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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILL COUNTY
Letitia Verdin, Circuit Court Judge

Case No. 2022-CP-23-01995
Appellant case No. 2022-001389

Lois Seaborn..... Appellant

v.

CPM Federal Credit Union,..... Respondent,

FINAL BRIEF OF APPELLANT

Lois Seaborn
1901 Woodruff Rd #1234
Greenville, SC 29607
Appellant-Pro se

Emily Irene Bridges
110 E. Coffee Street Ste 210
Greenville, SC 29601
Attorney for Respondents

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STATEMENT OF THE CASE

This action arises out of a April 21, 2021 death incident in which Appellant Lois Seaborn ("Seaborn" or "Appellant") found her son Nathaniel Colbert ("Colbert"), dead after returning home from work. On April 4, 2022, Appellant filed a Complaint with Greenville County Court of Common Pleas asserting various causes of action, including for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress/outrage. On June 10, 2022, Respondents filed a motion to dismiss or, in the alternative, to compel arbitration. (Mot. to Dismiss). On September 2, 2022, Appellant filed a Response in Opposition to Defendants' Motion to Dismiss or, in the alternative, to Compel Arbitration. (Resp. in Opp.). On September 19, 2022, the Honorable Letitia Verdin., held a hearing on the motion. (Order p. 1). On September 21, 2022, the Circuit Court filed an order granting the Defendants' motion to dismiss and compel arbitration. On October 27, 2017, Appellants filed a notice of appeal. (Not.).

Respondent did not file any Memorandum of Law in support of their motion to dismiss. Attorney for Respondents provided absolutely no evidentiary support of their position.

FACTS

Appellants' son Nathaniel Colbert and CPM Federal Credit Union entered into a Membership agreement. (Exh. A to Mot. to Dismiss). Respondents states that the parties executed the Membership agreement. (Exh. B to Mot. to Dismiss). Yet, Respondents failed to provide the Court or the Appellant a valid executed Membership agreement, or arbitration agreement. The alleged Membership and Arbitration Agreement states it "is made by and between CPM Federal Credit Union (the 'Company,' 'us,' 'we,' or 'our') and Nathaniel Colbert ('Member,' 'you' or 'your')." (Exh. A to Mot. to Dismiss). CPM Federal Credit Union is a chartered financial institution and Nathaniel Colbert was a member before his death.

That on or about the times between April 21, 2021 through July 21, 2021, a sum of money was unlawfully and unjustly withheld by the Defendant Bank CPM Credit Union without cause. At all times relevant, the Defendants invited Plaintiffs to patronize its premises and business establishment, located at or about 1270 E. Butler Rd, Mauldin South Carolina, a facility owned managed, operated and controlled by Defendants.

That Defendants took advantage of decedent untimely death to enter into his bank account with Defendants and removed a sum of money without justification.

That on or about July 19, 2021, documents were filed with the Greenville County Probate Court indicating a lessor amount of funds in the bank account that was due to the estate of the decedent. That at this time the Defendants provided the Greenville county Probate Court fraudulent and misleading information. That an agent for the Defendants took matters upon herself to remove lawful funds in decedents' account and forever deprive decedent's estate of the same. That as a result, Appellant, and the estate of Nathaniel Colbert has suffered, and continues to suffer great emotional distress. That the personal representative was publically humiliated by agents of the Defendants when seeking an explanation of the unlawful removal.

Mrs. Seaborn suffers injury from the horror of finding her son dead. Among other injuries, Seaborn suffers from anxiety, disturbed sleep, loss of enjoyment of daily activities, shame, dread and fear, and impairment of personal relationships and the ability to concentrate.

The Appellant, nor the estate of Nathaniel Colbert is not a party to any Membership or arbitration agreement. Mrs. Seaborn does not seek a recovery from the membership agreement.

