THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

G.D. Morgan, Jr. Circuit Court Judge

Appellate Case No. 2023-000033

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.

REPLY BRIEF

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REPLY ARGUMENT

1. Respondents' argument to dismiss or curtail Ms. Weldon's appeal ignores plain statutory language and recent precedent.

Ms. Weldon appealed an order granting a motion filed pursuant to Rule 12(b)(6), SCRCP that dismissed all of her legal claims. 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") now argue that order is not immediately appealable because it also compels arbitration. South Carolina's appellate courts have always recognized a dismissal order to be immediately appealable, and the legislature has expressly stated the statute underlying Respondents' flawed argument does not apply to claims like Ms. Weldon's. Respondents' alternative argument—that the Court should not reach Ms. Weldon's substantive challenges to the circuit court's arbitration ruling—is similarly flawed because it fails to account for the Court's recent contrary ruling.

The circuit court's order granted Respondents two forms of relief: (1) a requirement that Ms. Weldon pursue compensation solely through arbitration; and (2) dismissal of Ms. Weldon's legal claims. (R. p. 4) ("ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND DISMISSING CASES").[1] Dismissal of all a plaintiff's claims is a final order that may be immediately appealed. S.C. Code Ann. § 14-3-330(2) (conferring appellate jurisdiction over challenge to order that "in effect determines the action . . . or discontinues the action"). However, Respondents argue the circuit court's order here is different than the typical

[1] The Order references dismissal several times. E.g. (R. p. 4) (circuit court will "ORDER[] that this matter be dismissed and compelled to binding arbitration . . ."); (R. p. 7) ("the Court finds this matter should be dismissed and compelled to arbitration"); (R. p. 9) ("the Court concludes that this matter should be dismissed and compelled to arbitration"); (R. p. 25) ("Defendants' Motion to Compel Arbitration is hereby **GRANTED** and this matter is **DISMISSED**.") (emphasis in original).

dismissal because it also compelled arbitration. Respondents then build their entire argument for dismissing Ms. Weldon's appeal and a large part of their argument for curtailing it around a statute that grants limited appellate review of arbitration-related orders. (Resp'ts Br. at 11-13, 16-18) (citing S.C. Code Ann. § 15-48-200).

That argument must fail because section 15-48-200 does not apply to Ms. Weldon's claims. This statute is part of South Carolina's Uniform Arbitration Act ("UAA"). S.C. Code Ann. § 15-48-10 to -240. The UAA provides comprehensive governance but not for every type of arbitrable dispute. Specifically, the Legislature chose to exclude personal injury claims from the UAA's reach. S.C. Code Ann. § 15-48-10(b)(4) ("This chapter . . . shall not apply to . . .[a]ny claim arising out of personal injury, based on contract or tort . . ."). Ms. Weldon's complaint plainly seeks damages for personal injuries Ms. Cooley suffered due to alleged mistreatment by the Facility and other tortious conduct by the remaining Respondents. (R. pp. 43-45 ¶¶ 41, 44, 49, 55). Accordingly, no portion of the UAA applies to her lawsuit. See also Ex Parte Messer, 333 S.C. 391, 394, 509 S.E.2d 486, 487 (Ct. App. 1998) (noting section 15-48-10(b)(1) "exclude[s] certain types of claims from the [UAA], including . . . personal injury claims").

The cases Respondents cite do not affect this statutory mandate in any way. (Resp'ts Br. at 11-12 and n. 33) (citing Heffner v. Destiny, Inc., 321 S.C. 536, 537-38, 471 S.E.2d 135, 136 (1995) and Toler's Cove Homeowners' Ass'n, Inc. v. Trident Constr. Co., Inc., 355 S.C. 605, 610-11, 586 S.E.2d 581, 584-85 (2003)). Heffner, which is no longer good law, held only that, if sections 14-3-330 and 15-48-200 both potentially cover the disputed order, a court should apply the later statute because it is more specific. 321 S.C. at 538, 471 S.E.2d at 136 (citing Nat'l Adver. Co. v. Mount Pleasant Bd. of Adjustment, 312 S.C. 397, 440 S.E.2d 875 (1994)). There is no general versus

specific dispute here. The UAA simply cannot apply because Ms. Weldon's personal claims are expressly excluded.

