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SC Court of Appeals

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.

PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, Appellant Deonda Weldon, Individually and as Personal Representative of the Estate of Earline Cooley, petitions the Court for rehearing and reconsideration of Opinion No. 2025-UP-157, filed May 7, 2025. The Court correctly rejected 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's ("Respondents") appealability challenge because the circuit court's order compelling arbitration contains a dismissal, which is always subject to immediate appeal. See S.C. Code Ann. § 14-3-330. However, by remanding with instructions to vacate the dismissal and enter a stay rather than addressing the merits of Ms. Weldon's arbitration arguments, the Court misapprehended a key South Carolina Supreme Court precedent, overlooked the way in which this Court has applied that precedent, and constrained arbitration appeals in a way the Supreme Court never intended.

BACKGROUND

This appeal challenges a circuit court order compelling arbitration of a nursing home resident's (Earline Cooley) tort claims arising out of a series of preventable and ultimately fatal falls while in Respondents' care. Respondents cited an "Agreement to Arbitrate" provision in the Admission Agreement (R. p. 320-21) when moving to force arbitration and dismiss the litigation Ms. Weldon brought independently and on Ms. Cooley's (her mother's) behalf. However, Respondents offered the circuit court no evidence Ms. Cooley ever signed or otherwise assented to arbitration. Instead, they pointed to a signature on the Admission Agreement from Debra Galloway, one of Ms. Cooley other daughters. (R. p. 328).

The record shows Ms. Cooley had not authorized Ms. Galloway to execute legal documents on her behalf. Ms. Cooley had been quite meticulous in putting her affairs in order before she was

admitted to Respondents' facility. Her Durable Power of Attorney appointed Ms. Weldon as her sole "agent." (R. p. 345). It was only if Ms. Weldon was "unable or unwilling or unavailable to serve" that Ms. Cooley intended for anyone else to make legal decisions for her. If that contingency was proved, Ms. Cooley appointed her third daughter Robin Elliott as her "substitute or successor" agent who would then be empowered to step in and exercise the same authority Ms. Weldon had. Id. Then, just to cover all her bases, Ms. Cooley also addressed the possibility that at some point Ms. Weldon and Ms. Elliott could *both* prove "unable or unwilling or unavailable to serve" as her agent. If, and only if, that contingency proved true, Ms. Galloway would be empowered as Ms. Cooley's second substitute or successor agent. Id.

According to the sisters, Ms. Weldon and Ms. Elliott were not unable, unwilling, or unavailable to consider the Admission Agreement when Ms. Cooley arrived at Respondents' facility. (R. pp. 468-69 ¶¶ 2, 10; R. pp. 466-67 ¶¶ 2, 4). In fact, Ms. Weldon's availability is evident from the Admission Agreement itself as she was identified as Ms. Cooley's "Financially Responsible Party." (R. p. 309). Since Ms. Weldon was available and Ms. Cooley's Durable Power of Attorney was unambiguous, Ms. Weldon was the only individual who could execute the Admission Agreement on Ms. Cooley's behalf. Accordingly, Ms. Galloway's signature was insufficient to convey Ms. Cooley's assent to the "Agreement to Arbitrate," and Respondents cannot prove the formation of a valid arbitration contract.

Even so, the circuit court granted Respondents' motion to compel arbitration and Respondents' request to dismiss Ms. Cooley's lawsuit. (R. pp. 24-25). Along with erroneously ruling Ms. Galloway had authority to act for Ms. Cooley, the circuit court also erred in (1) refusing to find Respondents waived any perceived right to pursue arbitration; (2) finding the purported arbitration provision was not unconscionable despite multiple one-sided terms and damage

limitations; (3) allowing several Respondents who were not parties to the Admission Agreement to enforce its arbitration provision; and (4) extending arbitration to a wrongful death claim designed to compensate Ms. Cooley's family members. (R. p. 3-23).

On appeal, this Court rejected a pre-briefing motion to dismiss from Respondents premised on the notion that the circuit court's order was not immediately appealable. (Order, dated June 1, 2023). After briefing, the matter was set for oral argument on November 14, 2024, but removed from the roster on October 31, 2024. In an unpublished per curiam memorandum opinion issued on May 7, 2025, the Court reversed. Weldon v. Dominion Clemson, LLC, Op. No. 2025-UP-157 (Ct. App. May 7, 2025). The Court held the circuit court's order was immediately appealable, and it had erred in dismissing Ms. Cooley's lawsuit when it compelled arbitration. Id. at 3 (citing Widener v. Fort Mill Ford, 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009)). Rather than address the merits of Ms. Cooley's substantive arbitration arguments, the Court remanded the matter with instructions for the circuit court to stay the suit pending completion of arbitration proceedings. Weldon, Op. No. 2025-UP-157, at 4-5 (citing Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., 355 S.C. 605, 586 S.E.2d 581 (2003) and Huskins v. Mungo Homes, LLC, 439 S.C. 356, 887 S.E.2d 534 (Ct. App. 2022)[1]).