Mrs. Seaborn brought this separate action for her personal injuries suffered from the conduct committed by the Respondents after the death of her son. Rather, she seeks damages she suffered personally, beyond the loss of her son, because she was humiliated by CPM bank staff and intentionally misled by CPM to the point where the Greenville County Probate Court had to issue an Order for CPM Credit Union to provide an accurate accounting of the funds in Colbert's account at death. Respondents continued their deception and did not comply with the Order of the Greenville County

Probate Judge. Therefore, any valid arbitration agreement would not be a sufficient remedy at law because these issues are not contemplated by any operable arbitration provision. Mrs. Seaborn asserted causes of action for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress/outrage, among other things. Respondents filed a motion to dismiss or, in the alternative, to compel arbitration. (Mot.). Respondents argued the sole remedy available to Mrs. Seaborn was arbitration. (Mot.). This argument fails because the purported Membership Agreement and Arbitration Agreement does not comport to the S.C. Code of Laws Title 15 notice requirement:

S.C. Code of Laws Title 15 - Civil Remedies and Procedures; CHAPTER 48 Uniform Arbitration Act

SECTION 15-48-10.

Validity of arbitration agreement; exceptions from operation of chapter.

(a) A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.

(b) This chapter however shall not apply to:

(1) Any agreement or provision to arbitrate in which it is stipulated that this chapter shall not apply or to any arbitration or award thereunder;

(2) Arbitration agreements between employers and employees or between their respective representatives unless the agreement provides that this chapter shall apply; provided, however, that notwithstanding any other provision of law, employers and employees or their respective representatives may not agree that workmen's compensation claims, unemployment compensation claims and collective bargaining disputes shall be subject to the provisions of this chapter and any such provision so agreed upon shall be null and void. An agreement to apply this chapter shall not be made a condition of employment.

(3) A pre-agreement entered into when the relationship of the contracting parties is such that of lawyer-client or doctor-patient and the term "doctor" shall include all those persons licensed to practice medicine pursuant to Chapters 9, 15, 31, 37, 47, 51, 55, 67 and 69 of Title 40 of the 1976 Code.

(4) Any claim arising out of personal injury, based on contract or tort, or to any insured or beneficiary under any insurance policy or annuity contract.

Respondents' motion to compel arbitration is based on the Membership agreement entered into between Mr. Colbert and CPM Federal. (Mot.). Mrs. Seaborn is neither a party nor a signatory to the Membership agreement. The Respondents provided the Court with this paragraph in its motion;

"The applicable Membership Agreement contains a clear and unequivocal arbitration provision which requires the arbitration of Plaintiff's claims against CPM. The claims arise out of the account held by Mr. Colbert with CPM, and the arbitration provision explicitly states it survives the closure of the account. Therefore, CPM respectfully requests that this Court enter an Order dismissing this action and compelling Plaintiff to proceed with arbitration. This Motion is based on and will be supported by the pleadings in this action, the controlling statutes and rules, applicable case law, and any appropriate memoranda of law or affidavits filed in support of this Motion, any additional documents required by the Court, and such supporting arguments as may be submitted in connection herewith". This argument fails on several grounds pursuant to the S.C. Supreme Court decision in Chassereau v. Global-Sun Pooh, Inc., 363 S.C. 628, 611 S.E.2d 305 (2005). And Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 708 (2007).

Consistent with the South Carolina Supreme Court in Chassereau v. Global-Sun, Darwin argue that the court of appeals erred in determining that the Installation Agreement's arbitration clause did not apply to Chassereau's claims. S.C. Supreme Court disagreed. Appellant adopts this case as its chief in point.

Both state and federal policy favor arbitration of disputes. *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118. Unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered. *Id.* at 597, 553 S.E.2d at 118-119. However, arbitration is a matter of contract, and a party cannot be required to arbitrate any dispute which he has not agreed to arbitrate. *Id.* at 596, 553 S.E.2d at 118.