Toler's Cove also includes nothing to suggest 15-48-200 would apply to personal injury claims despite section's 15-48-10(b)(4)'s express exclusion of such claims from all UAA provisions. Toler's Cove was not a personal injury claim but instead a business dispute between a homeowners' association and contractor over economic losses from construction defects. 355 S.C. at 609, 586 S.E.2d at 583. Like Heffner, Toler's Cove held only that, should a conflict arise between two governing statutes, the UAA prevails. Id. at 611, 586 S.E.2d at 584 (rejecting the Federal Arbitration Act's appeal provision[2] in favor of section 15-48-200 because it is a state procedural rule not preempted by federal law). Respondents cannot rely on Heffner or Toler's Cove without first showing section 15-48-200 could apply to Ms. Weldon's claims. Since those claims seek personal injury damages, the UAA cannot apply here, and the core piece of Respondents' arguments for dismissing or curtailing this appeal is invalid. Thus, while Respondents accuse Ms. Weldon of attempting to "thwart the legislative intent" underlying section 15-48-200 (Resp'ts Br. at 17), it is Respondents who argue against the Legislature's intent as plainly expressed in the unambiguous exclusion of personal injury claims from all UAA provisions.

The Court should also reject Respondents' alternative request to limit the scope of Ms. Weldon's appeal. Respondents seem to argue the Court can reverse the dismissal of Ms. Weldon's claims but only with explicit instructions for the circuit court to stay those claims instead. The Court may not, Respondents contend, reach the substance of whether Ms. Cooley (or any

[2] The FAA permits immediate appeal of an order compelling arbitration and dismissing the plaintiff's claims. Green Tree Fin. Corp.—Ala. v. Randolph, 531 U.S. 79, 88-89 (2000) (citing 9 U.S.C. § 16(a)(3)).

authorized representative) formed with the Facility a valid arbitration contract. However, that argument stands at odds with the Court's recent precedent. See Huskins v. Mungo Homes, LLC, 439 S.C. 356, 887 S.E.2d 534 (Ct. App. 2023).

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 discussed above 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. See also Widener v. Fort Mill Ford, 381 S.C. 522, 524, 674 S.E.2d 172, 173 (Ct. App. 2009) (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. Huskins, 439 S.C. at 365, 887 S.E.2d at 539. Like Widener, an immediate appeal was appropriate because the circuit court granted a Rule 12(b)(6) dismissal in additional to compelling arbitration. Id. (citing Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001) (stating that an order dismissing an action pursuant to Rule 12(b)(6) is immediately appealable)). 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. Huskins, 439 S.C. at 365, 887 S.E.2d at 539. 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, 355 S.C. at 611, 586 S.E.2d at 584-85).

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).[3] 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, 439 S.C. at 369, 887 S.E.2d at 541

[3] Respondents mention Huskins only in passing, concluding it is distinguishable because, unlike Huskins, the circuit court's order here "was in no way based on Rule 12(b)(6)." (Resp'ts Br. at 14). That argument does not match the record. Respondents cited Rule 12(b)(6) as a basis for their motion (R. p. 306), referenced the rule multiple times in their supporting memorandum (R. pp. 372, 396-97), and raised it as an argument during the circuit court hearing. (R. p. 98, line 15).

(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 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 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, the Court should reject Respondents' appealability challenges in their entirety. Respondents would have the Court find an order dismissing a plaintiff's legal claims is not immediately appealable based on a statute that, on its face, does not apply to Ms. Weldon's personal injury claims. Respondents press the same flawed statutory argument in asking the Court to limit its consideration of Ms. Weldon's arguments. (Resp'ts Br. at 17-18). Moreover, Respondents err in relying on Widener when Huskins is the governing precedent. Thus, the Court should find as a matter of law that the circuit court order is immediately appealable and should be examined on its merits.

2. There is no concession or evidence to show Ms. Galloway had authority to execute an arbitration contract for Ms. Cooley.

