

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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. 2011-199987

Dianne 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.

**REPLY TO RETURN TO
PETITION FOR WRIT OF CERTIORARI**

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I. THIS CASE IS A PROPER CASE FOR REVIEW BY THIS COURT

Respondents assert that Petitioner has not demonstrated that this case is an appropriate case for this Court to issue a writ of certiorari to the Court of Appeals to review its decision. (Return, p. 6). Respondents assert in conclusory fashion that “No conflict between Supreme Court precedent and the Court of Appeals’ decision is cited.” (*Id.*). Respondents contend the petition “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.” (*Id.*) The Court should not be persuaded by this assertions.

At every stage of this case Petitioner argued that the appropriate thing for the circuit court to do is to stay the matter pending arbitration rather than dismiss. Petitioner even pointed out the relevant and controlling authority. *See Widener v. Fort Mill Ford*, 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009) (holding trial court should have stayed matter pending arbitration rather than dismissed). The issue was before the circuit court on alternative relief: Either stay the matter pending arbitration or dismiss the matter pending arbitration. There is simply no logical or realistic way to simultaneously do both things, and the adoption of one is necessarily the rejection of the other. Yet the circuit court, without explanation, chose to dismiss the matter rather than follow the law. And in doing so the circuit court necessarily rejected the request that the matter be stayed.

Rather than address this obvious logical inconsistency, the Court of Appeals held that the issue was not preserved for its review because Petitioner did not parade the issue back before the judge and obtain an expression of the obvious, that is, that in accepting the alternative of dismissal, the court necessarily rejected the alternative of a stay.

Petitioner pointed out to the Court of Appeals why its decision conflicted with cases from both this Court and the Court of Appeals on error preservation. *E.g.*, *Bennett v. State*, 383 S.C. 303, 680 S.E.2d 273 (2009) (so long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon counsel to harass the judge by parading the issue before him again); *Dunn v. Charleston Coca-Cola Bottling Co.*, 311 S.C. 43, 426 S.E.2d 756 (1993) (same); *Long v. Norris & Associates, Ltd.*, 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000) (same). *See also Spence v. Wingate*, 381 S.C. 487, 674 S.E.2d 169 (2009) (finding order sufficiently addressed argument even though order did not restate ground upon which relief granted); *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010) (finding issue sufficient preserved following review of filings before circuit court). In particular, Petitioner pointed out why the Court of Appeals decision conflicted with this Court's decision in *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (this Court held that trial court's adoption of contrary position in order acted as an implied ruling on the appellant's objections – "the trial court ruled on Seller's objections by expressly adopting Buyer's amortization schedule in its order. Consequently, it was unnecessary for Seller to make any post-trial motions."). Yet the Court of Appeals summarily denied the petition for rehearing.

The Court of Appeals's decision necessarily conflicts with this Court's cases on error preservation. Review pursuant to Rule 242(b), SCACR, is appropriate.

II. THE COURT OF APPEALS ERRONEOUSLY FOUND THE ISSUE NOT PRESERVED FOR REVIEW

Respondents contend that the issue of a stay rather than dismissal was not presented to the circuit court below and the court never had the “opportunity to rule upon the precise issue which Petitioner wants to present.” (Return, p. 9). This contention is contradicted by the express language of the order itself.

The circuit court’s order states:

This matter is before the Court pursuant to the [defendants’] timely filed motion to dismiss and compel arbitration, *or alternatively, to stay the action pending arbitration*, in the above case. The defendant seeks to have this Court compel arbitration, *or alternatively, to stay the present action pending arbitration*, pursuant to the terms of the residency agreement entered into between the parties on July 10, 2006. A hearing was held on the instant motion. After carefully considering the arguments made in the memoranda submitted by the [defendants] and plaintiff, the [defendants’] motion to dismiss and compel arbitration is granted.

(Appx. p. 53). Thus, the circuit court had before it the alternatives of whether to stay the action pending arbitration or whether to dismiss the matter and compel arbitration. The circuit court selected the latter option, necessarily rejecting the option of a stay. The order itself reveals that the issue was, in fact, presented to the circuit court and the court did, in fact, rule upon it. Respondents’ position would require a party to ask for an express ruling on any issue that the actual ruling necessarily rejected. That procedure is not what this Court requires. *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (this Court held trial court’s adoption of a contrary position in its order acted as an “implied ruling” on appellant’s objections; Court stated “the trial court ruled on Seller’s objections by expressly adopting Buyer’s amortization schedule in its order. Consequently, it was

unnecessary for Seller to make any post-trial motions.”).