The resolution of this case is controlled by our recent pronouncement in *Aiken v. World Finance Corporation of South Carolina*, Op. No. 26313, 644 S.E.2d 705 (S.C.Sup.Ct. filed April 23, 2007). In

that case, we refused to interpret an arbitration agreement with similar, though not identical, language to apply to illegal or outrageous acts that no reasonable person would have foreseen at the time the parties executed the agreement to arbitrate. We instructed:

Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.

From the beginning of her relationship with Global-Sun, Chassereau certainly knew that she would be required to make payments on the pool she purchased. Furthermore, Chassereau must have expected that Global-Sun employees would contact her and request that she make payments on the pool if she ceased doing so. However, we believe a reasonable person would not have foreseen and would not have expected (and ought not to expect) ***Global-Sun employees*** to commit acts historically associated with the common law tort of outrage in seeking to collect an overdue debt. Our opinion in *Aiken* unequivocally provides that although these types of uncivilized acts often arise in the course of performance of contracts containing arbitration clauses, South Carolina courts will not interpret arbitration clauses to apply to such acts which are outrageous and unforeseen. ***Emphasis Added.***

Although we are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis. While actions taken in an arrangement such as the one entered into by these parties might have the potential to generate several legal claims and causes of action, we have no doubt that Chassereau did not intend to agree to arbitrate the claims she asserts in the instant case. Accordingly, we hold that these claims are not covered by the arbitration agreement at issue in the instant case.

Regardless of its validity, this provision related to third parties applies only to a person claiming through the Membership. Seaborn does not claim through the Membership agreement. Rather, she makes an independent, personal claim based on her unique injuries.

The Honorable Letitia Verdin, held a hearing on Appellants' motion. On September 19, 2022, the lower court granted the motion in its entirety. (Order). The lower court did not have a valid executed arbitration agreement before it to examine as required by Title 15, S.C. Code of Laws. At the hearing, Plaintiff sufficiently plead each cause of action outside the boundaries of any valid arbitration agreement or provision. The court should have denied the motion to compel arbitration because nothing in the [arbitration] agreement shows that Plaintiff/Appellant was a party to the arbitration agreement or that CPM had any authority to bind Plaintiff/Appellant to such an agreement." Further, Respondents failed to show any facts "to justify binding Plaintiff/Appellant to arbitration under" any theory of assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary, waiver, or estoppel, in the event of a valid enforceable arbitration agreement. Finally, the lower court apparently found Plaintiff's tort claims appear to be subject to arbitration, which the Appellant claims is in error.

STANDARD OF REVIEW

Unless the parties provide otherwise, the question of the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). The determination of whether a claim is subject to arbitration is subject to *de novo* review. *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct.App. 2005); *United States v. Bankers Ins. Co.*, 245 F.3d 315, 319 (4th Cir.2001). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the

findings. *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct.App.

The determination of whether a claim is subject to arbitration is subject to *de novo* review. *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct.App. 2005). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct.App. 2003).

2003)."Arbitrability determinations are subject to de novo review." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 47, 790 S.E.2d 1, 3 (2016). "However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id* at 48, 790 S.E.2d at 3.

ARGUMENT

The lower court incorrectly held Mrs. Seaborn did not plead valid causes of action and her claims are subject to arbitration. We believe the Respondents contorted the allegations of the case by viewing them through the lens of the injuries specific to Mr. Colbert and the negligence related to him after his death. However, Mrs. Seaborn brings this case for her own injuries based on Respondents' conduct towards her specifically, after Mr. Colbert's death. Therefore, the relevant inquiry is the allegations related to Mrs. Seaborn and her damages because there is no existence of a relationship.

Mrs. Seaborn is not subject to arbitration because, among other reasons, she did not sign the agreement. Her claims do not fall within the terms or scope of the arbitration agreement because she does not make a claim through Mr. Colbert, and does not seek to enforce or benefit from the Membership agreement, as she may bring her claims in the absence of the Membership agreement. Further, Respondents' conduct falls within the outrageous and unforeseeable exception to arbitration. For any one of these reasons, the Court should reverse the lower court's decision.

