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

Cases No. 2021-CP-39-01127 and -01128
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.

FINAL BRIEF OF RESPONDENTS

Russell G. Hines (SC Bar No. 72100)
CLEMENT RIVERS, LLP
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

-and-

Joshua T. Thompson (SC Bar No. 79137)
BOULIER THOMPSON & BARNES, LLC
101 W. St. John Street, Suite 300
Spartanburg, South Carolina 29306
P.O. Drawer 6470 (29304)
(864) 606-9610

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authority

STATEMENT OF ISSUES ON APPEAL

Plaintiff[1] brought these survival[2] and wrongful death[3] actions (collectively, the "Litigation") against Defendants[4] for their alleged negligence with respect to Ms. Cooley's residency at an assisted living facility (the "Facility"[5]). Based on the agreement to arbitrate (the "Arbitration Provision") in the Resident Admission Agreement (the "Admission Agreement") that Ms. Cooley's daughter Debra Galloway ("Ms. Galloway") had signed on her behalf, Defendants successfully moved (via twin motions, one in each action) to compel arbitration (collectively, the "Motion to Compel Arbitration"[6]). The circuit court's order granting the Motion to Compel Arbitration compels all of Plaintiff's claims to arbitration and, in turn, the court having found all of Plaintiff's claims subject to arbitration, dismisses the Litigation.

Plaintiff's appeal of the circuit court's order granting the Motion to Compel Arbitration presents the following issues:

I. Should this appeal be dismissed because, even though the order on appeal provides that the Litigation is "dismissed," as opposed to "stayed," in favor of arbitration, it is nonetheless an order compelling arbitration, and an order compelling arbitration is not immediately appealable? And assuming, *arguendo*, the appeal should not be dismissed outright, should this Court reach both the Dismissal Issue and the Arbitrability Issue[7] or only the Dismissal Issue?

---

[1] "Plaintiff" refers to Plaintiff/Appellant, Deonda Weldon, individually and as personal representative of the estate of her late mother, Earline Cooley ("Ms. Cooley"). "Ms. Weldon" refers to Deonda Weldon solely in her individual capacity.

[2] Case No. 2021-CP-39-01127.

[3] Case No. 2021-CP-39-01128.

[4] "Defendants" refers to all Defendants/Respondents, collectively.

[5] The Facility is Defendant/Respondent Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square.

[6] Since the motions are the same in both cases, for the sake of convenience, they are hereinafter referred to in the singular.

[7] The "Dismissal Issue" and the "Arbitrability Issue" are defined in the argument on this issue below.

II. Assuming, *arguendo*, the Court should reach the Arbitrability Issue, has Plaintiff met her burden to show that the circuit court committed reversible error in granting the Motion to Compel Arbitration?

A. Has Plaintiff shown that the circuit court committed reversible error in finding Ms. Galloway authorized to agree to arbitration on Ms. Cooley's behalf?

B. Has Plaintiff shown that the circuit court committed reversible error in finding Defendants did not waive the right to compel arbitration?

C. Has Plaintiff shown that the circuit court committed reversible error in finding that the Arbitration Provision is not unconscionable?

D. Has Plaintiff shown that the circuit court committed reversible error in compelling Plaintiff's claims against all Defendants to arbitration, i.e., in compelling arbitration not only of Plaintiff's claims against the Facility but also of Plaintiff's claims against the Corporate Defendants[8]?

E. Assuming the circuit court properly compelled arbitration of the claims asserted in the survival action (as, of course, Defendants maintain it did), has Plaintiff shown that the circuit court nonetheless committed reversible error in compelling arbitration of the claims asserted in the wrongful death action?

III. Should the circuit court's order granting the Motion to Compel Arbitration be affirmed on the additional sustaining ground that Plaintiff is equitably estopped to deny the enforceability of the Arbitration Provision?

STATEMENT OF THE CASE

A. The Powers of Attorney

On January 10, 2006, Ms. Cooley executed two powers of attorney, one a general Durable Power of Attorney (the "GDPOA"),[9] the other a Health Care Power of Attorney (the "HCPOA"),[10] both of which appoint Ms. Galloway to serve as "substitute or successor" agent for Ms. Cooley if

[8] The "Corporate Defendants" refers to Defendants/Respondents Dominion Senior Living, LLC; Dominion Clemson, II, LLC; Dominion Management Group, LLC; and Dominion Group, LLC, collectively—in other words, to all Defendants/Respondents other than the Facility.

[9] (R. pp. 345–359.)

[10] (R. pp. 360–371.)

one (in the case of the HCPOA) or both (in the case of the GDPOA) of two other persons is/are "unable or unwilling or unavailable to serve." (R. p. 345, p. 360.)

The GDPOA appoints Ms. Weldon to serve as agent for Ms. Cooley; another of Ms. Cooley's daughters, Robin Elliot ("Ms. Elliott"), to serve as "substitute or successor" agent if Ms. Weldon is "unable or unwilling or unavailable to serve;" and Ms. Galloway to serve as "substitute or successor" agent if Ms. Elliott is "unable or unwilling or unavailable to serve." (R. p. 345.)

Subject only to certain specific limitations irrelevant to this appeal, the GDPOA grants Ms. Cooley's agent, including any substitute or successor agent, the broadest possible authority, expressly delegating to the agent "each and every power that [Ms. Cooley] may lawfully delegate," the agent having "full power and authority to do and perform all and every act, deed, matter, and things whatsoever in and about [Ms. Cooley's] estate, property, and affairs as fully and effectually to all intents and purposes as [she] might or could do in [her] own proper person if personally present." (R. p. 345.) And besides this broad general grant of authority, among other things, the GDPOA specifically grants the agent authority to arbitrate;[11] to abandon and/or compromise claims;[12] and to sign and execute contracts, agreements, releases, and waivers[13] and expressly provides that all actions by the agent thereunder shall "bind [Ms. Cooley] and [her] estate and [her] personal representative." (R. p. 352 ¶ 2.)[14]

The HCPOA appoints Ms. Elliott to serve as agent for Ms. Cooley; Ms. Galloway to serve as "substitute or successor" agent if Ms. Elliott is "unable or unwilling or unavailable to serve;"

---

11 (R. p. 347 ¶ 7, p. 349 ¶ 13.)

12 (R. p. 349 ¶ 13.)

13 (R. p. 351 ¶ 3.)

14 To be clear, "the specifically enumerated powers [in the GDPOA] [are] in aid and exemplification of the full and complete and general power [t]herein granted and not in limitation or definition thereof." (R. p. 345.)

and Ms. Weldon to serve as "substitute or successor" agent if Ms. Galloway is "unable or unwilling or unavailable to serve." (R. p. 360.)

Among other things, the HCPOA grants Ms. Cooley's agent, including any substitute or successor agent, authority to provide "a place of residence" for Ms. Cooley and "to make all necessary arrangements, contractual or otherwise," for Ms. Cooley to reside at any nursing home or similar facility. (R. p. 362 ¶ 1.) And like the GDPOA, the HCPOA expressly provides that all actions by the agent thereunder shall "bind [Ms. Cooley] and [her] estate and [her] personal representative." (R. p. 370 ¶ 15.)

B. Ms. Cooley's Admission to the Facility

With Ms. Galloway's help, Ms. Cooley was admitted as a resident of the Facility on March 8, 2019, Ms. Galloway having signed the required Admission Agreement on Ms. Cooley's behalf some three weeks earlier on February 14, 2019. (R. p. 34 ¶ 8, p. 61 ¶ 8, pp. 162:24–164:16, pp. 309–328, p. 467 ¶¶ 6–8, pp. 468–470 ¶¶ 3–12.)

Ms. Cooley resided at the Facility for about a year (from March 8, 2019, to March of 2020),[15] during which time she received assisted living care that included living accommodations and various services pursuant to the Admission Agreement,[16] the respective rights and obligations under which survive its termination[17] and are "bind[ing] [on] . . . the Parties [t]hereto, their legal representatives, heirs, estates, successors and assigns." (R. pp. 323–324 § 20(G).)

While identifying Ms. Weldon as *financially* responsible,[18] Ms. Galloway expressly signed the Admission Agreement on Ms. Cooley's behalf as the "Resident's Representative" and

---

15 (R. p. 37 ¶¶ 32–33, p. 64 ¶¶ 32–33, p. 429.)
16 (*See generally* R. pp. 309–328.)
17 (R. p. 324 § 20(H).)
18 (R. p. 309, p. 315; *see also* R. p. 398.)

"Medical Power of Attorney"[19] and listed herself, at an address in Easley, South Carolina, as the person to whom copies of notices to the resident should be sent. (R. p. 323.)[20] And although, at the time this dispute about Ms. Cooley's residency arose, the only power of attorney in the Facility's file was a copy of the *HCPOA*,[21] Ms. Galloway swears she provided the Facility a copy of the *GDPOA* when she signed the Admission Agreement. (R. p. 469 ¶ 8.)