This Court should view the precise issue presented on appeal as preserved for review. The Court should grant this Petition, review the Court of Appeals’s decision, and reverse its holding that the issue of a stay rather than dismissal was not preserved.

III. THE CIRCUIT COURT ERRONEOUSLY DISMISSED THE ACTION INSTEAD OF ORDERING IT STAYED PENDING ARBITRATION

Respondents contend Petitioner’s reliance on *Widener v. Fort Mill Ford*, 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009) is “misplaced,” based upon an argument that is essentially that *Widener* was wrongly decided in light of the foreign authority upon which it relied. (Return, pp. 17-19). The Court should not be persuaded by this argument.

It is true that the Court of Appeals in *Widener* relied upon persuasive authority from other jurisdictions to hold that a stay rather than dismissal is appropriate where there is a potential for injustice because a potential the statute of limitations could bar refileing of any unarbitrated claims. The Court’s reasoning is sound and applicable to this matter.

Moreover, as the *Widener* Court observed, “a stay, as distinguished from a dismissal, would likely better conserve the time and resources of the parties and the trial court even in the event of a successful arbitration, inasmuch as the winner commonly wants the arbitration award reduced to a judgment.” *Id.* at 525, 674 S.E.2d at 174.

The Court should grant this Petition, reverse the Court of Appeals, and remand the matter for further proceedings consistent with this Court’s ruling.

IV. THE CIRCUIT COURT'S RULING REGARDING THE ARBITRATION CLAUSE IS NOT THE "LAW OF THE CASE" PREVENTING LATER ATTACK ON THE VALIDITY OF THE CLAUSE

Respondents contend the circuit court upheld the validity of the arbitration clause and because Petitioner did not appeal that portion of the order it is the law of the case. (Return, pp. 16-17). The Court should not accept this argument for three reasons.

First, the only ruling the circuit court made was that the matter was subject to arbitration, and the court did not rule on the validity of the clause itself. Petitioner requested that the circuit court declare the arbitration clause to be unconscionable and not enforceable. (Appx. pp. 52-62). Respondents countered that the agreement was not, in fact, unconscionable. (Appx. p. 70). Respondents also contended that the Federal Arbitration Act applied and controlled, and thus the court could not "inquire into the fairness of compelling the parties to arbitrate." (Appx. p. 75). At the hearing Respondents contended any clause with which the court found a problem could be severed, adding "there's no reason that the parties should not arbitrate this matter." (Appx. p. 86, ll. 9-17). The circuit court thereafter entered a four-sentence, one-paragraph order simply ruling that the "defendant's motion to dismiss and compel arbitration is granted." (Appx. p. 53). Thus, there was no ruling on whether the arbitration clause itself is invalid because it is unconscionable.

Second, even if the court's ruling may be construed as a ruling on the validity and enforceability of the clause, the portion of the trial court's order compelling arbitration was not immediately appealable. The South Carolina Code provides that an appeal may be taken from: (1) an order denying an application to compel arbitration; (2) an order

granting an application to stay arbitration; (3) an order confirming or denying confirmation of an award; (4) an order modifying or correcting an award; (5) an order vacating an award without directing a rehearing; or (6) a judgment or decree entered pursuant to provisions of the Uniform Arbitration Act. S.C. Code Ann. § 15-48-200(a) (2005). This statute does not permit an immediate appeal of the merits of the trial court's ruling on the validity of the clause.

This Court recently discussed appealability of an order compelling arbitration under state law. In *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., Inc.*, the Court reaffirmed its rule that all orders relating to arbitration not mentioned in Section 15-48-200(a) are not immediately appealable. 355 S.C. 605, 610, 586 S.E.2d 581, 584 (2003), discussing *Heffner v. Destiny, Inc.*, 321 S.C. 536, 471 S.E.2d 135 (1995). The *Toler's Cove* Court noted:

The *Heffner* court also found that an order staying an action and compelling arbitration is not immediately appealable under 9 U.S.C.A. § 16(a)(3) (1999) of the FAA. The United States Supreme Court's subsequent decision in *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed.2d 373 (2000), overruled the *Heffner* decision to the extent it can be read to mean that a federal court's order compelling arbitration under the FAA is not immediately appealable. However, *Green Tree* does not affect our state's procedural rule that a South Carolina court's order compelling arbitration is not immediately appealable.

Toler's Cove, at 610 n. 3, 586 S.E.2d at 584 n. 3. The Court held "because South Carolina's procedural rule on appealability of arbitration orders, rather than the FAA rule, is applicable, the court's order compelling arbitration is not immediately appealable."

