. This is not an exceptional case or case of public importance. Rather, this is merely another attempt to “rehear” a case that has been reviewed by one seasoned circuit court judge and a panel of three learned Court of Appeals judges. The Court should deny this Petition as this case does not present any significant issue of law justifying the use of the state’s judicial resources.

II. THE COURT OF APPEALS PROPERLY CONCLUDED THAT PETITIONER FAILED TO PRESERVE THE ISSUE FOR APPEAL.

Even assuming Petitioner could satisfy the standard of review, the Court of Appeals properly concluded she failed to preserve the issue upon which she now seeks review and therefore, this Petition should be denied.

Petitioner has the burden of ensuring that the issue of which she seeks review was both *raised to and ruled upon* by the lower court to properly preserve it for appellate review. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000). In the present case, the Court of Appeals properly concluded Petitioner failed to ask the circuit court to stay this matter instead of dismissing the litigation pending arbitration.

“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues” and provide this Court with a platform for “meaningful appellate review.” Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). To preserve an issue for appellate review, the issue must be (1) raised to and ruled upon by the lower court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the lower court with sufficient specificity. Walterboro Cmty. Hosp. v. Meacher, 392 S.C. 479, 493, 709 S.E.2d 71, 78 (Ct. App. 2011); see also, e.g., Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

It is “axiomatic that an issue cannot be raised for the first time on appeal.” Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733. As this Court has explained:

The losing party must first try to convince the lower court it ... has ruled wrongly and *then, if that effort fails*, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court *and* obtain a ruling before an appellate court will review those issues and arguments.

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (emphasis added) (citing Roche v. S.C. Alcoholic Beverage Control Comm'n, 263 S.C. 451, 455, 211 S.E.2d 243, 244 (1975)) (“purpose of appeal is to determine whether the judge erroneously acted or failed to act, and when appellant’s contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal.”) Further, “the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge.” Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) (citing Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733).

Further, “[a]n issue is not preserved where the trial court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment.” Doe v. Roe, 369 S.C. 351, 376, 631 S.E.2d 317, 330 (Ct. App. 2006) (citing Hawkins v. Mullins, 359 S.C. 497, 597 S.E.2d 897 (Ct. App. 2004)); Nicholson v. Nicholson, 378 S.C. 523, 537, 663 S.E.2d 74, 82 (Ct. App. 2008). In its decision affirming the circuit court, the Court of Appeals adhered to this precedent, concluding:

While the circuit court clearly ruled on whether to enforce the arbitration clause, the court never ruled on the question of whether to employ the remedy of a stay instead of dismissal. To preserve the issue of which remedy was appropriate, the only issue Appellant now seeks to address on appeal, it was incumbent on Appellant to specifically ask the circuit court in a Rule 59(e) motion to consider employing the remedy of a stay instead of dismissal.

(App. p. 2). Since the Court of Appeals’ conclusion that Petitioner failed to file a Rule 59(e) motion and preserve the issue she attempts to present is well-supported by the record and sound legal precedent, her Petition should be denied.

A. Petitioner failed to present this issue to the circuit court prior to issuance of the Order.

In its decision, the Court of Appeals followed the well-established rule that an issue is not preserved when the circuit court does not explicitly rule on an argument. See, e.g., Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998). The purpose of this error preservation requirement is to “enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 381-82, 597 S.E.2d 181, 186 (Ct. App. 2004).

This Court and the Court of Appeals have adhered to this fundamental principle numerous times in situations similar to the present facts. For example, in Platt v. CSX Transp., Inc., 388 S.C. 441, 446, 697 S.E.2d 575, 577-78 (2010), this Court held that the issue of whether the common law presented a basis to establish a duty on the Department of Transportation, although pled in complaint, was not preserved since petitioner did not fully assert this as a basis for a duty until submitting his reply brief to the Court of Appeals. Similarly, in McCall, the Court of Appeals held that application of the door-closing statute was not preserved when appellant “advanced no arguments on this issue to the circuit court”. McCall, 359 S.C. at 381-82, 597 S.E.2d at 186-87.