Ms. Cooley had a distinct plan for how her daughters were to assist in managing her affairs and plainly stated those intentions in her powers of attorney. The evidence in the record shows the process by which the Admission Agreement was executed did not follow Ms. Cooley's plan. Therefore, while Ms. Galloway signed the Admission Agreement, that signature was unauthorized and insufficient to form a valid arbitration contract. Neither the circuit court's order nor

Respondents' brief points to any evidence or legal principle that would render Ms. Galloway's signature effective.[4]

Ms. Weldon was Ms. Cooley's designated agent for her "Durable Power of Attorney" ("DPOA"), and Phyllis Elliott was the designated agent in Ms. Cooley's "Health Care Power of Attorney" ("HCPOA"). Each document also designated two "substitute or successor" agents authorized to act only in the event that all agents ahead of her were "unable or unwilling to serve or to continue to serve." (R. pp. 345, 360). Ms. Galloway was the DPOA's second successor or substitute agent and the first successor or substitute agent for HCPOA purposes. Id. Thus, for Ms. Galloway to have any authority to act for Ms. Galloway under the DPOA, it must be shown that Ms. Weldon and Ms. Elliott were unable or unwilling to serve. Respondents bore the burden to make this showing. Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assur. Co., 867 F.3d 449, 456 (4th Cir. 2017); Fici v. Koon, 372 S.C. 341, 346, 642 S.E.2d 602, 604 (2007) ("The burden of proof is on the party seeking to enforce the contract"). The circuit court's order does not reference any evidence offered by Respondents to support that finding. The circuit court found Ms. Galloway's Admission Agreement was effective because "she was an available agent" under one of Ms. Cooley's powers of attorney. (R. p. 24). But, Ms. Galloway's availability is not the pertinent question for assessing her authority. Instead, the crucial issue is whether Ms. Weldon

[4] Respondents are incorrect in arguing the circuit court's ruling is owed a presumption of correctness. (Resp'ts Br. at 18) (citing McCall v. IKON, 380 S.C. 649, 659-60, 670 S.E.2d 695, 701 (Ct. App. 2008). McCall took this quotation from Ehlke v. Nemec Constr. Co., 298 S.C. 477, 481, 381 S.E.2d 508, 510 (Ct. App. 1989) which made the statement in the context of contested factual findings. A nursing home resident family member's legal authority to enter a contract is a legal question for which there is no presumption of correctness. Instead, as Respondents acknowledge earlier in its brief, legal issues are reviewed *de novo*. (Resp'ts Br. at 11) (citing Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014)).

and Ms. Elliott were unable or unwilling to serve. The circuit court took the wrong approach and did not cite sufficient evidence to support its legal conclusion.

Respondents argue any errors the circuit court made do not matter because Ms. Weldon's attorney gave her case away by conceding Ms. Galloway's authority to act. (Resp'ts Br. at 20-22) (citing R. p. 133, line 15-22). However, a quick peek at the hearing transcript shows there was no concession and no support for the series of pro-Respondent assumptions spun out from this supposed concession. The seven lines Respondents cite as a concession establish nothing more than what was already uncontested in this appeal: (1) Ms. Galloway did in fact sign the Admission Agreement; (2) Ms. Galloway was identified as a successor or substitute agent in the HCPOA; and (3) Ms. Cooley entered the Facility after the Admission Agreement was signed.

Respondents argue this exchange also established "Ms. Galloway had authority under the HCPOA to admit Ms. Cooley to the Facility." (Resp'ts Br. at 20). That conclusion is not only unexplained, it is wholly unsupported by the hearing transcript and the record. The Court need not even leave the same page of the transcript to see Ms. Weldon's counsel made no such concession. (R. p. 133, lines 1-2) ("the healthcare power of attorney does not provide that authority"). That had been Ms. Weldon's position all along. (R. p. 439) (arguing Ms. Galloway "did not possess the necessary authority . . . in either the Healthcare Power of Attorney or in the General Durable Power of Attorney . . . Galloway lacked the appropriate authority"). As they acknowledge in their brief, not even Respondents' counsel truly believes the HCPOA empowered Ms. Galloway to enter an arbitration contract. (Resp'ts Br. at 7) (quoting email where their counsel admitted that, based on the HCPOA, "I would very strongly recommend to my client not to pursue arbitration").

Respondents then go a step further arguing this purported concession was also a concession that both Ms. Weldon and Ms. Elliott were unavailable or unwilling to serve and a concession of

Ms. Galloway's authority to act under the DPOA. Ms. Weldon's counsel certainly did not concede Ms. Galloway's sisters were unavailable or unwilling to serve as Ms. Cooley's agent. (R. p. 131, lines 16-19) (arguing Respondents "have produced no evidence that Ms. Weldon was unavailable, unwilling, or unable to serve or sign this paperwork"). Respectfully, Respondents' concession argument is baseless and should be rejected.