The only address information for Ms. Weldon and Ms. Elliott is what Ms. Galloway provided to the Facility on an Emergency Contacts form. Besides listing Ms. Galloway herself, at the same Easley, South Carolina, address stated in the Admission Agreement, as "Medical POA" and "Closest Relative," the form lists Ms. Weldon, at an address in *Copenhagen, Denmark*, as "Financial POA," and Ms. Elliott, at an address in *Trophy Club, Texas*, as an "Additional Contact[]." (R. p. 398.)

In signing the Admission Agreement, Ms. Galloway expressly acknowledged that "she was given the opportunity to read [it] before signing"[22] and represented that "the information set forth on the Resident's application forms, health history and medical report, personal interview and emergency information records, as applicable, is true and correct." (R. p. 318 ¶ D.)

C. The Arbitration Provision

Again, the Arbitration Provision is in the Admission Agreement, and it provides as follows:

> **13. AGREEMENT TO ARBITRATE.**
>
> The Parties desire to resolve disputes between them as expeditiously and economically as possible. Therefore, any claim

---

[19] (R. p. 328, p. 398.)

[20] Ms. Cooley is, of course, identified in the Admission Agreement as the "Resident." (R. p. 328.)

[21] (R. p. 116:10–24, p. 400, pp. 421–422.)

[22] (R. p. 327 § 22.)

> or dispute (including those based on contract, negligence or statute) amongst the Parties, involving an amount in excess of $15,000, arising out of or related to this Agreement, the Establishment or the services/care provided to the Resident, shall be determined by arbitration in South Carolina, before a sole arbitrator. The arbitration shall be administered by JAMS (formerly Judicial Arbitration and Mediation Services) pursuant to its Comprehensive Arbitration Rules and Procedures. Judgment on the Award may be entered in any court having jurisdiction. The Parties agree that this Agreement evidences a transaction involving interstate commerce. The U.S. Arbitration Act shall govern the interpretation, enforcement, and proceedings pursuant to the arbitration provisions in this Agreement.[23] The arbitrator may award economic and non-economic damages, but shall have no authority to award punitive damages to any Party. Each side shall bear an equal share of the arbitrator's fees and the costs of the arbitration.

(R. pp. 320–321.)[24]

D. Procedural Posture

Following Ms. Cooley's death on May 27, 2021,[25] Plaintiff filed the Litigation in the Pickens County Court of Common Pleas on October 13, 2021, based on Defendants' alleged negligence with respect to Ms. Cooley's residency at the Facility. (R. pp. 27–73.)

---

[23] It is undisputed that the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. (the "FAA"), applies to the Arbitration Provision.

[24] But for the dispute about whether the Corporate Defendants can enforce the Arbitration Provision, there is no dispute about whether Plaintiff's claims are within the scope of the Arbitration Provision. And in any event, the plain language of the Arbitration Provision (calling for arbitration of "any claim or dispute (including those based on contract, negligence or statute) amongst the Parties, involving an amount in excess of $15,000, arising out of or related to [the Admission Agreement], the [Facility] or the services/care provided to [Ms. Cooley]") (R. p. 320) clearly embraces the subject matter of all of Plaintiff's claims. Moreover, even if there were "any doubts concerning the scope of arbitrable issues[,] [they] should be resolved in favor of arbitration . . . ." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999); *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001) ("[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.").

[25] (R. p. 429.)

Following service of Plaintiff's complaints, Defendants' counsel emailed Plaintiff's counsel on November 19, 2021, requesting a 30-day extension of time to "respond" to the Litigation. (R. pp. 401–402.) On November 23, 2021, Plaintiff's counsel responded that he was agreeable to granting Defendants a 30-day extension of time to "Answer,"[26] prompting this reply from Defendants' counsel, expressly addressing arbitration:

> [I]s . . . the extension limited to "an Answer[?]" At this time, I am still investigating the claim. I am aware that there is an arbitration provision in the admission agreement, but my best knowledge is that it was signed by a daughter pursuant to a health care power of attorney and not a durable power of attorney, in which case I would very strongly recommend to my client not to pursue arbitration. I however have not had time to confirm that and chase down the records from Pickens.

(R. p. 400.)

With Defendants' counsel still unaware of the GDPOA, Defendants timely answered Plaintiff's complaints on December 21, 2021, denying the liability alleged against them and raising numerous affirmative defenses, including, expressly, the right to arbitration. (R. pp. 74–89.) That same day, the Facility also served written discovery requests on Plaintiff, including, specifically, a request for Plaintiff to produce "[a]ll powers of attorney . . . executed by [Ms.] Cooley at any time." (R. p. 403, p. 408 ¶ 21.) And shortly thereafter, on January 4, 2022, the Facility served document subpoenas on four third parties. (R. pp. 508–526.)

On June 9, 2022, promptly upon receiving a copy of the GDPOA from Plaintiff in discovery (and recovering from a bout with COVID-19), Defendants' counsel filed the Motion to Compel Arbitration,[27] but not before emailing Plaintiff's counsel as follows, explaining the basis for, and timing of, the motion and (unsuccessfully) requesting consent thereto:

---

[26] (R. p. 400.)

[27] (R. pp. 306–371.)

> I have had COVID for a second time and have been at home feeling quite similar to having the flu. I am coming out of it now but not released from quarantine.
>
> In close review of Plaintiff's discovery production which we received early last month, we noticed [the GDPOA]. Though we had previously searched the databases in Pickens County (the last known county of residence), it appears this document was filed in Greenville County. Having had time to review it and discuss it with my clients, I have been instructed to move to compel arbitration pursuant to the arbitration provision found within the admission agreement.
>
> Given what our decisional courts have said on waiver, it would be imprudent of me to participate in any further discovery at this point, armed with knowledge of the [GDPOA] and a good faith argument to compel arbitration.
>
> ***
>
> I know this is not likely your desired path for this matter, but I am happy to move as swiftly as I can with arbitration should you agree to it.

(R. pp. 421–422.) True to Defendants' counsel's email, discovery in the Litigation has been halted since June 9, 2022, with no further written discovery conducted and no depositions having been taken at all. (R. p. 107:20–25.)

Following submission of the parties' respective briefs in support of[28] and opposition to[29] the Motion to Compel Arbitration and a hearing on October 20, 2022,[30] the circuit court, the Honorable G.D. Morgan, Jr., presiding, granted the motion by order filed January 3, 2023,

---

28 (R. pp. 372–427.)

29 (R. pp. 428–743.)

30 (R. pp. 90–166.)

compelling all of Plaintiff's claims to arbitration and, in turn, having found that none of Plaintiff's claims could proceed in court, dismissing the Litigation. (R. pp. 4–26.)[31] [32]

Without moving the circuit court to alter, amend, or reconsider (or to otherwise modify or grant any relief with respect to) its order granting the Motion to Compel Arbitration, Plaintiff took the instant appeal by notice served January 10, 2023. (R. pp. 744–746.)

Recognizing that an order granting a motion to compel arbitration is not immediately appealable, Plaintiff's notice of appeal includes the following footnote, arguing that the instant appeal is proper because, rather than "staying" the Litigation in favor of arbitration, the circuit court's order granting the Motion to Compel Arbitration "dismissed" it:

> The circuit court's order dismissed all of [Plaintiff's] claims. Order at 1 (stating that the court "ORDERS that this matter be dismissed . . ."); Id. at 22 ("this matter is DISMISSED") (emphasis in original). Accordingly, the order is immediately appealable pursuant to statute as recognized by this Court's precedent. S.C. Code Ann. § 14-3-330(2) (conferring appellate jurisdiction for any order that "discontinues the action"); see also Huskins v. Mungo Homes, LLC, ___ S.E.2d ___, 2022 WL 1760628, * 3 (S.C. Ct. App. June 1, 2022) (citing Widener v. Fort Mill Ford, 381 S.C. 522, 524, 674 S.E.2d 172, 173-74 (Ct. App. 2009) ("an order dismissing the actions without prejudice and ordering arbitration was immediately appealable" pursuant to section 14-3-330(2))). Like Huskins (and in contrast to Widener), the contested order addresses the substantive enforceability of a disputed arbitration

---

[31] Prior to January 3, 2023, via Form 4 order filed October 27, 2023, the circuit court had announced its decision to grant the Motion to Compel Arbitration and directed Defendants' counsel to submit a proposed formal order to that effect. (R. pp. 1–3.)

[32] The circuit court's orders (both its Form 4 order, filed October 27, 2022, and formal order, filed January 3, 2023) have only been filed in the survival action, Case No. 2021-CP-39-01127; however, the fact that they have not been filed in the wrongful death action, Case No. 2021-CP-39-01128, would appear to be a matter of mere inadvertence, as the respective motions filed in each case were the same (R. p. 306) and were heard together (R. pp. 90–166); the Form 4 order finds "that the arbitration agreement is enforceable as to the statutory beneficiaries' claims in the wrongful death action" (R. p. 2); the formal order likewise finds the wrongful death claims subject to arbitration (R. pp. 20–25) and expressly references both case numbers (R. p. 4); and, indeed, Plaintiff filed her notice of appeal of the formal order in the circuit court in both cases. (R. p. 744.)