As in these cases, the circuit court here was never given an opportunity to rule upon the precise issue which Petitioner now wants to present. While Brookdale’s motion sought dismissal or stay of the litigation, and the Order dismissed the litigation, the circuit court was never presented with an argument as to whether dismissal or stay was appropriate. Petitioner’s argument, both in her memorandum and at the hearing, was that only the arbitration agreement should not be enforced. (App. pp. 103-115). Petitioner never argued to the circuit court what the outcome should be if arbitration was compelled. Id. The only mention of alternative disposition

of the litigation is found in Brookdale's motion which sought a dismissal or alternatively, a stay of the litigation, and later in its supporting memorandum. (App. pp. 116-127). Brookdale did not present an argument for one outcome over the other in either its written or oral arguments. (App. pp. 116-139). Accordingly, there is no evidence in the record that an argument was made to the circuit court on the effect of a dismissal on the statute of limitations.

B. Petitioner failed to file a motion pursuant to Rule 59(e) asking the lower court to consider this issue or to reconsider its Order.

As the Court of Appeals correctly held, since the circuit court never ruled on whether to employ the remedy of a stay rather than dismissal, it was incumbent upon Petitioner to specifically ask the circuit court in a Rule 59(e) motion. (App. p. 2). It is well-established that when an issue or argument has been raised to but not ruled upon by the circuit court, a party must file a motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure to preserve the issue for appeal. See, e.g., Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). As noted by this Court in I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000), imposing this preservation requirement on appellant ensures the lower court has considered "all relevant facts, law, and arguments." "The issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011). Significantly, "[w]hen a trial judge makes a general ruling on an issue, but does not address the specific argument raised by the appellant and the appellant does not make a motion to alter or amend pursuant to Rule 59(e), SCRCP to obtain a ruling on the argument, the appellate court cannot consider the argument on appeal." Floyd v. Floyd, 365 S.C. 56, 73, 615 S.E.2d 465, 474 (Ct. App. 2005) (citing Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124

(1991)) (issue of whether Ismail was a permissive user was not preserved since circuit court did not explicitly rule on this argument and no motion under Rule 59(e) was made on this ground).

In response to the Court of Appeals' decision, Petitioner argues it was not necessary to make a Rule 59(e) motion to the circuit court on the issue of the appropriate remedy in light of the circuit court's decision to enforce the arbitration clause. (Petition, pp. 8-10). Petitioner claims that the circuit court implicitly chose to dismiss the litigation, and therefore, "[i]t was not incumbent upon [Petitioner]'s counsel to harass the circuit court by parading the issue before the court again by way of a Rule 59, SCRCF motion". (Petition, p. 8).

In support of her position that a Rule 59(e) motion was not necessary, Petitioner cites to decisions which are factually distinct from the case at bar since in those decisions, the circuit court had previously ruled on the issue appealed. See Bennett v. State, 383 S.C. 303, 680 S.E.2d 273 (2009) (counsel's failure to renew his objection to continuing hearsay testimony was not deficient assistance in post-conviction relief matter); Dunn v. Charleston Coca-Cola Bottling Co., 311 S.C. 43, 426 S.E.2d 2d 756 (1993) (failure to object to mention of insurance before panel during voir dire when court had inquired of counsel prior to questioning); Long v. Norris & Associates, Ltd., 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000) (no failure to object to party's dismissal when court previously ruled on issue). The key fact distinguishing these decisions from the case at bar is that the court had ruled on the specific issue presented on appeal. See id. However, there is nothing in the Appendix here demonstrating the circuit court considered the substantive argument Petitioner now seeks to make.

Petitioner also claims that it would have been futile to move the circuit court to reconsider its Order. (Petition, p. 8) Like Petitioner's argument that it was not necessary to make a Rule 59(e) motion, the cases she cites here are also distinguishable since they involve situations

where the particular argument appealed was raised to the lower court. While Spence v. Wingate, 381 S.C. 487, 498, 674 S.E.2d 169, 169 (2009), found the issue preserved, significantly, the issue was raised to the trial court as reflected in the transcript of the summary judgment hearing. In contrast, the record here reflects no argument regarding the proper remedy was presented to the circuit court. Additionally, in Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 42, 691 S.E.2d 135, 145 (2010), the absence of reference to the term “fair market value” while presenting a motion for directed verdict and use of this term only once during the witness’ testimony, was not fatal since counsel also filed a detailed memorandum in support of its motion. As with the decisions in Bennett, Dunn and Long discussed infra, the underlying facts do not support these decisions as precedent here.