Respondents' analysis of the evidence in the record is similarly misguided. They argue the sisters' affidavits support the circuit court's ruling on Ms. Galloway's authority to sign the Admission Agreement. (Resp'ts Br. at 23-24). Respondents start with Ms. Weldon's affidavit, insisting it contains probative omissions on her and Ms. Elliott's availability. (Resp'ts Br. at 23). However, Ms. Weldon plainly stated her position as the DPOA's "principal and primary agent" and that, in that role, "I would have been designated and been responsible for reviewing and considering the execution of the" Admission Agreement. (R. p. 466 ¶¶ 1-2). Ms. Weldon further asserted Ms. Elliott was in position to consider the Admission Agreement. (R. p. 467 ¶ 4) (stating that there was "no reason that [Ms. Elliott] was unwilling or unable" to consider the Admission Agreement"). Oddly, Respondents then argue Ms. Galloway never suggested her sisters were available. Ms. Galloway was clear on her sisters' availability by stating the Facility "could have provided the Admission Agreement . . . to either one of my other sisters for execution." (R. p. 468 ¶ 2).

Rather than pointing to evidence to support the circuit court's conclusion, Respondents offer these misguided quibbles with the evidence rejecting that conclusion. The only evidence Respondents cite in their favor is a one-page "Emergency Contact" form listing Ms. Galloway as the relative living closest to the Facility. However, nothing was offered to authenticate, explain, or corroborate this form. Respondents could not state who completed the form, under what

circumstances, or at what time. (R. pp. 131-32). Nothing was offered to confirm its information was accurate. Respondents did not even offer an affidavit from whatever Facility representative supposedly received the form to offer some context or support for its veracity. Respondents may not rely on the "Emergency Contact" form to support arbitration without providing the requisite evidence to authenticate the form. Berry v. Spang, 433 S.C. 1, 10-11, 855 S.E.2d 309, 314-15 (Ct. App. 2021). Respondents err in fully relying on such an unsubstantiated document especially when so much more reliable evidence shows Ms. Weldon and Ms. Elliott were not unavailable or unwilling to consider documents related to Ms. Cooley's admission.

Moreover, in an era where contracts are routinely transmitted (and even signed) electronically, Respondents never explain how this form establishes Ms. Weldon and Ms. Elliott were unavailable, especially when contradicted by two affidavits from the sisters. More importantly, claiming Ms. Weldon was "unavailable" is contradicted by the Admission Agreement itself where Ms. Weldon is identified as Ms. Cooley's "Financially Responsible Party" (R. p. 309). Despite her physical location, the Facility considered Ms. Weldon sufficiently available to claim it would be coming after her for Ms. Cooley's rent if it was not paid in a timely fashion. (R. p. 322 ¶ 17. The Admission Agreement, which the Facility alone drafted, even claimed Ms. Weldon's "Financially Responsible Party" status made her a party to the Admission Agreement. (R. p. 309). Respondents are arguing an individual who is identified as a party to the Admission Agreement and who bears the full weight of its financial obligations was unavailable to execute the Admission Agreement.

In sum, the record shows Ms. Galloway lacked authority to enter the Admission Agreement as Ms. Weldon and Ms. Elliott were not unavailable or unwilling to serve. As such, the circuit court erred in finding a binding Admission Agreement and in enforcing its arbitration provision.[5]

3. The Facility purposefully delayed its arbitration pursuit by months to gain information only available in litigation.

Respondents' brief shows the parties now agree on a crucial part of the waiver analysis. Ms. Weldon need not show she was prejudiced by the Facility's delay to prove waiver. (Resp'ts Br. at 25) (citing Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 388 (1992)); see also (App. Br. at 11) (citing Janasik). As the U.S. Supreme Court recently ruled, requiring proof of prejudice for waiver of arbitration but not for other contractual rights violates the FAA. (App. Br. at 14-15) (citing Morgan v. Sundance, Inc., 142 S. Ct. 1708 (2022)). Accordingly, the circuit court's prejudiced-based rejection of waiver in this case should be reversed. See (R. p. 17) (rejecting waiver in part because circuit court found "no procedural prejudice . . .").