The appropriate forum for determining the scope of the arbitration clause.

In the South Carolina Supreme Court case, Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 708 (2007),....The trial court found that the effectiveness of the arbitration agreement ceased when the relationship of the parties ended. Because Aiken paid off his last loan with World Finance prior to the tortious acts of the employees, the court concluded that Aiken's tort claims were completely independent of the loan agreements and not subject to the arbitration agreements. Therefore, the court denied World Finance's motions to compel arbitration. The conduct complained of by Mrs. Seaborn did not occur until after the death of her son.

Significant relationship between the underlying claims and the contract containing the arbitration agreement.

In Aiken v. World Finance, World Finance argues that the court of appeals erred in finding that Aiken's claims were not within the scope of the parties' arbitration agreement. South Carolina Supreme Court disagreed.

Both state and federal policy favor arbitration of disputes and unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596-97, 553 S.E.2d 110, 118-19 (2001). However, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. *Id.* at 596, 553 S.E.2d at 118. Given these principles, courts generally hold that broadly-worded arbitration agreements apply to disputes in which a "significant relationship" exists between the asserted claims and the contract in which the arbitration clause is contained. *Id.* at 598, 553 S.E.2d at 119 (quoting *Long v. Silver*, 248 F.3d 309 (4th Cir.2001)).

Courts typically characterize arbitration agreements purporting to govern disputes "arising out of or related to" the underlying contract between the parties as "broad" arbitration clauses encompassing a wide range of issues. *See J.J. Ryan Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir.1988).

World Finance primarily argues that because Aiken's contracts with World Finance gave the conspirators access to Aiken's information in order to carry out their crimes, there is a significant relationship between Aiken's claims and the underlying loan agreement, thereby warranting arbitration. We find this argument unpersuasive. In our opinion, the "relationship" asserted by World Finance between Aiken's tort claims and the parties' prior dealings under the loan agreements hardly rises to the level of "significant." Applying what amounts to a "but-for" causation standard essentially includes every dispute imaginable between the parties, which greatly oversimplifies the parties' agreement to arbitrate claims between them. Such a result is illogical and unconscionable. Set; *Seifert v. U.S. Home Corp.*, 750 So.2d 633, 638 (Fla. 1999) ("[T]he mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one `arising out of or relating to' the agreement."). *Sec also The Vestry and Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co., Inc.*, 356 S.C. 202, 209, 588 S.E.2d 136, 140 (Ct.App. 2003) ("[T]he mere fact that an arbitration clause might apply to matters beyond the express scope of the underlying contract does not alone imply that the clause should apply to every dispute between the parties.").

The court of appeals also rejected this overly simplified approach. Relying heavily on the fact that Aiken had paid his loans in full when the employees' tortious acts occurred, the court of appeals found that there was no significant relationship between Aiken's tort claims and his loan agreements with World Finance. *See Aiken*, 367 S.C. at 182-433, 623 S.E.2d at 876. Therefore, the court held that Aiken's claims were not within the scope of the arbitration agreement found in the underlying contract.

While relying mainly on the "significant relationship" lest to determine whether a claim is arbitrable, the court of appeals also seemed to endorse an additional test used specifically for determining whether a tort

claim is arbitrable. The court cited to *Zabinski* for the proposition that tort claims were within the scope of arbitration when "the particular tort claim is so interwoven with the contract that it could not stand alone." *Aiken*, 367 S.C. at 181, 623 S.E.2d at 875 (citing 346 S.C. at 597 n. 4, 553 S.E.2d at 119 n. 4). We note that the *Zabinski* articulation of this test is found in a footnote containing references to tests used by "other jurisdictions" and therefore has not been adopted by this Court as a separate lest applicable specifically to tort claims in this context.

