

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKEMS COUNTY
Court of Common Pleas

G.D. Morgan, Jr. Circuit Court Judge

Appellate Case No. 2023-000033

RECEIVED

Apr 10 2023

SC Court of Appeals

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.

**APPELLANT’S RETURN TO RESPONDENTS’ MOTION FOR LEAVE
TO MAKE RULE 60 MOTION OR FOR IMMEDIATE REVERSAL**

Appellant Deonda Weldon, Individually and as Personal Representative of the Estate of Earline Cooley, respectfully submits this return in opposition to Respondents’ motion for leave to make a Rule 60, SCRCP motion or for immediate reversal.

BACKGROUND

This appeal arises from a nursing home negligence action Ms. Weldon brought after the death of her mother Earline Cooley who was once a resident at Respondent Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square. On January 3, 2023, the Honorable G.D.

Morgan Jr. of the Pickens County Court of Common Pleas signed a document entitled “Order Granting Defendants’ Motion to Compel Arbitration and Dismissing Cases” (attached as **EXHIBIT 1**). The order’s substance was written by Respondents’ counsel at Judge Morgan’s direction. (Form 4 Order at 2) (directing Respondents’ counsel to prepare a proposed order) (attached as **EXHIBIT 2**). Counsel drafted the order to state seven times that Ms. Weldon’s legal action was being dismissed. (Order at 1, 4, 6, 9, 22) because Respondents’ motion, supporting memorandum, and hearing arguments had all specifically requested the circuit court dismiss Ms. Weldon’s suit.

Ms. Weldon appealed this order on January 10, 2023. Her Notice of Appeal referenced this Court’s statutory jurisdiction to review circuit court orders that dismiss a party’s legal claims. (Notice of Appeal at 1 n. 1) (citing S.C. Code Ann. § 14-3-330(2)). The Notice also cited this Court’s recent precedent permitting immediate appeal and substantive review of an order that both compels arbitration and dismisses a plaintiff’s claims. Id. (citing Huskins v. Mungo Homes, LLC, ___ S.E.2d ___, 2023 WL 2071173 (S.C. Ct. App. Feb. 15, 2023)). Following receipt of the circuit court hearing transcript, Ms. Weldon proceeded in the ordinary course by filing her initial appellant’s brief and designation of matter to be included in the record on appeal on February 27, 2023. On deadline day for their initial brief (March 29, 2023), Respondents’ filed the current motion which seeks to make substantive changes to the specific remedy the circuit court granted in an order Respondents’ counsel drafted.

ARGUMENT

1. Respondents’ motion for leave to file a Rule 60(b), SCRPC motion in the circuit court is procedurally improper.

The Court need not reach the flawed merits of Respondents’ motion for leave to file a Rule 60 motion because the motion for leave is untimely and procedurally improper.

Respondents seek a wholesale change to the remedy the circuit court granted by withdrawing the dismissal of Ms. Weldon’s suit and substituting a stay of her claims. (Resp’ts Mot. at 4). For the reasons discussed below, Respondents cannot offer even a colorable claim for Rule 60 relief because dismissal was the remedy Respondents repeatedly asked for and, therefore, its presence in the circuit court’s order cannot qualify as a Rule 60 “mistake.” Yet, Respondents’ current motion also fails because Rule 60 is not the proper mechanism for pursuing the order alteration they now seek. Since the circuit court gave Respondents what they asked for, Respondents are not seeking to correct a “mistake.” Instead, they want the circuit court to alter the scope of its judgment and were required to seek this relief through Rule 59, not Rule 60. Rule 59(e), SCRCF (stating parameters for filing “motion to alter or amend the judgment”); see also Banister v. Davis, 140 S.Ct. 1698, 1710 (2020) (“a Rule 59(e) motion is a one-time effort to bring alleged errors in a just-issued decision” to a court’s decision).

Respondents could only file a Rule 59(e) motion within “10 days after receipt of written notice of the entry of the order.” Rule 59(e), SCRCF. The circuit court’s order was entered on January 3, 2023, and Respondents’ motion seeking to alter or amend that order was not filed until March 29, 2023, more than two months after the Rule 59(e) deadline. Accordingly, Respondents’ motion for leave to file further circuit court motions should be denied because the deadline has long passed for the motion Respondents actually seek to file. Overland, Inc. v. Nance, 423 S.C. 253, 815 S.E.2d 431 (2018) (“the ten-day limit for serving a Rule 59(e) motion is an absolute deadline”).

