

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Pickens County  
Court of Common Pleas

G.D. Morgan, Jr., Circuit Court Judge

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Cases No. 2021-CP-39-01127 and -01128  
Appellate Case No. 2023-000033

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Deonda Weldon, Individually and as  
Personal Representative of the Estate of Earline Cooley,

Appellant,

v.

Dominion Clemson, LLC d/b/a Dominion Senior Living at  
Patrick Square; Dominion Senior Living, LLC; Dominion  
Clemson, II, LLC; Dominion Management Group, LLC; and  
Dominion Group, LLC,

Respondents.

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**RESPONDENTS' MOTION  
(1) FOR LEAVE TO MAKE RULE 60, SCRPC, MOTION,  
OR, ALTERNATIVELY, (2) FOR IMMEDIATE REVERSAL AND  
REMAND PURSUANT TO *WIDENER V. FORT MILL FORD*, AND, IF  
NECESSARY, (3) TO STAY/EXTEND BRIEFING DEADLINE**

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**Mar 29 2023**

**SC Court of Appeals**

NOW COME Defendants,<sup>1</sup> by and through their undersigned counsel, and hereby move this Honorable Court as follows.

### **BACKGROUND**

Plaintiff<sup>2</sup> filed these wrongful death and survival actions in the Pickens County Court of Common Pleas on October 13, 2022, based on Defendants' alleged negligence with respect to Ms. Cooley's residency at an assisted-living facility (the "Facility"). (Copies of the respective complaints (omitting the expert affidavit attached to each) are attached hereto as **Exhibit 1.**)

After first timely answering Plaintiff's complaints,<sup>3</sup> Defendants moved to compel Plaintiff's claims to arbitration pursuant to an arbitration agreement that was signed in conjunction with Ms. Cooley's admission to the Facility. (Copies of the respective motions to compel arbitration (omitting the attachments thereto) are attached hereto as **Exhibit 3.**)

By form order filed October 27, 2022, and formal order filed January 3, 2023, the circuit court, the Honorable G.D. Morgan, Jr., presiding, granted

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<sup>1</sup> "Defendants" refers to Defendants/Respondents, Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square; Dominion Senior Living, LLC; Dominion Clemson, II, LLC; Dominion Management Group, LLC; and Dominion Group, LLC, collectively.

<sup>2</sup> "Plaintiff" refers to Plaintiff/Appellant, Deonda Weldon, Individually and as Personal Representative of the Estate of Earline Cooley. "Ms. Cooley" refers to the decedent, Earline Cooley.

<sup>3</sup> (Copies of the respective answers are attached hereto as **Exhibit 2.**)

Defendants’ motion to compel arbitration. (Copies of the form and formal orders are attached hereto as **Exhibit 4**. Please note that these orders have only been filed in one of the two cases, namely, the survival action, Case No. 2021-CP-39-01127. To be sure, the fact that the orders have not been filed in the wrongful death action, Case No. 2021-CP-39-01128, is mere inadvertence, as the respective motions (filed in each case) to compel arbitration were heard together, the formal order granting them (filed in the survival action) references both case numbers, and indeed Plaintiff filed her notice of appeal of that order in both cases.<sup>4</sup>)

Without moving the circuit to alter, amend, or reconsider (or to otherwise modify or grant any relief with respect to) the grant of Defendants’ motion to compel arbitration, Plaintiff served notice of the instant appeal on January 10, 2023.

Recognizing that an order granting a motion to compel arbitration is not immediately appealable, Plaintiff’s Notice of Appeal includes the following footnote:

The circuit court’s order dismissed all of Appellant’s claims. Order at 1 (stating that the court “ORDERS that this matter be dismissed . . .”); *Id.* at 22 (“this matter is DISMISSED”) (emphasis in original). Accordingly, the order is immediately appealable pursuant to statute as recognized by this Court’s precedent. S.C. Code Ann. § 14-3-330(2) (conferring appellate jurisdiction for any

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<sup>4</sup> (A copy of the Notice of Appeal Plaintiff filed in each case is attached hereto as **Exhibit 5**.)

order that “discontinues the action”); see also Huskins v. Mungo Homes, LLC, \_\_\_ S.E.2d \_\_\_, 2022 WL 1760628, \* 3 (S.C. Ct. App. June 1, 2022) (citing Widener v. Fort Mill Ford, 381 S.C. 522, 524, 674 S.E.2d 172, 173-74 (Ct. App. 2009) (“an order dismissing the actions without prejudice and ordering arbitration was immediately appealable” pursuant to section 14-3-330(2))). Like Huskins (and in contrast to Widener), the contested order addresses the substantive enforceability of a disputed arbitration provision, and the Court should address Appellants’ arguments against arbitration on their merits. Huskins, 2022 WL 1760628 at \* 3 (citing Toler’s Cove Homeowners Ass’n, Inc. v. Trident Constr. Co., 355 S.C. 605, 611, 586 S.E.2d 581, 584-85 (2003)).