The facts of the case at bar are more similar to those in this Court’s decision in Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011) where the circuit court’s decision was appealed on a ground other than what was raised to and ruled upon by the trial court. The appellant in Herron argued the lower court erred in failing to compel arbitration based upon the Federal Arbitration Act. However, the record was devoid of any reference to federal preemption in the submissions, memoranda and hearings before the trial court. Id. at 468, 719 S.E.2d at 644. Further, the trial court’s statement in its written order that the parties agree state law controlled was unchallenged until appeal. Id. at 468-69, 719 S.E.2d at 644. This Court then held that because appellant could not identify where preemption had been raised and ruled upon by the trial court, “to disregard our issue preservation rules under these circumstances would render them meaningless.” Id. at 470, 719 S.E.2d 644-45. Like Herron, the argument Petitioner now wants to pursue is absent from the record presented to the circuit court.

Another instructive decision is Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 433 S.E.2d 871 (Ct. App. 1993). There, a surety defended a claim for payment on the grounds of defective materials. Summary judgment was entered in favor of the supplier. On appeal, the surety argued that the supplier had not denied the allegation of defective materials. However, the appellate court found that the surety never argued to the trial court that the supplier's failure to deny the existence of the defect somehow impacted on the issues raised by the summary judgment motion. Id. at 303, 433 S.E.2d at 873. The trial judge did not rule on the issue, and the surety did not file a post-trial motion to obtain a ruling. Id. As a result, the issue was not preserved for appeal. Id.

Likewise, this Court affirmed a similar conclusion by the Court of Appeals in Spahn v. Town of Port Royal, 326 S.C. 632, 486 S.E.2d 507 (Ct. App. 1997), aff'd 330 S.C. 168, 499 S.E.2d 205 (1998). There, a pedestrian sued the town for personal injuries sustained when a police car struck a boat that the pedestrian was retrieving from the highway. After a trial on the merits, the jury returned a verdict in favor of the town. On appeal, the pedestrian argued that the trial judge erred in refusing to strike the defense of assumption of the risk and charging the jury that such a defense, if proven, would bar the pedestrian from recovery. Id. at 636, 486 S.E.2d at 509. The pedestrian then argued that the defense of assumption of the risk is merged in to the doctrine of contributory negligence under the principles of comparative negligence, and thus should not act as a complete defense in a negligence case. Id. The Court of Appeals ruled that the pedestrian did not preserve this issue for appellate review. Id. At the trial court level, the pedestrian argued only that assumption of the risk was not applicable to the facts of the case. He did not argue that with the adoption of the comparative negligence doctrine the doctrine of assumption of the risk no longer remains a complete defense. Id.

Like the appellants in Herron, Englert and Spahn, the record shows Petitioner never raised the issue of the proper remedy should the circuit court compel arbitration, and therefore, cannot raise it for the first time on appeal. Because Petitioner failed to raise the issue of the remedy if arbitration is compelled to the circuit court, it is not preserved for review.

Petitioner claims an issue implicitly ruled upon is appropriately preserved, citing to the facts underlying Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) in support. (Petition, p. 9). In Wilder, the trial court was presented with two options – choosing between the amortization schedule presented by the buyer or the amortization schedule presented by the seller. Id. at 74, 497 S.E.2d at 732-33. The Wilder Court held that by expressly adopting the buyer’s amortization schedule in its order, the trial court ruled on and rejected the seller’s objections to it, thereby obviating the need for the seller to make any post-trial motions. Id. at 76-77, 497 S.E.2d. at 734. Because the trial court chose one option over the other, the Court held that post-trial motions, which are only for those issues raised to the trial court but not ruled upon, were unnecessary. Id. Here again, the argument in opposition to the trial court’s conclusion was raised by the appellant. In the present case, Petitioner only argued to the circuit court that the motion to compel arbitration should be denied – one of three potential outcomes the court could reach. Therefore, without any argument to the circuit court on the appropriate remedy should it compel arbitration – a question with two potential outcomes – there is no basis to conclude that the circuit court implicitly rejected the argument Petitioner now makes, rendering Rule 59(e) unnecessary.

The Court of Appeals correctly concluded that Petitioner failed to file a motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure asking the circuit court to address the only issue she tries to appeal: the disposition of the litigation in light of the order to arbitrate.

Instead, she chose to present her argument in support of a stay for the first time on appeal. Thus, although the circuit court ruled that the case should be dismissed, at no time did Petitioner argue for a stay, rather than dismissal, on any ground. Her appeal falls squarely outside this Court's long-standing rules on issue preservation cited above which make it incumbent on her to file a Rule 59(e) motion to secure a ruling from the circuit court, and, consequently, preserve the disputed issue for appeal. This Court must therefore reach the same conclusion reached by the Court of Appeals: this issue is not preserved for the appellate review. Accordingly, the Petition should be denied.