Although we agree with the ultimate conclusion reached by the court of appeals, we do not consider the timing of the employees' tortious conduct to be relevant to the arbitrability of Aiken's claim. Instead, we pronounce a more definitive rule for determining whether a significant relationship exists between a dispute between parties to a contract and the underlying contract, thereby implicating an arbitration agreement in the contract. Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.

In this case, we find the theft of Aiken's personal information by World Finance employees to be outrageous conduct that Aiken could not possibly have foreseen when he agreed to do business with World Finance. Consequently, in signing the agreement to arbitrate, Aiken could not possibly have been agreeing to provide an alternative forum for settling claims arising from this wholly unexpected tortious conduct. Accordingly, we hold that Aiken's claims for unanticipated and unforeseeable tortious conduct by World Finance's employees are not within the scope of the arbitration agreement with World Finance.

See also Towles v. United Healthcare Corp., 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct.App. 1999) ("When a party invokes an arbitration agreement after the contractual relationship between the parties has ended, the parties' intent governs whether the clause's authority extends beyond the termination of the contract." (citing *Zandford v. Prudential-Bache Sec, Inc.*, 112 F.3d 723, 727 (4th Cir.1997))).

Additionally, we are somewhat puzzled by the concurring opinion's characterization of identity theft as a foreseeable tort. Although this Court indicated its concern over the "rampant growth of identity theft" in *Huggins v. Citibank, N.A.*, 355 S.C. 329, 334, 585 S.E.2d 275, 277 (2003), the rule we set forth today is based on the concept of the expectations of a "reasonable man," a standard deeply rooted in tort law. Therefore, a determination of foreseeability under the rule is to be made from the standpoint of the injured party; not this Court. We do not believe that this Court should proclaim that fraudulent acts such as identity theft are foreseeable in the course of normal business dealings.

In establishing the line for claims subject to arbitration, this Court does not seek to exclude all intentional torts from the scope of arbitration. For instance, the parties in the instant case stipulate that a tort claim which essentially alleges a breach of the underlying contract (e.g., breach of fiduciary duty, misappropriation of trade secrets) would be within the contemplation of the parties in agreeing to arbitrate. We only seek to distinguish those outrageous torts, which although factually related to the performance of the contract, are legally distinct from the contractual relationship between the parties. *See McMahon v. RMS Electronics, Inc.*, 618 F.Supp. 189, 191 (S.D.N.Y.1985).

Our decision today does not ignore the state and federal policies favoring arbitration as a less formal and more efficient means for resolving disputes. *See Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 396, 498 S.E.2d 898, 902 (Ct.App. 1998). This Court merely seeks, as a matter of public policy, to promote the procurement of arbitration in a commercially reasonable manner. To interpret an arbitration agreement to apply to actions completely outside the expectations of the parties would be inconsistent with this goal. The allegations in the Complaint demonstrate the assertion of an independent duty owed to Mrs. Seaborn.

Respondents would have the Court read and interpret the Complaint as relating to any injury to Mr. Colbert before his death. However, this is legally impermissible. Liberally construing the Complaint in Mrs. Seaborn's favor and presuming all well pled facts as true, Mrs. Seaborn alleges

Respondents owed her an independent duty of due process and due care to adequately provide the family and the Greenville County Probate Court and Judge adequate and truthful accounting as well as a simple level of decency. These are all allegations of a duty owed to Mrs. Seaborn and not to Mr. Colbert in his death. They relate to the Respondent's conduct after Mr. Colbert's death. Therefore, the duties could not be owed to Mr. Colbert.

Assuming the facts as true and drawing all inferences in Mrs. Seaborn's favor, the Court should reverse the lower court's holding that Mrs. Seaborn is subject to arbitration.