(**Exhibit 5** p.1, n.1.)

The instant motion follows.

### **ARGUMENT**

Without question, an order granting a motion to compel arbitration is not immediately appealable. *Toler’s Cove Homeowners Ass’n, Inc. v. Trident Const. Co., Inc.*, 355 S.C. 605, 611, 586 S.E.2d 581, 584–85 (2003) (“[B]ecause 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.”). Here, however, in an attempt to force this matter before this Court prematurely, Plaintiff seizes upon what is at bottom no more than perhaps a matter of unartful or mischosen wording—in other words, a matter wholly immaterial to the actual substance of the circuit court’s decision—specifically, the use (in the

circuit court's formal order granting Defendants' motion to compel arbitration) of the word "dismissed" rather than the word "stayed." The good news here is that this issue, and along with it Plaintiff's basis for this immediate appeal, is very easily put to rest, and to this end, Defendants argue as follows.

**1. This Court should grant Defendants leave to move the circuit court for appropriate relief pursuant to Rule 60, SCRCP.**

Rule 60(a) provides that "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." Rule 60(a) further provides that "[d]uring the pendency of an appeal, leave to correct the mistake must be obtained from the appellate court."

Rule 60(b) sets forth a number of reasons for which the circuit court "may relieve a party or his legal representative from a final judgment, order, or proceeding," including "mistake" and "inadvertence." Like Rule 60(a), Rule 60(b) also provides that "[d]uring the pendency of an appeal, leave to make the motion must be obtained from the appellate court."

Again, the circuit court's use of the word "dismissed," as opposed to the word "stayed," in effectuating the grant of Defendants' motion to compel arbitration was wholly immaterial to the substance of its decision.

The aim of the motion that the circuit court granted (i.e., Defendants' motion to compel arbitration, quoted below) was not dismissal of Plaintiff's cases but rather to compel Plaintiff's claims to arbitration:

YOU WILL PLEASE TAKE NOTICE that Defendants . . . through their undersigned attorneys, will move . . . for an Order compelling arbitration and for a protective order from discovery . . . . As part of Defendants' Motion to Compel Arbitration, Defendants seek an Order requiring that arbitration be compelled subject to the limitations set forth in the Dominion Senior Living Resident Admission Agreement ("Admission Agreement") . . . .

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[T]his Motion is based on the terms and provisions of the arbitration clause found in the Admission Agreement . . . . The terms of the Admission Agreement expressly provide that all disputes for \$15,000.00 (Fifteen Thousand and 0/100) dollars or more between the parties will be resolved by binding arbitration in South Carolina.

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Further, because this matter is required to be submitted to binding arbitration, Defendants respectfully request that this Court stay and protect Defendants from any requirement to file any further responsive pleadings, respond to any motions filed by Plaintiff, or respond to any discovery served by Plaintiff, in particular Plaintiff's March 22, 2022 pending Motion to Compel with this Court. Alternatively, Defendants request that these proceedings be stayed pending the outcome of arbitration pursuant to Section 3 of the Federal Arbitration Act.

**(Exhibit 3.)**

Likewise, as reflected by the language of the circuit court's form order granting Defendants' motion, the substance of the circuit court's ruling was its agreement with Defendants that Plaintiff's claims should be compelled to arbitration, not that Plaintiff's claims should be dismissed:

This matter is before the Court on Defendants' Motion to Compel Arbitration. Based on a review of the file, the submissions of the parties and the extensive and thorough oral arguments of both parties, the Defendants' Motion is GRANTED.

The Court finds as follows:

- (1) The arbitration provision is not unconscionable. The Court may only analyze the arbitration provision itself when conducting an unconscionability inquiry. See *Damico v. Lennar Carolinas, LLC*, No. 2020-001048, 2022 WL 4231032 (S.C. Sept. 14, 2022). The Court may not go beyond the arbitration provision and look at the entirety of the contract. See *id.*;
- (2) the Defendants have not waived their right to compel arbitration;
- (3) that all Defendants have the right to join in the request for arbitration pursuant to the Admission Agreement;
- (4) that the arbitration agreement is enforceable as to the statutory beneficiaries' claims in the wrongful death action; and
- (5) that Debra Galloway did possess the appropriate authority to execute the Arbitration Agreement on behalf of Earline Cooley.

Defendants' counsel is to prepare a proposed order and submit it to the Court via e-mail.