Toler's Cove, at 611, 586 S.E.2d at 584-585. Cf. *Carolina Care Plan, Inc. v. United*

HealthCare Services, Inc., 361 S.C. 544, 606 S.E.2d 752 (2004) (holding that because Section 15-48-200(a) does not expressly permit an appeal from an order granting an application to compel arbitration or from an order to stay claims pending arbitration, an order compelling arbitration of the claims against third parties and staying the remaining claims was not immediately appealable); *Steinmetz v. American Media Services, LLC*, 393 S.C. 72, 709 S.E.2d 708 (Ct. App. 2011) (noting the only appeals that may be taken in arbitration are those orders enumerated in Section 15-48-200(a)). Thus, Petitioner could not have sought immediate appellate review of that ruling.

Third, even if the circuit court's ruling was immediately appealable because it was not within the scope of Section 15-48-200, the order is not a final order in the case but is an interlocutory ruling. *See, e.g., Charlotte-Mecklenburg Hosp. Authority v. South Carolina DHEC*, 387 S.C. 265, 692 S.E.2d 894 (2010) (if there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory; a final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined). The order dismissing the matter and ordering arbitration is far from final, and therefore is not appealable either under the special appeal statute, Section 15-48-200, or the general appeal statute, Section 14-3-330 of the South Carolina Code.

The order also does not fall within the limited categories of cases mandating an immediate appeal of an interlocutory order to avoid waiver of the issues. *See Neeltec Enterprises, Inc. v. Long*, 397 S.C. 563, 725 S.E.2d 926 (2012) (interlocutory order

requiring substitution of party-defendant must be immediately appealed or issue is waived); *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985) (interlocutory order that denies party of mode of trial to which party is entitled as a matter of right must be immediately appealed or issue is waived); *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005) (interlocutory order disqualifying party's chosen attorney must be immediately appealed or issue is waived). All other interlocutory orders, even if immediately appealable, need not be appealed immediately in order to preserve the issue for review. See § 14-3-330 (1) (“Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal ... [a]ny intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from*”) (emphasis added). Thus, even if the trial court’s order may be viewed as providing a ruling on the validity of the arbitration provisions (and it does not), that order is not a “final judgment,” and being interlocutory (and not within the narrow class of cases mandating immediate review), Petitioner could wait until the end of the case to raise the failed challenge to the arbitration clause.

It is true that “an unappealed ruling is the law of the case and requires affirmance.” *Graves v. CAS Medical Systems, Inc.*, 401 S.C. 63, 70 n. 3, 735 S.E.2d 650,

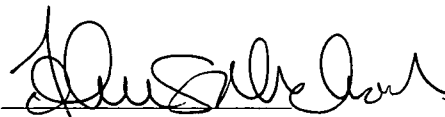
653 n. 3 (2012). But that principle applies *only* where the appellant is seeking review of a final judgment and neglects to raise and argue against an issue that is available to the appellant on review. In this case the order mandating arbitration is not immediately appealable, and Petitioner intends to raise the challenges once final judgment is entered. However, the erroneous order dismissing rather than staying the action is appealable and, arguably, falls within the “mode of trial” type orders for which an interlocutory appeal is required. *Cf. Fulmer v. Cain*, 380 S.C. 466, 670 S.E.2d 652 (2008) (noting “mode of trial” exception to the general rule that only final orders are appealable is confined to orders which abridge a party’s constitutional right to trial by jury). If the trial court is wrong about dismissal of the action rather than issuing a stay (and *Widener* so holds), and Petitioner successfully challenges the validity of the arbitration clause (as parties have done in other jurisdictions), then Petitioner risks the expiration of the statute of limitations if Petitioner does not challenge that ruling now. The result would be a denial of Petitioner’s right to a trial by jury of her tort claims against Respondents.

Accordingly, the Court should reject Respondents’ contention that the trial court’s ruling is an unappealed decision on the validity of the arbitration agreement, and should determine the issue is not the “law of this case.”

CONCLUSION

For the reasons stated in this Reply as well as the Petition, the Court should grant this Petition, reverse the Court of Appeals decision, reverse the trial court's order dismissing this matter and remand for the trial court to stay the action pending arbitration rather than dismiss.

Respectfully submitted,



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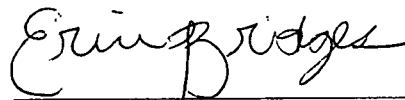
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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served
counsel for the Respondent with the *Reply to Return to Petition for Writ of Certiorari* by
mailing a copy of the same by United States Mail with first class postage prepaid to the
following address:

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