I. Seaborn's Claims are Not Subject to Arbitration because they do Not Fall within the Terms or Scope of the Arbitration Agreement and She Does Not Seek to Enforce or Receive a Benefit from the Membership Agreement

Mrs. Seaborn's claims do not fall within the terms or scope of the arbitration. Mrs. Seaborn may not be compelled to arbitrate because did not sign the Membership agreement. She does not seek to enforce any term or obligation of the Membership agreement and did not receive a benefit from it. Respondents should have acknowledged that Mrs. Seaborn did not sign the arbitration agreement instead argue that she is bound to its terms because she allegedly seeks to benefit from the Membership Agreement by asserting a tort claim based on breaches of duty that arise out of the contract and, thus, is equitably estopped from rejecting the arbitration provision. This argument is factually and legally incorrect. Appellants rely solely on one allegation of the Complaint for this entire line of argument, ignoring that the issue in this case is not Mr. Colbert but the conduct towards Mrs. Seaborn after Mr. Colbert's death.

A. Public Policy Favoring Arbitration Does Not Mandate that Every Claim is Subject to Arbitration

Respondents go to great lengths to point out the public policy favoring arbitration. (Affidavit of Mr. Thall). However, the public policy favoring arbitration is not absolute. "Although [a court is] constrained to resolve all doubts in favor of arbitration, this is not an absolute truism

intended to replace careful judicial analysis." Chassereau v. Global-Sun Pools, Inc., 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007). In this case, careful judicial analysis leads to the conclusion that the lower court incorrectly granted Respondents' motion to compel arbitration.

B. The Arbitration Agreement, by its Terms, Does Not Apply to Seaborn's Claims

Mrs. Seaborn's claims do not fall within the terms of the arbitration agreement and, therefore, are not subject to arbitration. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Aiken v. World Fin. Corp.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007). A review of the language of the arbitration agreement at issue, the allegations of this case, and applicable case law, show that the lower court incorrectly granted the motion to compel arbitration.

The arbitration agreement states:

> **What does claim means?... Claim means any claim, dispute or controversy (whether under s statute, in contract, tort or otherwise and whether for money damages, penalties or declaratory or equitable relief) by either you or the Credit Union against the other; or against any employee, agent or volunteer of the other, arising from or relating in any way to this Agreement or any Agreements to which the Membership Account Agreement in any manner (including any renewals, extensions or modifications) or any relationships between us.**

(Exh. A to Mot. to Dismiss- Agreement) (emphasis added). "Any relationship between us". Mrs. Seaborn's claims do not arise out of or relate to the Membership Agreement. Respondents' assertion to the contrary is incorrect.

"Even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law." *Aiken*, 373 S.C. at 151, 644 S.E.2d at 709. Accordingly, our courts "will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." *Id.* "[C]ourts generally hold that broadly-worded arbitration agreements apply to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained." *Id.* at 149,

644 S.E.2d at 708 (internal quotation marks omitted) (finding no significant relationship existed between a loan agreement and claims based on defendant's employees' use of plaintiff's personal information to embezzle money).

In this case, there is no significant relationship between Mrs. Seaborn's claims and the Membership agreement. Mrs Seaborn's claims arise out of Respondents' failure to provide her and the estate, as well as the Greenville County Probate Court an honest and accurate accounting of funds remaining in Mr. Colbert's account at his death. And the conduct of the Respondents surrounding these activities. These claims do not fall within the arbitration agreement because they arise out of Respondent's voluntary conduct. *See Hatcher v. Edward D. Jones & Co., L.P.*, 379 S.C. 549, 554, 666 S.E.2d 294, 297 (Ct. App. 2008) (affirming the denial of a motion to compel arbitration as to a negligence claim based on the impermissible withdrawal of money from plaintiff's retirement account because "although these claims are factually related to the performance of the contract, each action is legally distinct from the contractual relationship between the parties, and therefore, was not within the contemplation of the parties' agreement to arbitrate). Mrs. Seaborn's claims are distinct from the Membership agreement between Mr. Colbert and Respondents, and were not within the contemplation of the parties who signed the arbitration agreement.