ARGUMENT

1. The Court misapprehended the Toler's Cove principle and overlooked the way Huskins applied it.

Once the Court correctly rejected Respondents' appealability argument, the threshold issue for this appeal became whether the Court would address the merits of Ms. Weldon's challenges to the purported arbitration contract. The South Carolina Supreme Court laid out a principle for

[1] Rev'd on other grounds, 444 S.C. 592, 910 S.E.2d 474 (2024) (finding entire arbitration clause unenforceable because its unconscionable provisions could not be severed).

making that decision in Toler's Cove, and this Court recently applied that principle in Huskins. The Court's opinion in this case strays considerably from how Huskins interpreted Toler's Cove.

While there are statutory limitations on when an arbitration-related order may be immediately appealed (e.g. S.C. Code Ann. § 15-48-200[2]), there are also circumstances where challenges to the formation of an arbitration contract merit immediate appellate resolution. An appellate court should move past appealability questions to address the merits of an arbitration contract challenge when the "appellant's issues are capable of repetition and need to be addressed." Toler's Cove, 355 S.C. at 611, 586 S.E.2d at 585. This Toler's Cove principle was applied in the first instance to address the merits of arbitration waiver and unconscionability arguments even though the case reached the Supreme Court in an order it deemed not immediately appealable. Id. From there, the Toler's Cove principle was addressed just once more in this Court's recent ruling in Huskins. After holding an order compelling arbitration and dismissing claims was immediately appealable, Huskins invoked the Toler's Cove principle to address the merits of a home buyer's challenges to a purported arbitration agreement with a developer. 439 S.C. at 365, 887 S.E.2d at 539.

As Huskins correctly understood, the Toler's Cove principle is strictly a matter of repeatability. The homebuyer's challenge to arbitration merited resolution "because the issue is capable of repetition." Id. Huskins made no independent reference or analysis of the "need[s] to be addressed" language from Toler's Cove. Implicitly, Huskins treated that phrase not as an additional requirement, but as a rhetorical restatement: if an issue is capable of repetition, it

[2] Section 15-48-200 does not govern Ms. Weldon's claims as it is part of the South Carolina Uniform Arbitration Act, the entirety of which "shall not apply to . . . [a]ny claim arising out of personal injury . . .." S.C. Code Ann. § 15-48-10(b)(4).

necessarily warrants review. Thus, Huskins confirms Toler's Cove set out a unified rule—repeatability alone justifies immediate appellate consideration of arbitration issues.

The Court's opinion here applies these precedents backwards. Instead of recognizing repeatability as the standard demonstrating need for an issue to be addressed, the Court read "needs to be addressed" as an independent substantive standard and made no consideration of repeatability. Weldon, Op. No. 2025-UP-157 at 5 (declining to address Ms. Weldon's challenges on merits because prior precedent means "these issues do not need to be addressed"). This approach stands at odds with the precedent established by the Court's unanimous ruling in Huskins. Moreover, the Court's reference to Widener does not support its application of the Toler's Cove principle. For one, Widener does not reference Toler's Cove at all. That is because the decision in Widener to remand with instructions to enter a stay was motivated by a distinct procedural dilemma involving the statute of limitations. See Huskins, 439 S.C. at 365, 887 S.E.2d at 539 (limiting Widener to situations where an appellant "argue[s] the dismissal prejudiced them" in the application of a statute of limitations and applying the Toler's Cove principle when the appellant "ask this court to address the merits of the circuit court's decision as to the enforceability of the Arbitration Clause").

In sum, the Court should grant the petition and determine whether to reach the merits of Ms. Weldon's arguments against arbitration using the repeatability standard for the Toler's Cove principle established in Huskins.

2. The Toler's Cove principle is not limited to wholly novel issues, and Ms. Weldon's arguments present new issues that need to be addressed.

The Court appears to limit "needs to be addressed" to instances where an appellant raises a wholly novel challenge to the formation or enforcement of a proposed arbitration contract. Weldon, Op. No. 2025-UP-157 at 4-5. But, Toler's Cove itself and Huskins reached the merits of

arbitration challenges even when there was some precedent on the issues in question. Plus, the Court's recounting of precedents that have "already addressed" Ms. Weldon's issues is substantially flawed in a way that effectively denies her an opportunity to get relief from the circuit court's flawed order. Id. at 5.