The Facility voluntarily and deliberately relinquished its right to seek arbitration through a months-long pursuit of information only available in discovery. (App. Br. at 11-13). Respondents portray their discovery conduct as simply an attempt to obtain the GPOA so that the Facility could evaluate a possible motion to compel arbitration. (Resp'ts Br. at 26). Respondents' "Statement of the Case" claims their counsel was "unaware of the [DPOA]" when they filed their answer in December 2021. (Resp'ts Br. at 7). That is either untrue or the Facility's own fault. Ms. Galloway

[5] Respondent makes an alternative request for discovery on the authority issue. (Resp'ts Br. at 24 n. 58). Respondents never raised this argument to the circuit court. Plus, this Court has rejected similar requests on multiple occasions. Solesbee v. Fundamental Clinical & Op. Servs., LLC, 438 S.C. 638, 651, 885 S.E.2d 144, 150 (Ct. App. 2023); Hodge v. Unihealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 576-77, 813 S.E.2d 292, 310 (Ct. App. 2018).

provided the DPOA to the Facility at the time of Ms. Cooley's admission in early 2019. (R. p. 469 ¶ 8). The Facility was also provided the DPOA in June 2020 and any failure to pass the GPOA on to its attorney is chargeable to the Facility. (R. pp. 488-89). Respondents' discovery pursuits were not an arbitration document fact-finding mission but rather an attempt to gain a strategic advantage over their opponent. Respondents filed nearly sixty broad based discovery requests seeking far more than just the DPOA. (R. p. 435). Respondents also served multiple document subpoenas—a maneuver not permitted in arbitration. Comsat Corp. v. Nat'l Sci. Found., 190 F.3d 269, 278 (4th Cir. 1999). At the same time, Respondents refused to provide the information and documents sought in Ms. Weldon's request. (R. pp. 167-68).

In short, Respondents used the broad discovery powers unique to litigation to gain an informational advantage. Having received what it wanted from Ms. Weldon and facing a motion to compel for their own inadequate discovery responses, Respondents then began pursuing arbitration. If successful, Respondents could go through the entire arbitration hearing without having to answer Ms. Weldon's reasonable requests for information. This is exactly the type of legal maneuvering the waiver doctrine was designed to prevent. The Facility was required to pick a path and stick with it. The Facility[6], through its discovery pursuits, voluntarily and intentionally picked the litigation path. The circuit court erred in allowing the Facility to reverse course to seek arbitration.

[6] Respondents attempt a distinction between the Facility and Respondents Dominion Senior Living, LLC, Dominion Clemson, II, LLC, Dominion Management Group, LLC and Dominion Group, LLC ("Corporate Entities"), seeming to argue the latter should be excepted from any finding that the Facility waived arbitration. (Resp'ts Br. at 26). As discussed in Argument 4 below, none of the Corporate Entities have even a colorable claim to arbitration since the Admission Agreement's arbitration provision only purports to bar litigation of disputes between its parties (R. p. 320 ¶ 13), and the Corporate Entities are not Admission Agreement parties. (R. p. 309).

4. Respondents ask the Court to ignore the Admission Agreement's plain language to permit the Corporate Entities to compel arbitration.

The most fundamental principle in this area of the law is that arbitration is a matter of contract, and an individual may not be forced from litigation for any claim she has not agreed to arbitrate. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110 (2001). Respondents' argument, like the circuit court's order, fails to properly account for the Admission Agreement's text. Even though the Corporate Entities are not parties to the Admission Agreement, they may compel arbitration simply because that is their preference. (Resp'ts Br. at 32) (quoting S.C. Pub. Serv. Auth. v. Great W. Coal, 312 S.C. 559, 437 S.E.2d 22 (Ct. App. 1993) ("when the nonsignatory parties are willing to submit to arbitration, the case should be arbitrated"). But, the Admission Agreement is specific in limiting its arbitration provision. Only a "claim or dispute . . . amongst the Parties" must be arbitrated. (R. p. 320 ¶ 13). The Corporate Entities are not included in the Admission Agreement's definition of "Parties." (R. p. 309). The Court should not affirm the circuit court's contradiction of the governing contract's plain language. Plus, the isolated Great Western Coal quote on which the circuit court relied is not only inapplicable (see App. Br. at 26-28), is derived from a case that Respondents now admit is bad law. (Resp'ts Br. at 33).