Mrs. Seaborn's claims do not arise out of or relate to Mr. Colbert's membership with the Credit Union. See Aiken, 373 S.C. at 150, 644 S.E.2d at 708 ("Applying what amounts to a 'but-for' causation standard essentially includes every dispute imaginable between the parties, which greatly oversimplifies the parties' agreement to arbitrate claims between them. Such a result is illogical and unconscionable."). These factual allegations are unrelated to the Membership agreement.

Respondent's position is neither supported nor saved by reference in the arbitration agreement to third parties.

C. *Seaborn's Claims are Not Subject to Arbitration because she did Not Sign the Membership Agreement, Does Not Seek to Enforce It, and Received No Benefit From It*

Mrs. Seaborn, as a non-signatory to the Membership agreement, cannot be bound to its arbitration provision when she does not seek to enforce any term or obligation of the Membership agreement and received no benefit from it.

Our courts have "recognized that five theories 'aris[ing] out of common law principles of contract and agency law could provide a basis for binding nonsignatories to arbitration agreements: 1) incorporation by references; 2) assumption; 3) agency; 4) veil piercing/alter ego; and 5) estoppel.'" *Malloy* v. *Thompson*, 409 S.C. 557, 561-62, 762 S.E.2d 690, 692 (2014) (quoting *Pearson* v. *Hilton Head Hosp.*, 400 S.C. 281,288, 733 S.E.2d 597,601 (Ct. App. 2012)) (alteration in original). Appellants argue only the fifth theory-equitable estoppel-applies in this case. (Br. of App. pp. 28-32). "[T]he equitable estoppel doctrine in an arbitration setting allows a party to be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him." *Hodge* v. *UniHealth Post-Acute Care of Bamberg, LLC*, Op. No. 5541 (Shearouse Adv. Sh. No. 10 at 65, (Ct. App. filed March 7, 2018), 2018 WL 1177630, *14-15 (internal quotation marks omitted). "Restated, when a signatory seeks to enforce an arbitration agreement against a nonsignatory, the doctrine prevents the nonsignatory from averring he or she is not bound to the arbitration agreement when he or she receives a direct benefit from a contract that contains an arbitration clause." *Id.*

The equitable estoppel theory does not apply to this case because Mrs. Seaborn does not seek to enforce the Membership agreement and neither received nor receives a benefit from it. The allegations of Mrs. Seaborn's Complaint and the factual and legal foundations for her claims have nothing to do with the Membership agreement. Respondent's argument on this point incorrectly

focuses on their conduct toward Mr. Colbert after his death. These claims do not rely on or arise out of any provision of the Membership agreement and do not assert the breach of any term of the Membership agreement. *See, e.g., Malloy,* 409 S.C. at 562, 762 S.E.2d at 692-93 (holding defendants' "argument that a derivative 'duty' from the CRAs binds Malloy, a non-signatory to the CRAs, conflates the duties created by the CRA contracts and general tort duties. Malloy does not claim that Merrill Lynch breached a duty created by the CRAs, but rather that it breached the duty owed by all persons not to intentionally interfere with another's expected inheritance"); *Hodge,* 2018 WL 1177630, *24-25 ("[B]ecause Appellant is not suing for a breach of the Membership Agreement, they are not attempting to enforce that agreement)" Mrs. Seaborn asserts breach of common law duties owed to her by virtue of Respondents' conduct, not duties dependent upon the terms or obligations imposed by the Membership agreement.