**(Exhibit 4.)**

The substantive question posed by Defendants’ motion to compel arbitration was whether Plaintiff’s claims should be compelled to arbitration, not whether Plaintiff’s cases should be dismissed. The use of the word “dismissed,” as opposed to “stayed,” in the formal order granting Defendants’ motion is in no way material to the circuit court’s answer to this question. Defendants submit that this is, at most, a matter of unartful or mischosen verbiage in the nature of a clerical mistake that may be remedied under Rule 60(a), but even assuming, *arguendo*, it should somehow rise above a clerical mistake under Rule 60(a), it is, at least, the sort of mistake or inadvertence that may be remedied under Rule 60(b). Accordingly, Defendants ask this Court to grant them leave to move the circuit court under Rule 60 to address this issue such that the formal order granting Defendants’ motion to compel arbitration provides for a stay pending arbitration, rather than a dismissal. In further support of this request, Defendants note that such leave should also authorize the circuit court, in conjunction with the grant of Defendant’s motion under Rule 60, to clarify the record in the wrongful death case, Case No. 2021-CP-39-01128, by filing its order granting Defendants’ motion to compel arbitration and providing for a stay pending arbitration therein, too.

**2. Alternatively, this court should immediately reverse and remand pursuant to *Widener v. Fort Mill Ford*.**

This Court has already dealt with a substantially identical situation in the case of *Widener v. Fort Mill Ford*, 381 S.C. 522, 674 S.E.2d 172 (2009). In

*Widener*, the circuit court granted the defendant’s motion to compel arbitration and, in so doing, “dismissed the action, holding ‘[t]he arbitration agreement is enforceable . . . pursuant to the Federal Arbitration Act as to the claims asserted . . . in this litigation.’” *Id.* at 523, 674 S.E.2d at 173. Agreeing with the plaintiff/appellant that the circuit court erred in *dismissing* his action, the *Widener* Court “reverse[d] the decision of the trial court and remand[ed] th[e] case for the trial court to vacate its dismissal of Widener’s claims and to enter an order *staying* his action pending the outcome of the arbitration proceedings.” *Id.* at 525, 674 S.E.2d at 174 (emphasis added). And having doing so, the *Widener* Court then (correctly) declined to reach the plaintiff/appellant’s challenge to the merits of the circuit court decision on arbitrability, because, with the reversal of the circuit court’s order dismissing the case in favor of an order staying it, there was no basis on which the plaintiff/appellant could take an immediate appeal. *Id.* at 525–26, 674 S.E.2d at 174 (“Widener argues the trial court erred in concluding his causes of action are subject to arbitration. We do not reach this issue because we are reversing and remanding this case for the trial court to stay this action pending arbitration.”).

Accordingly, even assuming, *arguendo*, the Court is not inclined to grant Defendants leave to move the circuit court for appropriate relief pursuant to Rule 60, the Court should simply follow the course it already established in *Widener* and

immediately reverse the decision of the circuit court only insofar as is necessary for the matter to be remanded to the circuit court to vacate its dismissal of Plaintiff's claims and to enter an order staying them pending the outcome of the arbitration proceedings. And, here again, in further support of this request, Defendants note that following this course would and should allow the circuit court to clarify the record in the wrongful death case, Case No. 2021-CP-39-01128, by filing its order (staying Plaintiff's claims pending the outcome of the arbitration proceedings) therein, too.

- 3. To the extent necessary, Defendants ask the Court to stay their briefing deadline until it acts on the remainder of this motion, or, alternatively, to at least extend their briefing deadline by thirty (30) days.<sup>5</sup>**

Defendants submit that the nature of the relief requested in this motion is effectively that of a dismissal of this appeal, and accordingly, the making of this motion should automatically stay this appeal. Rule 240(b), SCACR ("A motion to dismiss an appeal or a motion to relieve counsel shall, however, automatically stay the time limits for perfecting the appeal until the motion is decided."). To the extent that the Court is not inclined to agree, however, Defendants submit that the nature of the relief requested herein is such as to warrant that their briefing

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<sup>5</sup> Plaintiff's initial brief was served on February 27, 2023, which, in the absence of this motion, would make Defendants' initial brief due today, March 29, 2023, pursuant to Rule 208(a)(2), SCACR.

deadline should be stayed until the Court acts on this motion, or, alternatively, at least, that a 30-day extension of this deadline is warranted.

### **CONCLUSION**

WHEREFORE, Defendants move this Honorable Court (1) for leave to move the circuit court for appropriate relief under Rule 60, or, alternatively, (2) for immediate reversal and remand pursuant to *Widener v. Fort Mill Ford* (i.e., immediate reversal only insofar as is necessary for the matter to be remanded to the circuit court to vacate its dismissal of Plaintiff's claims and to enter an order staying them pending the outcome of the arbitration proceedings), and, if necessary, (3) to stay or, alternatively, extend Defendants' briefing deadline by 30 days from today, March 29, 2023, which would be an extension through April 28, 2023. And in conjunction with the relief requested herein in the form of (1) or (2), Defendants request that the Court either dismiss this appeal now or do so upon the circuit court's the grant of the relief for which the instant motion requests this Court's leave to seek.

**<SIGNED ON THE FOLLOWING PAGE>**

Respectfully submitted,

By: s/Russell G. Hines

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