> provision, and the Court should address Appellants' arguments against arbitration on their merits. Huskins, 2022 WL 1760628 at * 3 (citing Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., 355 S.C. 605, 611, 586 S.E.2d 581, 584-85 (2003)).

(R. pp. 744–745.)

Previously, Defendants moved this Court (1) for leave to move the circuit court under Rule 60, SCRCP, to revise its order granting the Motion to Compel Arbitration to provide that the Litigation is "stayed," rather than "dismissed," in favor of arbitration or, alternatively, (2) for immediate reversal and remand pursuant to *Widener v. Fort Mill Ford*, 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009), i.e., for immediate reversal of the circuit court's order granting the Motion to Compel Arbitration only insofar as necessary for the matter to be remanded to the court to vacate its "dismissal" of the Litigation and enter an order "staying" it pending arbitration.

By order filed June 1, 2023, the Court denied Defendants' motion but authorized Defendants to argue the issue of appealability in this brief.

STANDARD OF REVIEW

Arbitrability determinations by the circuit court are subject to de novo review on appeal. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007). Issues of law, however, are reviewed without any particular deference to the circuit court. *See, e.g., Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 782 S.E.2d 590 (2016). The litigant opposing arbitration bears the burden of demonstrating a valid defense to arbitration. *Johnson v. Heritage Healthcare of Estill, LLC*, 416 S.C. 508, 512, 788 S.E.2d 216, 218 (2016).

ARGUMENT

I. This appeal should be dismissed because, even though the order on appeal provides that the Litigation is "dismissed," as opposed to "stayed," in favor of arbitration, it is nonetheless an order compelling arbitration, and an order compelling arbitration is not immediately appealable. And even assuming, *arguendo*, the appeal should not be dismissed outright, this Court should reach only the Dismissal Issue, not the Arbitrability Issue.

The appealability of a circuit court's order is governed by statute. *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 537, 773 S.E.2d 144, 145 (2015). The statute that governs the appealability of orders relating to arbitration is § 15-48-200 of South Carolina's Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10 et seq. (the "SCAA"), not the general appealability statute, S.C. Code Ann. § 14-3-330. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537–38, 471 S.E.2d 135, 136 (1995) (rejecting the argument that § 14-3-330 should be applied to determine the appealability of an order staying an action and compelling arbitration because "[t]o apply the general appealability provisions of § 14-3-330 would conflict with the more specific provisions of § 15-48-200 regarding the appealability of orders relating to arbitration"),[33] overruled on other grounds by *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000).[34]

---

[33] And to be clear, South Carolina law applies to determine the appealability of orders relating to arbitration even where the arbitration agreement at issue is covered by the FAA. *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., Inc.*, 355 S.C. 605, 610–11, 586 S.E.2d 581, 584–85 (2003) (holding that South Carolina's procedural rule on the appealability of arbitration orders, § 15-48-200, is not preempted by the FAA and thus § 15-48-200 applies to determine the appealability of circuit court orders relating to arbitration even where the arbitration agreement at issue is covered by the FAA).

[34] The *Heffner* Court also found that an order staying an action and compelling arbitration is not immediately appealable under § 16(a)(3) of the FAA. 321 S.C. at 538, 471 S.E.2d at 136. *Green Tree* "overruled the *Heffner* decision to the extent it can be read to mean that a federal court's order compelling arbitration under the FAA is not immediately appealable. However, *Green Tree* does not affect our state's procedural rule that a South Carolina court's order compelling arbitration is not immediately appealable." *Toler's Cove*, 355 S.C. at 610, 586 S.E.2d at 584 n.3.

In enacting § 15-48-200 (in particular, subsection (a) thereof, which sets forth what "[a]n appeal may be taken from"), the legislature intended to "restrict the right to appeal orders which favor arbitration over litigation;"[35] thus, "[b]y application of the rule of statutory construction 'expressio unius est exclusio alterius' (the mention of one is the exclusion of another), all . . . orders related to arbitration [not mentioned in § 15-48-200(a)[36]] are not immediately appealable." *Id.* at 537–38, 471 S.E.2d at 136; *see also Toler's Cove*, 355 S.C. at 610, 586 S.E.2d at 584 ("*Heffner* held all orders relating to arbitration not mentioned in . . . § 15-48-200(a) . . . are not immediately appealable.").

The order on appeal, i.e., the circuit court's order granting the Motion to Compel Arbitration, is undeniably an order relating to arbitration. Its appealability is therefore determined under § 15-48-200(a), not § 14-3-330. *Heffner*, 321 S.C. at 537–38, 471 S.E.2d at 136. And it is not immediately appealable under § 15-48-200(a), because, viewing the order for what it undeniably is—an order compelling arbitration—it clearly is not immediately appealable

---

[35] *Heffner*, 321 S.C. at 537, 471 S.E.2d at 136.

[36] Section 15-48-200(a) provides that an appeal may be taken from (1) an order denying an application to compel arbitration, (2) an order granting an application to stay arbitration, (3) an order confirming or denying confirmation of an award, (4) an order modifying or correcting an award, (5) an order vacating an award without directing a rehearing, or (6) a "judgment or decree" entered pursuant to provisions of the SCAA. And to be clear, putting aside the matter of whether a "judgment or decree" arising out of an arbitration agreement covered by the FAA constitutes a "judgment or decree" entered pursuant to the provisions of the SCAA, a "judgment or decree" under the SCAA does not mean simply any order relating to arbitration, but rather, specifically, "an order confirming, modifying or correcting an [arbitration] award." *See* § 15-48-150 ("Upon the granting of an order confirming, modifying or correcting an award, judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree."); § 15-48-160 (regarding the clerk of court's preparation of the judgment roll "[o]n entry of any judgment or decree" and the docketing of "[t]he judgment or decree").

under § 15-48-200(a),[37] and it cannot reasonably be viewed in any way otherwise that falls within any of the categories of appealable orders under § 15-48-200(a).[38]

Plaintiff, however, contends that the circuit court's order granting the Motion to Compel Arbitration is immediately appealable because it "dismissed" the Litigation in favor of arbitration rather than "staying" it. Plaintiff points to this Court's decision in *Huskins v. Mungo Homes, LLC*, wherein it allowed an immediate appeal of a circuit court order that found only some of the plaintiffs' claims subject to arbitration and dismissed the other claims pursuant to Rule 12(b)(6), SCRCP. 439 S.C. 356, 363, 887 S.E.2d 534, 538 (Ct. App. 2022) ("The [plaintiffs'] argue that under *Widener* . . . the order was immediately appealable because it granted [the defendant's] Rule 12(b)(6), SCRCP, motion to dismiss. We agree."); *see also id.* at 364, 887 S.E.2d at 538 (citing *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001), for the proposition that "'[d]ismissal of an action pursuant to Rule 12(b)(6) is appealable.'"). But the instant case is readily distinguishable from *Huskins*, because, unlike in *Huskins*, the dismissal here was in no way based on Rule 12(b)(6) or, for that matter, any other basis besides the circuit court's determination that all of Plaintiff's claims were subject to arbitration and thus could not proceed in the Litigation. (R. pp. 4–26.)[39]

---

[37] *Toler's Cove*, 355 S.C. at 611, 586 S.E.2d at 584–85 ("[B]ecause South Carolina's procedural rule on appealability of arbitration orders, rather than the FAA rule, is applicable, the court's order compelling arbitration is not immediately appealable.").

[38] Indeed, while, as further discussed below, the *Widener* Court did allow a limited appeal of an order that "dismissed" an action in favor of arbitration, it expressly acknowledged that "section 15-48-200 does not include an order dismissing an action among a list of orders from which an appeal may be taken in arbitration cases . . . ." 381 S.C. at 524, 674 S.E.2d at 173.

[39] Indeed, Plaintiff's reaction to the order granting the Motion to Compel Arbitration—by raising the "dismissal"-versus-"stay" issue to *this Court* for purposes of appealability without ever having raised it to the *circuit court* to begin with—underscores the point that the "dismissal" of the Litigation was solely a non-substantive byproduct of the circuit court's determination as to arbitrability and in no way based on any substantive disposition of Plaintiff's claims. Plaintiff appealed to this Court just seven days after entry of the circuit court's order granting the Motion to

Widener itself does not support allowing Plaintiff an immediate appeal of the circuit court's determination as to arbitrability, either. Like the instant case, *Widener* involved an appeal from a circuit court order compelling all of the plaintiff's claims to arbitration and thus dismissing the plaintiff's case for the simple reason that all of the claims asserted therein were subject to arbitration and could not proceed in litigation. While recognizing that an order compelling arbitration is not immediately appealable, the *Widener* Court agreed with the plaintiff that, because the circuit court had "dismissed," as opposed to "stayed," the plaintiff's case in favor of arbitration, the dismissal prejudiced him because of the potential for the statute of limitations to bar the refiling of any unarbitrated claims in court. 381 S.C. at 525, 674 S.E.2d at 174.