Moreover, Respondents’ motion for leave overlooks the fact that all circuit court matters were automatically stayed when Ms. Weldon noticed her appeal. Rule 241(a), SCACR. Respondents have not followed the required process for attempting to lift the automatic stay. Rule

241(d)(1), SCACR (requiring that any motion to lift the automatic stay be presented first to circuit court absent extraordinary circumstances). Respondents also could not prevail on a motion to lift the automatic stay as the misguided relief they seek is not “necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.” Rule 241(c)(2), SCACR.

In sum, Respondents’ motion was filed far too late for the Rule 59(e) relief they are actually seeking. Moreover, the current motion fails to account for the automatic stay, and Respondents have not followed the rules in seeking to lift the stay. For these timeliness and procedural reasons, Respondents’ motion should be denied.

2. Respondents cannot meet the requirements for Rule 60 relief.

The Rule 60 motion Respondents seek leave to file would be a decidedly odd one. Respondents want the most substantive change possible (i.e. alteration of the scope of relief) in an order their own attorneys drafted. Respondents also never explain how, as the prevailing parties, they need “relief” from an order offering the most extensive remedy a defendant can ever receive—dismissal of the plaintiff’s case. See Rule 60(b), SCRCPC (“the court may relieve a party . . . from a final judgment”). Beyond these foundational problems, Respondents’ proposed Rule 60 motion would be futile because they cannot show the order contains a Rule 60 “mistake.”

Respondents want to change the circuit court’s order from a dismissal to a stay using either Rule 60(a) or 60(b)(1). (Resp’ts’ Mot. at 4, 7). Respondents would bear the burden on either ground to prove the circuit court’s order contains some form of “mistake.” BB&T v. Taylor, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006) (“The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief”). Respondents contend the mistake here was the circuit court order’s choice to dismiss Ms. Weldon’s suit rather than to enter a stay.

Respondents argue the order's use of the word "dismiss" was "unartful or mischosen wording." (Resp'ts Mot. at 3, 7). The record does not support that characterization.

First, the order language itself rebuts the notion that "dismissal" was a mistake. The order references dismissal at least seven times. (Order at 1, 4, 6, 9, 22). It is not just the sheer number of references that is compelling but also their context. Dismissal is written right into the order's caption. (Order at 1) ("ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND *DISMISSING CASES*") (italics added). Then, in the third sentence, the order summarizes its ruling by stating it will "ORDER[] that this matter be dismissed and compelled to binding arbitration . . ." (Order at 1). In fact, the order is bookended with unambiguous statements that dismissal is the chosen and intended result. The conclusion starts by stating "Defendants' Motion to Compel Arbitration is hereby **GRANTED** and this matter is **DISMISSED.**" (Order at 22) (emphasis in original). Between the introduction and conclusion, the order ends multiple individual sections by stating Ms. Weldon's claims are dismissed. (Order at 4) ("the Court finds this matter should be dismissed and compelled to arbitration"); (Order at 6) ("the Court concludes that this matter should be dismissed and compelled to arbitration"). The circuit court's conscious choice to dismiss Ms. Weldon's claims was even the specific reason why the parties' competing discovery motions were deemed moot. (Order at 22) ("Given the Court's ruling granting the Motion to Compel Arbitration and Dismissing these Actions, Plaintiff's Motion to Compel and Defendants' Motion for a Protective Order are now denied as moot"). Thus, Respondents' argument that the order is mistaken is based on the implausible notion that the circuit court made the same mistake seven times in prominent portions of its order and in its reasoning for mooting other motions before it.

Second, Respondents' claim that their attorneys simply chose the wrong word when drafting the order does not match up with their actions before the circuit court. At every step along the way, Respondents were asking the circuit court to dismiss Ms. Weldon's action. Defendants' motion was asserted under the authority of Rules 12(b)(1), (3), and (6), SCRCF. (Defs.' Mot. to Compel Arb. at 1, attached as **EXHIBIT 3**). All three of those rule provisions concern motions to dismiss. Posey v. Proper Mold & Eng'g, Inc., 378 S.C. 210, 225, 661 S.E.2d 395, 403 (Ct. App. 2008) (affirming grant of "motion for dismissal under Rule 12(b)(1)"); Howell v. Covalent Chem., LLC, 435 S.C. 345, 350, 867 S.E.2d 264 (Ct. App. 2021) (noting Rule 12(b)(3) permits "motion to dismiss" based on "the defense of improper venue"). The rule language expressly states 12(b)(6) is a motion to "dismiss for failure of the pleading to state facts sufficient to constitute a cause of action." Rule 12(b), SCRCF.