The Court's final point in choosing to remand without addressing Ms. Weldon's arguments on the merits was to distinguish Toler's Cove and Huskins by finding the issues here are different because "our appellate courts have already addressed" them. Id. However, the issues Ms. Weldon raises have been no more addressed by precedent than those at issue in Toler's Cove and Huskins. Take for example the primary issue in Toler's Cove which was whether a defendant subcontractor had waived the right to arbitration by engaging in litigation. 355 S.C. at 612, 586 S.E.2d at 585. Waiver is a fact-specific issue, but certainly not a novel one. Toler's Cove cited two previous rulings from this Court on the issue. Id. (citing Evans v. Accent Manufactured Homes, Inc., 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2003) and Gen. Equip. & Supply Co., Inc. v. Keller Rigging & Constr., SC, Inc., 344 S.C. 553, 544 S.E.2d 643 (Ct. App. 2001)). These cases established a general rule that arbitration can be waived and outlined what a proponent must prove to show a waiver has occurred. Yet, it was not just general rules that Toler's Cove took from these waiver precedents. The Supreme Court turned to General Equipment in particular to find the length of litigation before arbitration was invoked and the amount of discovery that the subcontractor had performed was insufficient to prove waiver. Toler's Cove, 355 S.C. at 612, 586 S.E.2d at 585 (reasoning that, "as in General Equipment" the discovery here was too limited to support waiver).

This example shows novelty *was not* the criteria Toler's Cove used to determine whether an issue needed to be addressed. The Supreme Court actually applied precedent to decide the issue. If novelty was the standard, there is no reason to believe the waiver issue in Toler's Cove would

have warranted immediate consideration.[3] The same is true of Huskins where the case turned on whether an arbitration provision's attempt to shorten the statute of limitations for various legal claim rendered the provision unconscionable. This Court used long-standing precedent to identify and apply the two components of the unconscionability analysis and even noted precedent addressing unconscionability in the context of a developer-homebuyer dispute. Huskins, 439 S.C. at 367-70, 887 S.E.2d at 540-42 (citing Smith v. D.R. Horton, Inc., 417 S.C. 42, 790 S.E.2d 1 (2016), Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc., 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016), and Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021)). All of this goes to show the Toler's Cove principle is based on repeatability, not novelty, and this Court will apply that principle even when South Carolina appellate courts have delved into the general area of the present issue in previous cases.

The Court also misinterpreted the precedents it cites in ruling South Carolina appellate courts have "already addressed" Ms. Weldon's issues. Ms. Weldon raises a number of challenges to arbitration ranging from waiver to unconscionability to the general contract rule limiting enforcement to a contract's parties. None of the issues Ms. Weldon raises have been decided by South Carolina precedent. For example, Ms. Weldon's primary argument is that no valid arbitration contract was formed because Ms. Cooley's power of attorney did not authorize Ms. Galloway to sign the purported contract on her behalf. (App.'s Br. at 5-11). The Court errs in stating "[p]recedent already exists" on this issue. Weldon, Op. No. 2025-UP-157 at 4-5 (citing Arredondo v. SNH SE Ashley River Tenant, LLC, 433 S.C. 69, 85, 856 S.E.2d 550, 559 (2021)

[3] Similarly, the second issue in Toler's Cove—whether prohibitive arbitration costs rendered the arbitration contract unconscionable—was decided using U.S. Supreme Court precedent on a similar issue. 355 S.C. at 613, 586 S.E.2d at 585-86 (citing Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000)).

and Stott v. White Oak Manor, Inc., 426 S.C. 568, 578, 828 S.E.2d 82, 88 (Ct. App. 2019)). Arredondo interpreted a nursing home resident's powers of attorney to determine the scope of an agent's powers, not the identity of the person empowered to act. 433 S.C. at 77-85, 856 S.E.2d at 554-59. Stott turned on a statutory requirement to record a durable power of attorney with the register of deeds. 426 S.C. at 573-74, 828 S.E.2d at 85 (citing S.C. Code Ann. § 62-5-501(C)). Neither considered a nursing home resident's power of attorney with primary and alternative agents, and neither evaluated what evidence would be sufficient to show a primary agent was unavailable to serve. Thus, Arredondo and Stott are no more governing precedent for this case than General Equipment was in Toler's Cove or D.R. Horton was in Huskins.