Compel Arbitration, before the 10-day window for a Rule 59(e), SCRCP, motion had even expired. While Plaintiff had, of course, argued to the circuit court that her claims should not be compelled to arbitration (based on lack of authority, waiver, unconscionability, etc.), she never raised any issue or argument about what was to become of the Litigation if the court disagreed and found they should, i.e., she never raised any issue or argument to the circuit court to the effect that, if it found her claims subject to arbitration, the Litigation had to be "stayed," not "dismissed." (*See* R. pp. 90–166, pp. 372–397, pp. 428–465.) Obviously, the reason Plaintiff appealed without first raising the "dismissal"-versus-"stay" issue to the circuit court via a Rule 59(e) motion is that she did not want the court to fix the alleged problem, lest she lose the basis of her argument for an immediate appeal. And implicit in Plaintiff's pursuit of this strategy of deliberately not raising the "dismissal"-versus-"stay" issue in the circuit court is Plaintiff's belief that the "dismissal" was solely based on the circuit court's determination as to arbitrability and, thus, that, provided they prevail (which, of course, Defendants maintain they should not), the issues and arguments she has preserved for review as to the arbitrability determination are all she needs to effectively challenge the "dismissal" on appeal, so she does not need to preserve any issue or argument for review as to the "dismissal"-versus-"stay" issue in particular. Because if this is not the case, i.e., if the "dismissal" of the Litigation was not merely a non-substantive, logistical byproduct of the circuit court's determination as to arbitrability, but rather is based (even if only in part) on a substantive disposition of Plaintiff's claims apart from arbitrability, appealing to this Court without first raising the "dismissal"-versus-"stay" issue in the circuit court establishes the "dismissal" as the law of the case. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); *Anderson v. Short*, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) (where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case).

But the *Widener* Court's agreement with the plaintiff did not extend so far as to an appeal of the whole of the circuit court's order. Rather, the *Widener* Court recognized a distinction between the issue of the circuit court's dismissal of the case (the "Dismissal Issue") and the issue of the circuit court's determination that the claims in the case are subject to arbitration (the "Arbitrability Issue") and proceeded only to reach the Dismissal Issue, not the Arbitrability Issue—indeed, stopping short of the Arbitrability Issue for the express reason that it had reached and corrected the Dismissal Issue. 381 S.C. at 525, 674 S.E.2d at 174 ("[The plaintiff] argues the trial court erred in dismissing his action. He asserts the dismissal prejudices him because any future action will be barred by the statute of limitations. We agree. . . . [T]here is a potential the statute of limitations could bar refiling of any unarbitrated claims in court. Accordingly, we reverse the decision of the trial court and remand this case for the trial court to vacate its dismissal of [the plaintiff's] claims and to enter an order staying his action pending the outcome of the arbitration proceedings."); *id.* at 525–26, 674 S.E.2d at 174 ("[The plaintiff] argues the trial court erred in concluding his causes of action are subject to arbitration. We do not reach this issue because we are reversing and remanding this case for the trial court to stay this action pending arbitration.").

The *Widener* Court's decision not to proceed beyond the Dismissal Issue would appear to implicate more than a mere matter of discretion. For one thing, as explained above, the right to appeal is governed by statute,[40] and the particular statute that governs the appealability of orders relating to arbitration is § 15-48-200(a), not § 14-3-330. *Heffner*, 321 S.C. at 537–38, 471 S.E.2d at 136. Therefore, assuming the *Widener* Court correctly reached and corrected the

[40] *Morrow*, 412 S.C. at 537, 773 S.E.2d at 145.

circuit court as to the Dismissal Issue,[41] as soon as it did so, the only alleged basis for an immediate appeal (the fact that the circuit court had "dismissed" the case instead of "stayed" it) was nullified, leaving nothing else before it but the Arbitrability Issue, which clearly was not immediately appealable § 15-48-200(a). And in any event, given that "South Carolina's procedural rule on appealability of arbitration orders,"[42] i.e., § 15-48-200(a), is in fact aimed at "restrict[ing] the right to appeal orders which favor arbitration over litigation,"[43] due respect for legislative intent would seem to require that any departure from the rule be as small as possible—all the more so here, where, as explained, Plaintiff purposely avoided the most expedient route for correction of the circuit court's alleged error in "dismissing," as opposed to

---

[41] The *Widener* Court reached the Dismissal Issue on the basis that dismissal of the action was prejudicial because of the potential for the statute of limitations to bar refiling any unarbitrated claims in court. 381 S.C. at 525, 674 S.E.2d at 174. But it is not clear to Defendants that such prejudice exists. Where, as here, the circuit court compels all claims in litigation to arbitration, whether the court "dismisses" or "stays" the litigation in favor of arbitration, the only way the claims could be litigated thereafter is if the court's determination that they are subject to arbitration is reversed on appeal. Once it orders a case to arbitration, "[a]t that point, the circuit court [is] divested of jurisdiction over the case," *Main Corp. v. Black*, 357 S.C. 179, 181, 592 S.E.2d 300, 302 (2004), and without question, where the court "stays" litigation pending arbitration (as opposed to "dismissing" it), there is no appeal of the order compelling arbitration until after arbitration is concluded and an appealable order under § 15-48-200(a) is entered. *Steinmetz v. Am. Media Servs., LLC*, 393 S.C. 72, 74–75, 709 S.E.2d 708, 709 (Ct. App. 2011). If the opponent of arbitration then prevails on appeal, the order compelling arbitration (and, in turn, the result of arbitration) is nullified, whereupon all claims would proceed in court as if there had been no order compelling arbitration. *See Moore v. N. Am. Van Lines*, 319 S.C. 446, 448, 462 S.E.2d 275, 276 (1995) ("Generally, reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no judgment had been rendered."). Accordingly, where the circuit court compels all claims in litigation to arbitration, an order "dismissing" the litigation in favor of arbitration would seem to be no more prejudicial to the opponent of arbitration than an order "staying" the litigation in favor of arbitration. Either way, once the circuit court has compelled all of the claims to arbitration, the only way that the claims could be litigated thereafter is if the court's determination that they are subject to arbitration is reversed on appeal, and if that happens, the order compelling arbitration—whether it provides for "dismissal" or a "stay" in favor of arbitration—is nullified. *See Moore*, 319 S.C. at 448, 462 S.E.2d at 276.

[42] *Toler's Cove*, 355 S.C. at 611, 586 S.E.2d at 584–85.

[43] *Heffner*, 321 S.C. at 537, 471 S.E.2d at 136.

"staying," the Litigation (a Rule 59(e) motion to the circuit court itself, which, indeed, could have been a consent motion had Plaintiff alerted Defendants to any concern about the "dismissal"-versus-"stay" issue) in an effort to thwart the legislative intent against the immediate appeal or orders compelling arbitration.

While the *Widener* Court did address the relationship between § 15-48-200 and § 14-3-220 to an extent,[44] it did not address the above-cited authority regarding the appealability of an order relating to arbitration being exclusively determined under § 15-48-200(a) and the general appealability statute, § 14-3-330, being in conflict therewith. *Heffner*, 321 S.C. at 537–38, 471 S.E.2d at 136. And, as explained above, pursuant to such authority, the circuit court's order granting the Motion to Compel Arbitration is not immediately appealable in any respect (neither as to the Dismissal Issue nor the Arbitrability Issue)—and thus this appeal should be dismissed in its entirety—because as an order compelling arbitration, which the appealed order undeniably is, clearly is not immediately appealable under § 15-48-200(a), and the appealed order cannot reasonably be viewed in any way otherwise that falls within any of the categories of appealable orders under § 15-48-200(a). But at most, *Widener* stands for the proposition that this Court should reach the Dismissal Issue but not the Arbitrability Issue.

II. Even assuming, *arguendo*, the Court should reach the Arbitrability Issue, Plaintiff has not met her burden to show that the circuit court committed reversible error in granting the Motion to Compel Arbitration.

An appealed order comes to the appellate court with a presumption of correctness, and the burden is on the appellant to demonstrate reversible error. *McCall v. IKON*, 380 S.C. 649,

[44] 381 S.C. at 524, 674 S.E.2d at 173–74 ("[The respondent's] reliance on section 15-48-200 is misplaced. Although section 15-48-200 does not include an order dismissing an action among a list of orders from which an appeal may be taken in arbitration cases, this section does not preclude the order in this case from being immediately appealable. By dismissing [the

659–60, 670 S.E.2sd 695, 701 (Ct. App. 2008). And to succeed, the appellant's demonstration of reversible error must be based on issues/arguments that are properly preserved and presented to the appellate court for review. *See Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532–33, 564 S.E.2d 322, 323 (2001) (recognizing that preserving issues for appellate review is a fundamental component of appellate practice, as South Carolina appellate courts do not recognize the plain error rule); *Elam*, 361 S.C. at 25, 602 S.E.2d at 780 (noting that South Carolina's preservation requirements are "mandatory"); *id.* at 23, 602 S.E.2d at 779–80 ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); *id.* at 24, 602 S.E.2d at 780 ("[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.") (emphasis in original).