Respondents made their requested relief equally certain in their supporting memorandum, which concluded by asking the circuit court to "dismiss this case," compel arbitration and stay proceedings. (Defs.' Mem. in Supp. of Mot. to Compel Arb. at 25-26, attached as **EXHIBIT 4**). As Respondents' counsel admitted earlier in the memorandum, he had contemplated filing a motion to dismiss from the moment he received Ms. Weldon's complaint. Id. at 13 (stating that counsel asked for extension of deadline to file either a responsive pleading or "motion to dismiss or compel arbitration"). Then, during a hearing on the motion, Respondents' counsel made the following statement:

[W]e argued that *this action should be dismissed* and that arbitration should be compelled pursuant to the Federal Arbitration Act, contract law, Rules 12(b)(1); 12(b)(3); 12(b)(6).

(Hearing Tr. at 9, lines 11-15) (emphasis added) (attached as **EXHIBIT 5**). There is simply no “mistake” in an order that provided Respondents the relief they consistently requested from the moment the motion was filed.

Third, Respondents incorrectly characterize the order their attorneys drafted as well as the Form 4 order that preceded it. Respondents argue the final order’s use of the word “dismissed” was “wholly immaterial to the substance of its decision.” (Resp’ts Mot. at 4). As discussed above, dismissal was an integral and intentional part of the circuit court’s decision evidenced by how often and in which contexts the order discussed dismissal. Plus, Respondents offer no authority for the extraordinary notion that the specific remedy a court chooses—here, case dispositive relief—is somehow immaterial to its decision. Respondents then argue the formal order’s seven references to dismissal must be a mistake because they are inconsistent with the Form 4 order. (Resp’ts Mot. at 6). However, the word “stay” appears nowhere in the Form 4 order, and the circuit court’s decision to grant dismissal is nothing less than the ultimate relief Respondents asked for.

Respondents’ mischaracterization of the record shows they could not prevail on the Rule 60 motion for which they seek leave to file. Rule 60(a) would only allow the circuit court to correct a “clerical mistake.” Clerical errors are generally “mistake[s] in writing or copying” and, even then, the circuit court can only make a change if doing so would “conform to the record.” Dion v. Ravel, Eiserhardt Assocs., 316 S.C. 226, 230, 449 S.E.2d 251, 253-54 (Ct. App. 1994). The order’s seven prominent references to dismissal were purposeful acts, not errors in writing or copying. Plus, labeling the dismissal a “mistake” would not conform to the record because the record shows Respondents repeatedly asking for dismissal. Finally, changing “dismissal” to “stay” cannot qualify as a clerical mistake because under no circumstances may a court use Rule 60(a) to “change the scope of the judgment.” Id.

Respondents' proposed motion fares no better under Rule 60(b)(1). This rule only offers relief if Respondents show the circuit court's order contains "a good faith mistake of fact" as well as a showing that "failure to avoid the mistake was justified." Williams v. Watkins, 384 S.C. 319, 324, 681 S.E.2d 914, 917 (Ct. App. 2009). Respondents do not challenge any of the circuit court order's factual findings, only the legal remedy the circuit court chose to apply. That chosen remedy was legally incorrect but it was not mistakenly granted. It was the circuit court reaching the outcome Respondents asked for. Even if dismissing Ms. Weldon's action was a mistake, Rule 60(b)(1) would not apply because it generally may not be used "as a vehicle for relief from a mistake of law." Hillman v. Pinion, 347 S.C. 253, 256, 554 S.E.2d 427 (Ct. App. 2001).

In sum, even if Respondents' motion was not untimely and procedurally flawed, it fails because a Rule 60 motion would be futile under the circumstances. Granting Respondents the dismissal they repeatedly asked for was not a "mistake" as that term is used in Rule 60(a) or 60(b). Since there is no basis for a Rule 60 motion, the Court should deny Respondents' motion for leave to file one.