In short, arbitration is at its core a contract matter, and there is no contractual support for the circuit court's order compelling arbitration of Ms. Weldon's claims against the Corporate Entities. Even if Ms. Cooley or her daughters had agreed to forgo litigation against the Facility, they would have no idea the Corporate Entities could also force them into arbitration. The Admission Agreement provides no such notice and actually offers assurances that only its purported parties must arbitrate.

5. Respondents do not cite and cannot meet the elements required to invoke equitable estoppel.

Respondents cannot cite a single South Carolina precedent that applied equitable estoppel in a nursing home arbitration setting. In fact, every reported opinion to consider the doctrine in this context has refused to apply it. In many of these cases, nursing home admission and arbitration were governed by separate contracts. Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014); Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018). However, equitable estoppel is just as inapplicable when an arbitration provision is written into the admission agreement. Weaver v. Brookdale Sr. Living, Inc., 431 S.C. 223, 230, 847 S.E.2d 223 (Ct. App. 2020). This trend against applying the doctrine in nursing home cases is consistent with the South Carolina Supreme Court's instruction that equitable estoppel "should be used sparingly." Wilson v. Willis, 426 S.C. 326, 345, 827 S.E.2d 167, 177 (2019).

First, Respondents cite the wrong equitable estoppel test. As Wilson recognized, whether a non-signatory may be bound to an arbitration contract is a state law issue. 426 S.C. at 348, 827 S.E.2d at 174 (citing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630-31 n. 5 (2009)). Under South Carolina law, equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conducted be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on conduct of the party to be estopped. Id. Wilson did not dismiss or eliminate this test for equitable estoppel but only found its application was an issue that had not been preserved for appellate review. Respondents

suggest Wilson concluded this test only applies to "non-arbitration cases." Resp'ts Br. at 14 (citing Wilson, 426 S.C. at 340 n. 9, 827 S.E.2d at 175 n. 9). However, that could not have been Wilson's meaning because applying different rules to arbitration and non-arbitration contracts would violate the U.S. Supreme Court's equal-treatment principle. See Prima Paint Corp. v. Flood Conklin Mfg. Co., 388 U.S. 395, 404 n. 12 (1967) (finding intent of FAA was "to make arbitration agreements as enforceable as other contracts, but not more so").

Second, Respondents also overlook the governing standard for applying the alternative "direct benefit" form of equitable estoppel in nursing home arbitration cases. While South Carolina law recognizes the possibility that a nonsignatory may be required to arbitrate under a contract she did not sign, the party asserting estoppel must make three distinction showings. Weaver, 431 S.C. at 230, 847 S.E.2d at 272. Respondents must show (1) Ms. Cooley claim (asserted by Ms. Weldon through the estate) arose from a contractual relationship; (2) Ms. Cooley "exploited" other parts of the contract by reaping its benefits; and (3) her claim "relies solely on the contract terms to impose liability. Id. (citing Wilson, 426 S.C. at 340-44, 827 S.E.2d at 175-77).

Considering these elements, Weaver found a nursing home's resident does not gain a "direct benefit" for estoppel purposes simply by accepting the services obtained upon admission to the home. 431 S.C. at 230-31, 847 S.E.2d at 272-73. Ms. Cooley's personal injury claims also do not "arise from" the Admission Agreement. There is no breach of contract claim, and the Admission Agreement is not referenced at all in the Complaint. Id. at 231, 847 S.E.2d at 272 (finding "arising from" requirement is not met just because claim would not exist "but for" a contract's existence). Instead, the complaint grounds its claims in duties arising from common law with no reference to any contract. Id. at 232, 847 S.E.2d at 273 (finding nursing home resident's claims "rely on general tort duties . . . not any provision of the residency agreement"). Under those

circumstances, estoppel cannot apply because the claims do not "arise from" a contract and certainly do not "rely solely" on a contract's terms. Id. at 232-33, 847 S.E.2d at 273 (citing Hodge as further support to show "direct benefit" estoppel does not apply to nursing home resident's common law tort claim). Respondents point to nothing to distinguish Weaver or to address its holding which forecloses their estoppel argument. Thus, the Court should reject Respondents' attempt to apply equitable estoppel because Weaver is strong precedent against applying estoppel in this context.

CONCLUSION

Based on the arguments above and those in her earlier brief, Ms. Weldon respectfully requests the Court reverse the circuit court's order.

Respectfully submitted,

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