Respectfully, as shown below, even assuming, *arguendo*, the Court should reach the Arbitrability Issue, Plaintiff has not met her burden to show that the circuit court committed reversible error in granting the Motion to Compel Arbitration.

A. Plaintiff has not shown that the circuit court committed reversible error in finding Ms. Galloway authorized to bind Ms. Cooley to the Arbitration Provision.

As an initial matter, in framing it in terms of the circuit court having given "[t]he authority question" short shrift by "not address[ing] it until the order's penultimate page, without any

---

plaintiff's] action, the court finally determined the rights of the parties; therefore, we have jurisdiction pursuant to section 14-3-330 . . . .").)

citations, and in just three paragraphs,"[45] Plaintiff undermines her own argument on preservation grounds, because Plaintiff did not make a Rule 59(e) motion asking the circuit court to rule on anything she now contends is missing from the court's analysis. *See Elam*, 361 S.C. at 23, 602 S.E.2d at 779–80 ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); *id.* at 24, 602 S.E.2d at 780 ("[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.") (emphasis in original).

Additionally, "[a]n issue conceded in the lower court may not be argued on appeal,"[46] and Plaintiff conceded in the circuit court that Ms. Galloway had authority under the HCPOA to admit Ms. Cooley to the Facility:

> THE COURT: Let me ask you this, is there -- Ms. Galloway is the alternate power of attorney, signed it and it did allow Ms. Cooley to go into the home; correct?
>
> [PLAINTIFF'S COUNSEL]: Yes, sir.
>
> THE COURT: All right, so there's authority there, at least, to allow her to go in and she's in there for about a year.

(R. p. 133:15–22.)

To concede that Ms. Galloway had authority under the HCPOA to admit Ms. Cooley to the Facility is effectively to concede that Ms. Galloway had authority under the HCPOA to agree to arbitration on Ms. Cooley's behalf, because to concede that Ms. Galloway had authority under the

[45] (Br. of App. p. 6.)

HCPOA to admit Ms. Cooley to the Facility is to concede that Ms. Galloway had authority under the HCPOA to sign the Admission Agreement required for Ms. Cooley's admission,[47] and the Arbitration Provision is in the Admission Agreement. *Cf. Arredondo v. SNH SE Ashley River Tenant, LLC*, 433 S.C. 69, 82, 856 S.E.2d 550, 557 (2021) ("[T]he characterization of an arbitration agreement as either a mandatory condition to admission or an optional, collateral agreement often determines the authority issue when the agent holds a power of attorney empowering her to make necessary health care decisions."). And in any event, to concede that Ms. Galloway had authority under the HCPOA to sign the Admission Agreement is effectively to endorse the circuit court's reasoning that Ms. Galloway had authority to agree to arbitration on Ms. Cooley's behalf as her available agent under the GDPOA.

"A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal." *Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014) (quoting *In re Thames*, 344 S.C. 564, 569, 544 S.E.2d 854, 856 (Ct. App. 2001)) (internal quotation marks omitted). "[T]he holder of [the] power of attorney steps into the shoes of the grantor and is basically the alter ego of the grantor." *Bennett v. Carter*, 421 S.C. 374, 382, 807 S.E.2d 197, 201 (2017).

Our courts look to contract law to interpret powers of attorney. *Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 577, 828 S.E.2d 82, 87 (Ct. App. 2019). "The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties, and, in determining that

---

[46] *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998).

[47] (R. pp. 162:24–164:16.)

intention, the court looks to the language of the contract." *Id.* (quoting Watson, 407 S.C. at 454–55, 756 S.E.2d at 161).

The language of the HCPOA and the GDPOA is the same regarding what triggers a "substitute or successor" agent's authority: the agent(s) appointed ahead of them being "unable or unwilling or unavailable" to serve as agent for Ms. Cooley. (R. p. 345, p. 360.) Therefore, since Ms. Elliot is ahead of Ms. Galloway under both the HCPOA and the GDPOA, for Plaintiff to concede that Ms. Galloway had authority under the HCPOA to sign the Admission Agreement, is for Plaintiff to concede that Ms. Elliott was unavailable to serve as Ms. Cooley's agent under both the HCPOA and the GDPOA. Moreover, it is for Plaintiff to concede that the trigger mechanism for the "substitute or successor" agent's authority under both the HCPOA and the GDPOA (that the agent(s) appointed ahead of the "substitute or successor" is/are "unable or unwilling or unavailable" to serve as agent for Ms. Cooley) operates simply and seamlessly to authorize the next agent up to sub in on Ms. Cooley's behalf—which debunks the notion in Plaintiff's brief that there is any sort of "designated procedure" spelled out for determining whether a "substitute or successor" agent's authority is triggered due to unavailability.[48] Indeed, even what it means to be unavailable is not specified. (R. pp. 345–371.) And having conceded that Ms. Elliott was sufficiently unavailable to trigger Ms. Galloway's authority as "substitute or successor" agent for Ms. Cooley under the HCPOA (and, by extension, under the GDPOA), Plaintiff cannot deny Ms.

[48] (Br. of Appellant p. 10.) Indeed, Plaintiff's brief contradicts itself in this regard. Plaintiff correctly characterizes the provision in the GDPOA regarding an agent attesting to her authority under penalty of perjury as a "safe harbor" for third parties. (Br. of Appellant p. 10.) And as a "safe harbor," this provision has to do with the protection of third parties. Indeed, it is in the section of the GDPOA addressing third-party reliance, and its language is permissive ("may") at that. (R. pp. 352–353.) Such a "safe harbor" does not amount to a "designated procedure for determining" an agent's authority.

Weldon's unavailability under the GDPOA where the evidence of Ms. Weldon's unavailability is at least as probative as that of Ms. Elliott's.

The circuit court correctly found that, while Ms. Galloway's authority under the GDPOA was conditioned on both Ms. Weldon and Ms. Elliott being "unable or unwilling or unavailable to serve" as Ms. Cooley's agent, the evidence reasonably supports the conclusion that that condition was met, i.e., that neither Ms. Weldon nor Ms. Elliott was available when Ms. Galloway signed the Admission Agreement, Ms. Galloway having represented to the Facility at that time that the information she provided in conjunction with Ms. Cooley's admission was true and correct;[49] that she had had the opportunity to read the Admission Agreement before signing it;[50] that she was the "Resident's Representative"[51] and the person to whom notices to the resident should be sent;[52] that she lived nearby in Easley, South Carolina, while Ms. Weldon lived in Denmark and Ms. Elliott lived in Texas; and that she had authority to act on Ms. Cooley's behalf via power of attorney[53] and, via her affidavit, having represented to the circuit court that she provided the Facility a copy of the GDPOA as proof of her authority. (R. p. 469 ¶ 8.)

In further support of this conclusion, notice how, in her affidavit submitted in opposition to the Motion to Compel Arbitration, Ms. Weldon states, "had [the Admission Agreement] been presented to [her] and had [she] been aware of a potential Arbitration Agreement, [she] would not have agreed to an Arbitration Agreement or any limitations on damages,"[54] but she does not

---

[49] (R. p. 318 § 11(D).)

[50] (R. p. 327 § 22.) Moreover, "one who has signed a contract is presumed to have read, understood, and assented to its terms." *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) ("[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms.").

[51] (R. p. 328.)

[52] (R. p. 323 ¶ E.)

[53] (R. p. 328.)

[54] (R. p. 466 ¶ 3.)

actually say she was available—nor does she say that she was not aware that Ms. Galloway was signing the Admission Agreement on Ms. Cooley's behalf, only that she was not "aware of a potential Arbitration Agreement." Likewise, Ms. Weldon states, "there was no reason that [Ms. Elliott] was *unwilling* or *unable* to review the Admission Agreement for execution,"[55] but she says nothing of whether Ms. Elliott was *available*—and, as explained above, by conceding that Ms. Galloway had authority under the HCPOA to sign the Admission Agreement, Plaintiff conceded she was not. Similarly, Ms. Galloway states, "at no time prior to the execution of the Admission Agreement did either one of my sisters state that they were *unwilling* or *unable* to serve as my mother's Power of Attorney,"[56] but she, too, is silent as to Ms. Weldon and Ms. Elliott's *availability*.