III. THE CIRCUIT COURT PROPERLY DISMISSED THE LITIGATION INSTEAD OF ISSUING A STAY WHEN IT COMPELLED ARBITRATION.

Even assuming that the Court of Appeals' decision is erroneous and the issue Petitioner now attempts to present was preserved, the circuit court properly dismissed the action because there are no further issues which could be presented to the circuit court and Widener v. Fort Mill Ford, 381 S.C. 522, 525, 674 S.E.2d 172, 174 (Ct. App. 2009) does not apply here.

Petitioner basis this argument solely on Widener v. Fort Mill Ford, 381 S.C. 522, 525, 674 S.E.2d 172, 174 (Ct. App. 2009) which held that litigation should be stayed when potential for injustice exists with a dismissal due to the expiration of the statute of limitations. While her argument on such potential injustice is largely absent and not entirely clear, Petitioner foreshadows an attack on the arbitration clause in the Residency Agreement as oppressive and unconscionable and perhaps also upon other provisions in the Residency Agreement. (Petition, p. 12). However, any issue which Petitioner could try to raise now regarding the Residency Agreement either goes to: the validity of the arbitration clause which was addressed by the circuit court and is now the law of the case; or the validity of the contract as a whole which is an

issue decided by the arbitrator. Therefore, there are no remaining claims which would be barred after the statute of limitations expires.

A. The unappealed parts of the Order are the law of the case and cannot be raised in the future.

As the Court of Appeals held, “[a] portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case.” McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 378, 597 S.E.2d 181, 184 (Ct. App. 2004) (quoting Austin v. Specialty Transp. Servs., 358 S.C. 298, 320, 594 S.E.2d 867, 878 (Ct. App. 2004)); see also Toler’s Cove Homeowners Ass’n v. Trident Constr. Co., Inc., 355 S.C. 605, 610, 586 S.E.2d 581, 584 (2003) (holding the findings of the lower court to be the law of the case because neither party took issue with that finding and the unappealed ruling is law of the case). Any portions of the Order other than the disposition of the litigation are unappealed. As such, they are now the law of the case and cannot be raised in the future to any tribunal.

Although expressly not an issue now, Petitioner claims she will make future “attacks on the arbitration clause” and attack the “Agreement and the oppressive and unconscionable clauses contained therein.” (Petition, p. 12). She vigorously argued to the circuit court that arbitration could not be compelled since the arbitration and limitation of liability provisions of the Residency Agreement were not enforceable for multiple reasons, including their unconscionable and oppressive nature. (App. pp. 133-134). Petitioner cited the same cases in her memoranda to the circuit court in support of her position on the unenforceability of the arbitration clause as she now also presents to this Court. (App. pp. 103-115). She also correctly argued that the circuit court, rather than the arbitrator, should decide the validity of the parties’ arbitration provision. (App. pp. 104-105); see, e.g., Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (“The question of the arbitrability of a claim is an issue for judicial

determination...”); Prima Paint Corp v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (holding while the validity of a contract as a whole is an issue for an arbitrator, the validity of an arbitration agreement is an issue for judicial determination); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 215, 659 S.E.2d 209, 212 (Ct. App. 2008) (“If there is a challenge to the arbitration, it is for the courts, not the arbitrator, to decide...”); McCutcheon v. THI of S.C., No. 2:11-CV-02861, 2011 WL 6318575, at *4 (D.S.C. Dec. 15, 2011) (finding unconscionability of nursing home residency agreement to be issue properly decided by court).

Despite these arguments, the circuit court, in ordering arbitration, found the claims in the complaint fall within the scope of the arbitration provisions in the Residency Agreement, therefore rejecting the argument made by Petitioner they are unconscionable and/or oppressive. (App. p. 53). The issue of validity of the agreement to arbitrate was properly presented to the circuit court, decided by the circuit court,² and is the law of the case since it is not contested now on appeal. Further, to the extent Petitioner intends to challenge the validity of the contract as a whole or other contractual provisions, that question is presented to and decided by the arbitrator.