3. Respondent's immediate reversal argument misconstrues Widener and overlooks the Court's most recent ruling on appealability of arbitration-related orders.

Respondents' alternative request for an immediate reversal and remand improperly asks the Court to not only end this appeal without reaching the merits but to end it without full briefing on appealability. The one case Respondents cite, Widener v. Fort Mill Ford, 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009), does not appear to have denied the appellant the benefit of merits briefing. Plus, Respondents err in asserting Widener is "substantially identical" to Ms. Weldon's appeal (Resp'ts Mot. at 7) when in fact the most recent precedent in this area supports Ms. Weldon's positions that (1) the circuit court's order is immediately appealable; and (2) the Court should rule on the substantive issue of whether a valid arbitration contract was formed. (Notice of

Appeal n. 1) (citing Huskins v. Mungo Homes, LLC, ___ S.E.2d ___, 2023 WL 2071173 (S.C. Ct. App. Feb. 15, 2023)).

Respondents cite no authority for drastically altering routine appellate practice by ruling on an appeal one-third of the way through the briefing process and before Ms. Weldon has any opportunity to brief the appealability concern Respondents just raised in this motion. Respondents claim only that this case and Widener are “substantially identical” and the result there should be applied here. (Resp’ts Mot. at 7-8). However, this case is critically different than Widener and is actually governed by Huskins, a case Respondents fail to address in their motion.

South Carolina’s appellate courts have encountered two pertinent appealability questions related to orders compelling arbitration. The first considers whether the order may be immediately appealed if it does more than just compel arbitration—i.e. dismiss the plaintiff’s legal action or stay the plaintiff’s claims. The second asks whether, in instances where the order compelling arbitration includes a dismissal, an appellate court should reach the merits of an appellant’s arbitration challenge. For the first question, precedent holds that an order dismissing an action (with or without prejudice) and compelling arbitration is immediately appealable while an order staying the action and compelling arbitration is not. Widener, 381 S.C. at 524, 674 S.E.2d at 524 (citing Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 558, 606 S.E.2d 752, 759 (2004)).

For the second question, reaching the merits depends on the parties’ arguments. For example, in Widener, the plaintiff argued compelling arbitration and dismissing his case would prejudice him because any claims not covered by arbitration would have to be refiled and there was no certainty the arbitration would be complete in time to refile those claims within the applicable statute of limitations. 381 S.C. at 525, 674 S.E.2d at 174. Because of that unique

situation, the Court reversed the order of dismissal and remanded with instructions to enter a stay. Id. (citing Johnson v. Jefferson Cnty. Racing Ass'n, 1 So.3d 960, 969-70 (Ala. 2008)). In light of that ruling, the Court deemed it unnecessary to reach the merits of the plaintiff's arbitration challenge. Widener, 381 S.C. at 525-26, 674 S.E.2d at 174.

But, when the prejudice/limitations concern is removed, the Court has taken a different approach. In Huskins, the Court applied Widener for the first issue but distinguished Widener for the second issue. Like Widener, an immediate appeal was appropriate because the circuit court granted a Rule 12(b)(6) dismissal in addition to compelling arbitration. Huskins, 2023 WL 2071173, at * 3. However, unlike Widener, there was no prejudice/limitations argument that would support the Widener approach of reversal and remand with instructions to enter a stay. Id. So, Huskins went on to consider the merits of the appellant's challenge to the proposed arbitration contract, reasoning that substantive review was justified because those challenges were capable of repetition. Id. (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)).

This case tracks Huskins in all important respects. The circuit court's order goes beyond compelling arbitration and enters a Rule 12(b)(6) dismissal of Ms. Weldon's legal action. (Order at 26). Accordingly, the order is immediately appealable. Ms. Weldon does not raise a prejudice/limitations argument and, therefore, this case is different than Widener and, like Huskins, not appropriate for the "reverse and remand with instructions" approach taken in Widener. Instead, the Court should do as it did in Huskins by reaching the merits of Ms. Weldon's challenges to the purported arbitration contract. Ms. Weldon's challenges are just as capable of repetition as those in previous cases. Huskins, 2023 WL 2071173, at * 4-7 (unconscionability); Toler's Cove, 355 S.C. at 612-13, 586 S.E.2d at 585-86 (waiver, unconscionability). Ms. Weldon

also raises waiver and unconscionability challenges. (App.'s Initial Brief at 11-20). Plus, her challenge to the circuit court's interpretation of a nursing home resident's power of attorney form (App.'s Initial Brief at 5-10) is certainly capable of repetition as evidenced by how often it has arisen in the past. See e.g., Arredondo v. SNH SE Ashley River Tenant, LLC, 433 S.C. 69, 856 S.E.2d 550 (2021); Stott v. White Oak Manor, Inc., 426 S.C. 568, 828 S.E.2d 82 (Ct. App. 2019).