Moreover, in speaking to what she says her sisters did not say to her, Ms. Galloway implies that she was in communication with her sisters and acted with their knowledge, as she also does when she states that "*we* were under significant stress and duress in trying to obtain placement in an assisted living facility for my mother with very few options"[57] and that "this was an extremely emotional time for the *family*." (R. p. 469 ¶ 9 (emphasis added).) And, again, although it was not in the Facility's file when this dispute arose, according to Ms. Galloway herself, in support of her authority to sign the Admission Agreement on Ms. Cooley's behalf, she provided the Facility with a copy of the GDPOA. (R. p. 469 ¶ 8.) All this supports the reasonable inference that Ms. Galloway was in communication with her sisters about admitting Ms. Cooley to the Facility and

---

55 (R. p. 467 ¶ 4 (emphasis added).)
56 (R. p. 469 ¶ 10 (emphasis added).)
57 (R. p. 469 ¶ 9 (emphasis added).)

that, as Ms. Galloway was the only one who lived nearby, she was the one who was available to handle the admissions paperwork as Ms. Cooley's agent.[58]

Lastly, the circuit court's finding accords with the intended flexibility and functionality reflected by the very fact that the GDPOA goes ahead and lines up multiple "substitute or successor" agents to serve depending on availability. The very fact that the GDPOA, which, again, does not specify what it means to be unavailable, is structured this way, instead of only appointing a single agent with no back up, reflects an intent to prioritize flexibility and functionality, and thereby hedge against the risk that there is no agent available to protect Ms. Cooley's interests, and the lack of any intent to undermine that flexibility and functionality by making it unduly difficult for a "substitute or successor" agent to serve.

Respectfully, Plaintiff has not shown that the circuit court committed reversible error in finding Ms. Galloway authorized to bind Ms. Cooley to the Arbitration Provision.

B. Plaintiff has not shown that the circuit court committed reversible error in finding Defendants did not waive the right to compel arbitration.

"Waiver is the voluntary and intentional relinquishment of a known right." *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 928 (Ct. App. 1994). As Plaintiff points out, proving waiver focuses on the conduct of the allegedly waiving party,[59] as "[t]he doctrine of waiver does not necessarily imply that the party asserting waiver has been

[58] But out of an abundance of caution, Defendants note that, even if the Court disagrees that the evidence supports the reasonable conclusion that neither Ms. Weldon nor Ms. Elliott was available when Ms. Galloway signed the Admission Agreement on Ms. Cooley's behalf, it does not warrant the reversal of the circuit court on this issue outright. Rather, assuming, *arguendo*, the Court is not inclined to affirm the circuit court on the additional sustaining ground argued below, the matter should be remanded for discovery solely with respect to the availability issue to be conducted (without waiver of Defendants' arbitration rights) and further consideration of the issue by the circuit court with the benefit thereof.

[59] (Br. of Appellant p. 11.)

misled to his prejudice or into an altered position." *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 388 (1992).

The party claiming waiver has the burden of proving it, and "[g]enerally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended." *Janasik*, 307 S.C. at 344, 415 S.E.2d at 387–88. "[W]aiver require[s] a party to have known of a right, and known that the party was abandoning that right." *Strickland v. Strickland*, 375 S.C. 76, 85, 650 S.E.2d 465, 470–71 (2007).

"Waiver is a question of fact for the finder of fact,"[60] which in this case is the circuit court, and its "factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Simpson*, 373 S.C. at 22, 644 S.E.2d at 667.

There is ample evidence to support the circuit court's factual finding that Defendants did not waive the right to arbitrate here. Defendants' intent to preserve, and not abandon, the right to arbitration is evidenced from the outset of their response to the Litigation. Through counsel, Defendants expressly raised their potential pursuit of arbitration even before answering Plaintiff's complaints and then expressly raised the right to arbitration in their answers. (R. p. 78 ¶ 36, pp. 400–402.) The discovery requests the Facility served successfully sought the power of attorney, the GDPOA, on which the Motion to Compel Arbitration was based; the motion was promptly made upon receipt of the GDPOA from Plaintiff; and discovery has been halted ever since, with no further written discovery conducted and no depositions having been taken at all. (R. p. 107:20–25, pp. 306–371, p. 403, p. 408 ¶ 21, pp. 421–422.)[61]

---

[60] *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994).

[61] And to be clear, the fact that there was some discovery conducted prior to the Motion to Compel Arbitration is not fatal. *See Toler's Cove*, 355 S.C. 605, 612, 586 S.E.2d 581,

As for Plaintiff's point about the Facility having been sent a copy of the GDPOA via a *pre-litigation* records request,[62] this bare fact says nothing of probative value about whether the Facility (much less the Corporate Defendants) had the requisite intention to waive the right to arbitration when the time came to respond to the Litigation. And even assuming, *arguendo*, it did, at most, it would constitute one piece of evidence and would not negate the evidence that supports the circuit court's finding against waiver.

Respectfully, Plaintiff has not shown that the circuit court committed reversible error in finding Defendants did not waive the right to compel arbitration.

C. Plaintiff has not shown that the circuit court committed reversible error in finding that the Arbitration Provision is not unconscionable.

To prove the Arbitration Provision unconscionable, Plaintiff must show both (1) that there was a lack of meaningful choice as to whether to arbitrate *and* (2) that the terms of the Arbitration Provision were so oppressive no reasonable person would make them and no fair and honest person would accept them. *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668; *see also Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 612, 879 S.E.2d 746, 755 (2002) ("[A] take-it-or-leave-it contract of adhesion is not necessarily unconscionable, even though it may indicate one party lacked a meaningful choice. Rather, to constitute unconscionability, the contract terms must be so oppressive that no reasonable person would make them and no fair and honest person would accept them.").

The circuit court's unconscionability analysis focuses on the first prong of the test: whether there was a lack of meaningful choice. Rejecting Plaintiff's contention that Ms. Galloway had signed the Admission Agreement during a hurried and emotional time without

---

585 (2003) ("Respondent had not held any depositions or engaged in extensive discovery requests. Accordingly, respondent did not waive its right to enforce the arbitration clause.").

being aware of the Arbitration Provision, the circuit court found that the Arbitration Provision was conspicuously set forth in the Admission Agreement under a bolded and capitalized heading and that Ms. Galloway, a competent adult, had signed the Admission Agreement, which she had expressly acknowledged having had the opportunity to read before signing, twenty-two (22) days in advance of Ms. Cooley's admission. (R. pp. 9–11.) Its findings are amply supported by the evidence (already cited herein) and the law. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (rejecting argument that an arbitration provision was unconscionable as an adhesion contract where the opponents of arbitration were not advised the provision was included in the contract); *id.* ("Under state law, an adhesion contract is not per se unconscionable. Further, a person who can read is bound to read an agreement before signing it.") (internal citations omitted); *Gibson*, 426 S.C. at 352, 827 S.E.2d at 181 ("[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms.").

As for whether "the terms of the *Admission Agreement* are so oppressive that no fair or honest person would accept them,"[63] the circuit court expressly—and, to be sure, correctly—"decline[d] to review the liability and damages limiting provisions of the *Admission Agreement*"[64] pursuant to the *Prima Paint* doctrine. *See Damico*, 437 S.C. at 608–09, 879 S.E.2d at 753 ("Pursuant to the *Prima Paint* doctrine, the FAA requires courts to separate the validity of an arbitration clause from the validity of the contract in which it is embedded."); *id.* at 609, 879 S.E.2d at 753 (Accordingly, "'in conducting an unconscionability inquiry, courts may

---

62 (Br. of Appellant p. 16.)
63 (R. p. 9 (emphasis added).)
64 (R. p. 11 (emphasis added).)

only consider the provisions of the arbitration agreement itself, and not those of the whole contract.'") (quoting *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016)).[65]

The order granting the Motion to Compel Arbitration does not rule on whether any term of the Admission Agreement is unduly oppressive, much less whether any term of the Arbitration Provision itself is unduly oppressive. (R. pp. 9–11.) And Plaintiff having sought no such ruling from the circuit court via a Rule 59(e) motion, any argument based on allegedly unduly oppressive terms is not preserved for review. *See Elam*, 361 S.C. at 23, 602 S.E.2d at 779–80 ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); *id.* at 24, 602 S.E.2d at 780 ("[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.") (emphasis in original).

Moreover, Plaintiff's argument about unduly oppressive terms has always been based on the alleged collective oppressiveness of the Arbitration Provision and terms outside of the Arbitration Provision. (*See, e.g.,* Br. of Appellant p. 20 ("In sum, the Admission Agreement's *arbitration and dispute resolution provisions* cannot stand.") (emphasis added); R. p. 439 ("The unconscionability is evidenced by multiple integral terms to the agreement including, but not limited to, ...").) Such an argument cannot possibly prevail, because, again, pursuant to the *Prima Paint* doctrine, "'in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract.'" *Damico*, 437

[65] The *Prima Paint* doctrine gets is name from the United State Supreme Court's

S.C. at 609, 879 S.E.2d at 753 (quoting *D.R. Horton*, 417 S.C. at 48, 790 S.E.2d at 4). And on the other side of this coin, we have the fact that, in addition to the above-referenced preservation problem, by tying her oppression argument to the alleged oppressiveness of terms outside the Arbitration Provision itself, Plaintiff has abandoned any argument that the terms of the Arbitration Provision itself are unduly oppressive. *See First Savings Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (issues not argued in the brief are deemed abandoned and will not be considered on appeal).