Mrs. Seaborn may bring claims against Respondents in the absence of the Membership agreement. In *Wilson v. Willis,* 416 S.C. 395, 786 S.E.2d 571 (Ct. App. 2016), this Court expressly found the allegations of the plaintiffs "complaints necessarily depend upon the terms, authority, and duties created and imposed by" the agreement containing the arbitration provision. 416 S.C. at 417, 786 S.E.2d at 582. In this case, the allegations of the Complaint arise from Respondents' conduct, not from any term, authority, or duty created or imposed by the Membership agreement. Therefore, Mrs. Seaborn may "reach" Respondentss in the absence of the Membership agreement. *Id.* at 417-18, 786 S.E.2d at 583; Significantly, the "benefit" Respondents assert Mrs. Seaborn receives from the Membership agreement is that, she "would receive a benefit from the Agreement if she prevails on her claims" because she allegedly cannot hold Appellants liable but for the Membership agreement. (Br. of App. p. 31). This argument turns the equitable estoppel-benefit theory on its head. Mrs. Seaborn must have received a benefit from the Membership agreement that justifies enforcing its terms as to her. *See Pearson,* 400 S.C. at 296, 733 S.E.2d at

605 (finding the plaintiff "received a benefit due to the contract, in that he was able to work at the Hospital and receive payment for his work"). The benefit cannot be something that ***may*** be received as a result of the very litigation as to which the defendant is seeking to compel arbitration. Respondents essentially argue that Mrs. Seaborn may benefit from the very thing it is working to prevent her from receiving-a recovery in this lawsuit. That is no benefit at all and would make every claim of a non-signatory subject to arbitration. Mrs. Seaborn also does not seek to benefit from any services Respondents were obligated to or did provide to Mr. Colbert. She alleges Respondents breached a duty owed ***to her,*** not a duty to owed to Mr. Colbert.

Finally, Respondents cannot prove the elements of an estoppel claim. "Essential elements of estoppel as related to the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position." *Regions Bank v. Schmauch,* 354 S.C. 648, 675, 582 S.E.2d 432, 446 (Ct. App. 2003). Respondents had means of knowledge as to the true nature and duty owed to Mrs. Seaborn. Therefore, even if an equitable estoppel theory applied, which it does not, Respondents could not prove it. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

II. The Court Should Refuse to Compel Arbitration because Respondent's Conduct Constitutes Outrageous Acts that No Reasonable Person would have Foreseen when entering into an Arbitration Agreement

Mrs. Seaborn argued to the lower court the outrageous and unforeseeable torts exception as a basis on which it could refuse to compel arbitration in this case. This is an alternative and independent basis upon which the Court may refuse to compel arbitration. Rule 220(c), SCACR.

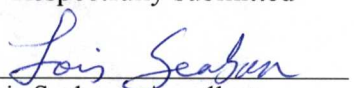
South Carolina courts consistently refuse to enforce arbitration agreements where the facts consist of "illegal or outrageous acts that no reasonable person would have foreseen at the time the parties executed the agreement to arbitrate." *Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 172,644 S.E.2d 718, 720 (2007) (refusing to enforce an arbitration agreement where defendants' employees "systematically harass[ed]" plaintiff about not paying a bill by repeatedly calling her at work, disclosing private information to her family, friends, and coworkers, and making false and defamatory statements about plaintiff). Neither Mrs. Seaborn nor her son who signed the arbitration agreement could have foreseen that Respondents would act so egregiously and fraudulently and not to comply with a valid Court Order. "Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." *Aiken v. World Fin. Corp.*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007) (finding "theft of Aiken's personal information by World Finance employees to be outrageous conduct that Aiken could not possibly have foreseen when he agreed to do business with World Finance. Consequently, in signing the agreement to arbitrate, Aiken could not possibly have been agreeing to provide an alternative forum for settling claims arising from this wholly unexpected tortious conduct.").

The signatories to the Membership agreement did not agree to an alternative forum for settling claims arising from wholly unexpected tortious conduct, and the Court may affirm the lower court's decision to deny Appellants' motion to compel arbitration on this basis.

CONCLUSION

For judicial harmony, and For the reasons stated herein, the Court should reverse the lower court's decision which granted Rule 12(b)(6) motion to dismiss and alternative motion to compel arbitration, and the South Carolina Court of Appeals should remand the case to proceed in the Court of Common Pleas.

Respectfully submitted



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September 30, 2023