In sum, Respondents' request for immediate reversal and remand with instructions to enter a stay is procedurally and substantively flawed. Respondents offer no authority for the notion that Ms. Weldon should be denied an opportunity to fully brief the merits of her appeal and the appealability question. Substantively, Respondents err in relying on Widener when Huskins is the governing precedent. Thus, the Court could find as a matter of law that the circuit court order is immediately appealable and should be examined on its merits. At the very least, Respondents must assert their flawed appealability arguments in the ordinary briefing process with Ms. Weldon afforded a full and fair opportunity to respond in her reply.

4. Ms. Weldon's appeal presents meritorious challenges to the proposed arbitration contract.

Respondents' unusual maneuver seeking to rewrite the order their attorney drafted and backing away from the dismissal they asked for perhaps recognizes the strength of Ms. Weldon's appeal. Ms. Weldon's brief presents strong arguments that the proposed arbitration provision in the "Dominion Senior Living Resident Admission Agreement" ("Admission Agreement", attached as **EXHIBIT 6**) was waived through litigation, fails as unconscionable, and is inapplicable to several Respondents and Ms. Weldon's wrongful death claim. (App. Initial Br. at 11-42). More importantly, there is just no evidence to support the circuit court's conclusion that a valid arbitration contract was ever formed. (App. Initial Br. at 5-11). There is no dispute Earline Cooley had a valid durable power of attorney (attached as **EXHIBIT 7**) that named Ms. Weldon (her

daughter) as her primary agent and no dispute that a different daughter (Ms. Galloway) signed the Admission Agreement. Pursuant to the durable power of attorney, Ms. Galloway had no authority to sign the Admission Agreement unless Ms. Weldon *and another sister* (Robin Elliott) were “unable or unwilling or unavailable to serve.” Respondents offered no evidence to show that was the case here. The notion that Ms. Weldon was somehow unavailable or unwilling to consider the Admission Agreement and its arbitration provision is belied by the fact that Ms. Weldon was named in the document as a “financially responsible party.” (Exhibit 6 at 1). Thus, the nursing home recognized Ms. Weldon’s availability but chose instead to present the Admission Agreement to Ms. Galloway for signature.

Without evidence that Ms. Galloway had authority to sign, there was no proof of a valid arbitration agreement. Since arbitration is strictly a matter of contract, Respondents could not compel arbitration without first proving the formation of a valid agreement. Chassereau v. Global-Sun Pools, Inc., 363 S.C. 628, 611 S.E.2d 305, 307 (2005) (“Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that the party has not agreed to submit”). These strong grounds for reversal merit this Court’s consideration, and Respondents should not be permitted to use a procedural maneuver to prevent a full airing of these issues.¹

CONCLUSION

Based on the arguments stated above, Ms. Weldon respectfully requests the Court deny Respondents’ motion. Respondents seek to alter or amend the circuit court’s judgment by changing the specific relief it granted to them. Respondents’ request is untimely under Rule 59(e), and their

¹ Ms. Weldon disagrees with Respondents’ assertion that Rule 240(b), SCACR applies here (Resp’ts Mot. at 9 n. 5) because Respondents’ motion never asks the Court to dismiss Ms. Weldon’s appeal. However, Ms. Weldon does not oppose Respondents’ request for a briefing deadline extension.

proposed Rule 60 motion would be futile. The circuit court’s order does not contain a clerical error or other “mistake” for which Rule 60(b) relief is available because it is the specific relief Respondents requested. Respondents’ alternative request for immediate reversal and remand fails to account for the governing rule of Huskins and is an impermissible attempt to sidestep the meritorious arguments in Ms. Weldon’s initial brief. Accordingly, Respondents’ motion should be denied and this appeal should continue in the ordinary course.

Respectfully submitted,

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