And in any event, the terms of the Arbitration Provision itself are not unconscionable. The only aspect of the Arbitration Provision about which Plaintiff has complained is its prohibition against the arbitrator awarding punitive damages to any party. (R. pp. 320–321.) "In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. And the mere removal of punitive damages from the equation neither compromises the arbitrator's neutrality nor in any way requires that the arbitrator award a successful claimant anything less than the full amount of any and all actual damages (whether based on economic or non-economic injury or loss) that the arbitrator determines the claimant is owed as compensation.

Contrast the instant matter with *Simpson*, wherein our Supreme Court found the following language in an arbitration provision to be unconscionable: "'[i]n no event shall the arbitrator be authorized to award punitive, exemplary, double, or treble damages (or any other damages which are punitive in nature or effect) against either party.'" 373 S.C. at 28, 644 S.E.2d

---

decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967).

at 670. The *Simpson* Court's decision was not based on the provision's limitation on *punitive* damages, but rather its limitation on *statutory* remedies, which restriction the Court found violative of public policy in that it violated the statutory law by preventing the claimant from receiving "the *mandatory statutory remedies* to which she may be entitled in her underlying SCUTPA and Dealers Act claims." *Id.* at 29–30, 644 S.E.2d at 671 (emphasis added). In the instant matter, Plaintiff asserts no claim for any statutory remedies,[66] and even if she did, the Arbitration Provision does not limit them, only "punitive damages." (R. p. 321.)

At most, the enforceability of an arbitration provision excluding punitive damages is an open question. *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C.544, 555, 606 S.E.2d 752, 758 (2004) ("This Court has not addressed whether it violates South Carolina public policy for parties to voluntarily forgo punitive damages in an arbitration agreement."). And, as our Supreme Court has recognized, "[a] number of courts in other jurisdictions have held that an arbitration agreement limiting or excluding punitive damages is enforceable." *Id.* at 556, 606 S.E.2d at 758. But in any event, this question does not provide a basis for this Court to reverse the circuit court. *Id.* at 557, 606 S.E.2d at 759 (holding that the question of whether an arbitration provision's exclusion of punitive damages was enforceable was not ripe for appellate review for two reasons: "First, it is unclear whether [the claimant] will prevail on the merits in arbitration. Second, it is unclear whether an arbitrator would find that punitive damages are warranted. Accordingly, we hold that any challenge that the clause violates public policy is premature.") (citing *Hawkins v. Aid Assn. for Lutherans*, 338 F.3d 801 (7th Cir. 2003) (holding that complaints about the unavailability of punitive damages must first be presented to the arbitrator)).

[66] (R. pp. 29–46, pp. 56–73.)

Respectfully, Plaintiff has not shown that the circuit court committed reversible error in finding that the Arbitration Provision is not unconscionable.

D. Plaintiff has not shown that the circuit court committed reversible error in compelling Plaintiff's claims against all Defendants to arbitration, i.e., in compelling arbitration not only of Plaintiff's claims against the Facility but also of Plaintiff's claims against the Corporate Defendants.

As the circuit court correctly observed, in her own complaints, Plaintiff avers that the actions of the Corporate Defendants "directly affected" Ms. Cooley's care[67] and that Defendants were engaged in a "joint enterprise,"[68] and Plaintiff structured her pleadings so as to disregard individual distinctions via blanket references to "Defendants." (*See generally* R. pp. 29–46, pp. 56–73.) While Defendants' responses to these allegations speak for themselves,[69] Plaintiff herself cannot disavow them. *See Kitchen Planners, LLC v. Friedman*, 432 S.C. 267, 851 S.E.2d 724 (Ct. App. 2020) ("However, '[i]t is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise.'") (quoting *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992)); *see also Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015) ("Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions."); *Postal*, 308 S.C. at 387, 418 S.E.2d at 323 ("The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action.").

The circuit court correctly followed the precedent of *South Carolina Public Service Authority v. Great Western Coal (Kentucky)*, wherein our Supreme Court stated as follows:

---

67 (R. p. 38 ¶ 36, p. 65 ¶ 36.)

68 (R. p. 38 ¶ 36, p. 65 ¶ 36.)

> Goins also argues the trial judge erred in ruling Goins is not entitled to demand arbitration because he did not sign the contract in his individual capacity. We agree. In *Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir. 1990), the court held that a party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint, or signatory parties in their individual capacity because this would nullify the rule requiring arbitration. The court further held when the nonsignatory parties are willing to submit to arbitration, the case should be arbitrated. *Id.* Goins is the party seeking arbitration. Therefore, we hold the trial judge erred in denying Goins's motion to compel arbitration because he did not sign the contract.

312 S.C. 559, 563, 437 S.E.2d 22, 24–25 (1993).

While *Arnold*, 920 F.2d 1269, has since been abrogated on the basis that it was based on an adherence to federal common law rather than state law,[70] *Great Western Coal* itself has not. Indeed, *Arnold* was not *binding* on our Supreme Court when *Great Western Coal* was decided, but rather merely *instructive*. In other words, by citing *Arnold*, the *Great Western Coal* Court was not "following" *Arnold*, but rather making its own independent determination that situations of this type should be handled in South Carolina the way they were handled in *Arnold*. And *Great Western Coal* itself still being good law, the circuit court correctly followed it.

Respectfully, Plaintiff has not shown that the circuit court committed reversible error in compelling Plaintiff's claims against all Defendants to arbitration.[71]

---

[69] (R. pp. 74–89.)

[70] *See AtriCure, Inc. v. Meng*, 12 F.4th 516, 524 (6th Cir. 2021).

[71] But even assuming, *arguendo*, Plaintiff showed reversible error in this regard, while the arbitration would only be between Plaintiff and the Facility, Plaintiff's claims against the Corporate Defendants still could not proceed in the Litigation pending the arbitration between Plaintiff and the Facility. *See* 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties *stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.") (emphasis added); *Stokes v. Metro. Life Ins.*

E. Plaintiff has not shown that the circuit court committed reversible error in compelling arbitration of the claims asserted in the wrongful death action.

To be clear, conceptually, Plaintiff's argument here is wholly separate and independent from any other challenge to the enforceability of the Arbitration Provision. In effect, she argues that, even if an agreement to arbitrate is in all other respects valid and enforceable under South Carolina's general contact law, it is still not enforceable with respect to a claim of wrongful death unless it is signed by all wrongful death beneficiaries. The only way this could be correct—which, respectfully, it is not—is if the claim of wrongful death (i.e., the substantive right of action) belongs to the wrongful death beneficiaries themselves because, otherwise, a specific rule prohibiting enforcement of valid agreements to arbitrate simply because a wrongful death claim is involved would plainly violate the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts under state law,[72] as indeed our Supreme Court has already expressly recognized in *Dean*, 408 S.C. at 389, 759 S.E. at 737 n.3 ("[C]ourts *may not* refuse to compel arbitration simply because a wrongful death claim is involved.") (emphasis added).

Co., 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) ("[The] FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties.").

[72] *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (Under the FAA, "courts must place arbitration agreements on equal footing with other contracts . . . ."); *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (While a court may invalidate an arbitration agreement based on "generally applicable contract defenses," it may not do so based on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.") (citing *Concepcion*, 563 U.S. at 339); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.") (emphasis added) (internal citations omitted)).

A wrongful death claim, however, does not belong to the wrongful death beneficiaries, but rather to the decedent's personal representative. And an enforceable agreement to arbitrate, like the Arbitration Provision here, applies with equal force to wrongful death claims.

"The right of action for wrongful death is purely statutory and did not exist at common law . . . ." *Glenn v. E. I. DuPont Nemours & Co.*, 254 S.C. 128, 133, 174 S.E.2d 155, 157 (1970). Per the plain language of the wrongful death statute, a wrongful death claim must be a claim that, had the decedent lived, they could have maintained themselves. S.C. Code Ann. § 15-51-10 ("Whenever the death of a person shall be caused by the wrongful act, neglect or default of another *and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof*, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.") (emphasis added); *see also Maxey v. Sauls*, 242 S.C. 247, 250, 130 S.E.2d 570, 572 (1963) ("[T]he right to maintain the [wrongful death] action is based upon the condition that 'the act, neglect or default' must be 'such as would, if death had not ensued, have entitled the person injured to maintain an action and recover damage in respect thereof.' In other words, '*if the deceased never had a cause of action, none accrues under the wrongful death statute*.'") (discussing prior statutory language that is identical to that in present § 15-51-10) (quoting *Scott v. Greenville Pharmacy*, 212 S.C. 485, 489, 48 S.E. 324, 326 (1948) (emphasis added).

Accordingly, a claim of wrongful death is derivative in nature in the sense that it derives from (and does not arise without) a cause of action arising in favor of the *decedent*. *See Id.*; *see also* 26 S.C. Jur. Limitation of Actions § 32 ("A wrongful death action is derivative in nature . . . ."); *Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939, 942 (D.S.C. 1988) ("If the decedent

never had a cause of action, none accrues under the wrongful death statute. Furthermore, anything that would have defeated the decedent's recovery had he survived the accident, such as contributory negligence, a valid release, or similar acts on his part, would defeat the right of recovery in behalf of his family in case of his death. It follows logically that the decedent's failure to file a timely claim . . . is an act, or omission, on his part which should defeat the right of recovery of his personal representative.") (internal citations and quotation marks omitted); *Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 349, 699 S.E.2d 143, 146 (2010) ("*Quattlebaum* was correctly decided and adheres to the principle that a decedent's estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived.'").