B. Petitioner’s reliance on Widener v. Fort Mill Ford is misplaced.

In support of her argument that the circuit court should have held the matter in abeyance pending the outcome of the arbitration, Petitioner cites to the Court of Appeals’ decision in Widener v. Ford Mill Ford, 381 S.C 522, 674 S.E.2d 172 (Ct. App. 2009). The rationale articulated for the conclusion that litigation should be stayed, rather than dismissed, pending arbitration where future action would be barred by the statute of limitations was simply “a potential the statute of limitations could bar refiling of any unarbitrated claims in court.” Id. at

² The cases Petitioner cites involving similar arbitration provisions which were not upheld based upon a finding of unconscionability were decided by courts on a motion to compel arbitration. (App. p. 53)

525, 674 S.E.2d at 174 (citing S.C. Code Ann. §§ 39-5-150 and 56-15-120, the statutes of limitations for South Carolina's Unfair Trade Practices Act and Regulation of Manufacturers, Distributors and Dealers Act). There is no discussion of how or under what facts and circumstances such a potential might have arisen in that case.

Noting that South Carolina had not previously addressed the issue, the Widener decision refers to the Alabama Supreme Court opinion, Johnson v. Jefferson County Racing Ass'n, 1 So. 3d 960, 969-70 (Ala. 2008), a purported class action. Adopting that court's rationale, the Widener court quoted from Johnson which in turn, had quoted from an earlier Alabama decision, Porter v. Colonial Life & Accident Ins. Co., 828 So. 2d 907, 908 (Ala. 2002). However, the Porter court did not decide this issue since the plaintiff in Porter failed to argue to the trial court that a dismissal, as distinguished from a stay, was not the appropriate form of relief. Porter, 828 So. 2d at 908.³

The present situation is distinguishable from Johnson. As noted above, the circuit court has already determined Petitioner's claims should be arbitrated and she has not challenged that decision, unlike the plaintiff in Johnson, who did challenge arbitrability and was concerned about a bar of putative class members' claims. See Johnson, 1 So. 3d at 967, 969. Also, unlike Johnson, there are no further issues for a court to decide.

In circumstances like these, where all claims have been held to be arbitrable and there are no issues remaining to present to a court, it is appropriate to dismiss the underlying litigation, rather than to stay it. "Dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable." Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707, 709-10


³ On that basis, the Porter court declined to decide the "stay-versus-dismissal" issue as it was presented for the first time on appeal, and accordingly, compelled the plaintiff to arbitrate his claims and dismissed his action. Porter, 828 So. 2d at 908.

(4th Cir. 2001) (declining to dismiss because complaint contained at least one non-arbitrable claim); Aggaro v. MOL Ship Mgmt. Co., Ltd., 675 F.3d 355, 376 (4th Cir. 2012) (acknowledging holding in Choice Hotels but because specific defense was not subject to arbitration, party could not pursue that defense until after arbitration award); see also Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th Cir. 1992) (“[W]eight of authority clearly supports dismissal of the case when *all* of the issues raised in the district court must be submitted to arbitration.”). Since the issues Petitioner raised in her complaint have been ordered to be arbitrated, there is nothing left for a circuit court to decide. Thus, even assuming this issue is preserved and properly before this Court, the circuit court’s decision to dismiss the litigation should be affirmed.

CONCLUSION

For all the reasons set forth above, Respondents, Brookdale Senior Living, Inc., FEBC-ALT Investors, LLC, FEB-ALT Holdings, Inc., and Brookdale Senior Living Communities, Inc., d/b/a Sterling House of Sumter, request that this Court deny the Petition for Writ of Certiorari, affirm the Court of Appeals' decision and circuit court's order dismissing this action, award the costs of this appeal, and attorney's fees as contemplated under the SCACR, and grant such other and further relief as this Court deems just and proper.

Respectfully submitted,



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April 25, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

2012-UP-679 (S.C. Ct. App. filed Dec. 28, 2012)
Appellate Case No. 2013-000350

Diane B. Sprott as Personal Representative
of the Estate of Gladys Hanna Brown, Petitioner,

v.

Brookdale Senior Living, Inc.; FEBC-ALT
Investors, LLC; FEBC-ALT Holdings, Inc.;
and Brookdale Senior Living Communities, Inc.,
d/b/a Sterling House of Sumter, Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on the 25th day of April 2013, a copy of Respondents' Return to the Petition for a Writ of Certiorari was placed in an envelope with sufficient postage prepaid, and mailed to counsel for Petitioner as follows:

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