The Court makes a similar error in describing the state of the law on who may agree to arbitrate a wrongful death claim. The Court holds that the South Carolina Supreme Court already addressed the issue in one footnote over a decade ago. Weldon, Op. No. 2025-UP-157 at 5 (citing Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 378 n. 3, 759 S.E.2d 727, 731 n. 3 (2014)). Yet, the Dean footnote addressed only an overly broad pronouncement in the appealed order suggesting wrongful death claims are categorically excluded from arbitration. Id. (citing circuit court order statement stating that "wrongful death actions are not something that's arbitrated"). That type of rule would violate the FAA's equal-treatment principle. Id. (citing Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 532-33 (2012)). However, that is not what is at issue here. A wrongful death claim may be arbitrable in instances where the statutory beneficiaries agree to do so. Ms. Weldon simply argues an individual's consent to arbitrate may not be grafted into a wrongful death claim that pays different people for different losses. Dean does not reject that argument or even consider it.

Then there is the finding that South Carolina jurisprudence is such that the Court need not address whether Respondents waived the right to pursue arbitration. Weldon, Op. No. 2025-UP-157 at 4 (citing Johnson v. Heritage Healthcare of Estill, LLC, 416 S.C. 508, 514, 788 S.E.2d 216, 219 (2016), Toler's Cove, 355 S.C. at 611, 586 S.E.2d at 584-85, and Gen. Equip., 344 S.C. at 557, 544 S.E.2d at 645-46). All of these cases are pegged to a conception of waiver that has since been called into serious question by U.S. Supreme Court precedent. See Morgan v. Sundance, Inc., 596 U.S. 411, 417-18 (2022) (overruling Carcich v. Rederi A/B Nordie, 389 F.2d 692, 696 (2d Cir. 1968) and finding proof of prejudice is not required to show a party waived the right to pursue arbitration). The arbitration analysis from Johnson, Toler's Cove, and General Equipment all eventually trace back to Carcich, which is no longer good law. See Gen. Equip, 344 S.C. at 556, 544 S.E.2d at 645 (citing Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp., 287 S.C. 346, 351, 338 S.E.2d 631, 634 (1985) which cited Carcich alone for the prejudice requirement). This recent development certainly suggests the waiver issue Ms. Weldon raises has *not* already been addressed, and the way waiver jurisprudence is now in flux is a great reason for concluding this issue needs to be addressed.[4]

In short, the Toler's Cove principle has never been limited to novel issues. As Toler's Cove and Huskins demonstrate, a challenge to arbitration may need to be addressed even when related to a broad issue South Carolina appellate court rulings have previously touched on. Also, the

[4] Additionally, the traditional arbitration waiver analysis was always conducted in the shadow of a purported policy favoring arbitration. See e.g., Gen. Equip., 344 S.C. at 556, 544 S.E.2d at 645. As the South Carolina Supreme Court recently announced (and reiterated), "[t]here is . . . no public policy—federal or state—'favoring' arbitration." Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021); see also Lampo v. Amedisys Holding, Inc., 445 S.C. 305, 317, 914 S.E.2d 139, 146 (2025) ("remind[ing] our litigants and lower courts that we dispensed with this incorrect notion" of a pro-arbitration policy in Palmetto Construction Group).

precedents the Court cites on powers of attorney, arbitration of wrongful death claims, and waiver do not resolve this case or actually address the specific issues Ms. Weldon raises. In fact, they only go to show these areas of law are underdeveloped and need further exploration. These are the circumstances the Toler's Cove principle was intended to reach, and the Court should address Ms. Weldon's arguments on their merits.

CONCLUSION

Based on the arguments above, Ms. Weldon respectfully requests the Court grant this petition, rehear this appeal, and consider Ms. Weldon's challenges to the purported arbitration contract on their merits. In the end, this is a case where a family is being forced to forego their right to a jury trial based on a contract Ms. Cooley did not sign and did not authorize Ms. Galloway to sign for her. This circuit court's order is in error, the issues are fully presented in the parties' briefs, and the Toler's Cove principle calls for the Court to address the issues on the merits rather than forcing this family out of court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on May 22, 2025, he served Respondents' counsel with the Petition for Rehearing, at the email addresses listed below pursuant to Rule 262(c)(3), SCACR and Section (d)(1) of the South Carolina's Supreme Court's August 25, 2021 order (Order No. 2021-08-25-02):

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Outlook

D. Weldon v. Dominion Clemson, LLC et al. (Appellate Case No. 2023-000033

From Jordan Calloway <jordan@mcgowanhood.com>
Date Thu 5/22/2025 1:26 PM
To Hines, Russell <rhines@ycrlaw.com>; jthompson@btblawfirm.com <jthompson@btblawfirm.com>
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1 attachment (126 KB)
E. Cooley--Pet. for Rehearing FINAL PDF.pdf;

Counsel:

I am attaching the Petition for Rehearing that is being electronically filed today with the South Carolina Court of Appeals. Pursuant to Rule 262(c)(3), SCACR and Section (d)(1) of the South Carolina Supreme Court's August 25, 2021, order (Order No. 2021-08-25-02), please consider this email as service for the Petition.

Thanks,

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