"[T]he substantive right to bring . . . a wrongful death action . . . is determined by the Probate Code." *Fisher on behalf of estate of Shaw-Baker v. Huckabee*, 422 S.C. 234, 240, 811 S.E.2d 739, 742 (2018); *see also id.* at 242, 811 S.E.2d at 743 ("The Probate Code defines who may act on behalf of the estate of a deceased person. The Probate Code, therefore, is the substantive law by which the identity of the *'real party in interest'* is determined for all civil actions *brought on behalf of the estate of a deceased person*.") (emphasis added). "Under the Probate Code . . . *wrongful death actions must be brought by the personal representative* . . . ." *Id.* (emphasis added); *see also* S.C. Code Ann. § 15-51-20 ("Every [wrongful death] action shall be brought by or in the name of the executor or administrator of [the] person [whose death was wrongfully caused]."); [73] *Glenn*, 254 S.C. at 134, 174 S.E.2d at 158 ("If an action for wrongful

[73] As explained by the *Fisher* Court, "Under the Probate Code . . . the terms 'executor' and 'administrator' do not have separate meaning, but are included within the defined term 'personal representative.'" 422 S.C. at 240, 811 S.E.2d at 742 (citing S.C. Code Ann. § 62-1-201(33) (defining "Personal representative" to "include[] executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same

death is instituted by one other than the personal representative of a decedent, duly appointed by the Probate Court, it should be dismissed.").

Even though it is for their "benefit," a wrongful death claim does not belong to the wrongful death beneficiaries themselves. It is a claim that is brought on behalf of the estate of the deceased person. The substantive right to bring the claim belongs to decedent's personal representative, who must bring the claim and is the real party in interest under South Carolina law. Consistent with Judge Anderson's correct analysis in *Quattlebaum* (which explains that anything that would have defeated the decedent's recovery had he survived, such as, for instance, a valid release, will apply to the wrongful death claim), it necessarily follows that a valid arbitration agreement must also apply to the wrongful death claim.

Respectfully, Plaintiff has not shown that the circuit court committed reversible error in compelling arbitration of the claims asserted in the wrongful death action.

III. The circuit court's order granting the Motion to Compel Arbitration should be affirmed on the additional sustaining ground that Plaintiff is equitably estopped to deny the enforceability of the Arbitration Provision.[74]

Direct benefits estoppel recognizes, and remedies, the patent inequity that would result if a party were able to enjoy direct benefits under a contract containing an arbitration provision (which, without question, the Admission Agreement does here) while at the same time denying that the arbitration provision is enforceable. *See Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012) ("To allow [a plaintiff] to claim the benefit of the contract and

---

function under the law governing their status.")). "Therefore, wrongful death actions must be brought by the personal representative, despite the language 'shall be brought by . . . the executor or administrator' that still appears in section 15-51-20." *Id.*

[74] Defendants present this argument pursuant to Rule 208(b)(2), SCACR ("Respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c).").

simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.") (citation and internal quotation marks omitted).

So, to be clear, this argument, i.e., equitable estoppel, is *not* an argument *for the enforceability* of the Arbitration Provision per se, *but rather* an argument for Ms. Cooley, and, in turn, her estate, i.e., Plaintiff, to be *estopped to deny the enforceability* of the Arbitration Provision. The basic idea is that, because Ms. Cooley directly benefited from the Admission Agreement in which the Arbitration Provision is included, Plaintiff cannot now deny the enforceability of the Arbitration Provision. And accordingly, any counterargument about a supposed lack of enforceability—e.g., that Ms. Galloway lacked authority—is beside the point and unavailing to refute this argument, which, again, turns not on the question of whether the Arbitration Provision is enforceable but whether Plaintiff is estopped to deny its enforceability.

In *Wilson v. Wilis*, our Supreme Court favorably discussed the direct benefits test—which test this Court had applied, following its earlier decision in *Pearson*, 400 S.C. 281, 733 S.E.2d 597, in the decision then before the *Wilson* Court on writ of certiorari, and under which test Defendants now contend Plaintiff is estopped to deny the enforceability of the Arbitration Provision here, where Ms. Cooley received direct benefits under the Admission Agreement in which the Arbitration Provision is included. 426 S.C. 326, 340–45, 827 S.E.2d 167, 175–77 (2019); *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the arbitration opponent's alternative argument based on the application of the state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., the six-factor test, "has been analyzed most-often in *non*-arbitration cases") (emphasis added).

The key to determining if direct benefits estoppel applies is not whether the claims that the party to be estopped chooses to assert rely on contract terms to impose liability but whether

the benefits that the party to be estopped received were direct or indirect. *Wilson*, 426 S.C. at 340–41, 827 S.E.2d at 175 ("Under direct benefits estoppel, [a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause. In the arbitration context, the doctrine recognizes that a party may 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. Stated another way, [u]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement . . . .") (internal citations and quotation marks omitted); *id.* at 343, 827 S.E.2d at 176 ("It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.") (internal citations omitted).

As set forth in *Wilson*, and consistent with this Court's decision in *Pearson*, which the *Wilson* Court favorably cites, the essence of the test for direct benefits estoppel is simply whether the party to be estopped has exploited other parts of the contract by reaping its benefits. Indeed, to require more than this—or, in other words, to limit the applicability of direct benefits estoppel to only instances where the claim relies solely on the contract terms to impose liability—is to invite the very sort of have-your-cake-and-eat-it-too inequity that the doctrine aims to prevent in

the first place. Neither *Wilson* nor this Court's decision in *Pearson* nor general notions of equity countenance,[75] much less call for, such a result.

Without question, Ms. Cooley received direct benefits under the Admission Agreement. Indeed, to deny her receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of her residency—even Plaintiff's complaints do not go so far as that. (*See* R. pp. 29–46, pp. 56–73.) Accordingly, the circuit court's order granting the Motion to Compel Arbitration should be affirmed on the additional sustaining ground that Plaintiff is equitably estopped to deny the enforceability of the Arbitration Provision.

CONCLUSION

For the foregoing reasons, Defendants ask this Honorable Court to dismiss this appeal; or, assuming, *arguendo*, that the appeal should not be dismissed, to reach only the Dismissal Issue; or, assuming, *arguendo*, that the Court should reach the Arbitrability Issue, to affirm the circuit court. Additionally, out of an abundance of caution, assuming, *arguendo*, that the Court should reach the Arbitrability Issue, to the extent that the Court may be inclined to reverse the circuit court as to the issue of Ms. Galloway's authority, Defendants ask the Court to remand the matter to the circuit court for discovery on the availability issue (without waiving Defendants' right to arbitrate) and the circuit court to consider the matter further with the benefit of such discovery and argument thereon. Likewise, to the extent that the Court may be inclined to reverse the circuit court as to arbitration including all Defendants, Defendants ask that the Court's decision provide that the Litigation cannot proceed against the Corporate Defendants pending arbitration between Plaintiff and the Facility.

<SIGNED ON THE FOLLOWING PAGE>

[75] *See Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) ("Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible.").

Respectfully submitted,

By: s/Russell G. Hines

Russell G. Hines (SC Bar No. 72100)
CLEMENT RIVERS, LLP
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

-and-

Joshua T. Thompson (SC Bar No. 79137)
BOULIER THOMPSON & BARNES, LLC
101 W. St. John Street, Suite 300
Spartanburg, South Carolina 29306
P.O. Drawer 6470 (29304)
(864) 606-9610

Attorneys for Respondents

Charleston, South Carolina

December 7, 2023

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

Cases No. 2021-CP-39-01127 and -01128
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.

RESPONDENTS' CERTIFICATION FOR FINAL BRIEF

Russell G. Hines (SC Bar No. 72100)
CLEMENT RIVERS, LLP
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

-and-

Joshua T. Thompson (SC Bar No. 79137)
BOULIER THOMPSON & BARNES, LLC
101 W. St. John Street, Suite 300
Spartanburg, South Carolina 29306
P.O. Drawer 6470 (29304)
(864) 606-9610

Attorneys for Respondents

I, Russell G. Hines, do hereby certify that the **Final Brief of Respondents** complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

Respectfully submitted,

By: s/Russell G. Hines

Russell G. Hines (SC Bar No. 72100)
CLEMENT RIVERS, LLP
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

-and-

Joshua T. Thompson (SC Bar No. 79137)
BOULIER THOMPSON & BARNES, LLC
101 W. St. John Street, Suite 300
Spartanburg, South Carolina 29306
P.O. Drawer 6470 (29304)
(864) 606-9610

Attorneys for Respondents

Charleston, South Carolina

December 7, 2023