

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Charleston County
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2025-000286

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SC Court of Appeals

William Haynes as Personal Representative of the Estate of Elizabeth Varner,

Respondent,

v.

Fundamental Services LLC, Fundamental Clinical and Operational Services LLC, and Jerrolyn
Montgomery-Small,

Appellants.

INITIAL BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Are the Circuit Court Orders included in Appellants' Notice of Appeal interlocutory and subject to dismissal by this Court?
2. Is Appellants' Motion to Compel Arbitration and Stay Proceedings that are the subject of Appellants' Notice of Appeal successive Rule 59(e) SCRCP motions to reconsider the denial of Appellants' Motion for Summary Judgment?
3. Does the Arbitration Agreement and the Order Granting Motion to Compel Arbitration and Motion to Stay, filed February 24, 2022, apply to the corporate negligence claims in the instant litigation?

STATEMENT OF THE CASE

Respondent William Haynes (“Respondent”) is the Personal Representative for the Estate of Elizabeth Varner, who was admitted as a resident at Riverside Health and Rehab (“Riverside”) on May 20, 2019. Jerrolyn Montgomery-Small (“Appellant Small”) was the Administrator of Riverside and an employee of Riverside at the time of Elizabeth Varner’s residency and throughout her admission. Plaintiff filed the instant lawsuit on June 11, 2021, alleging corporate negligence, joint venture, alter ego/piercing the corporate veil, negligence against the providers at Riverside Health and Rehab, neglect of a vulnerable adult, wrongful death, and survivorship. (Compl. filed June 11, 2021). The Complaint alleges Fundamental Administrative Services LLC (“Appellant FAS”), Fundamental Clinical and Operational Services LLC (“Appellant FCOS”), and Small were engaged in a joint venture to manage and control the operations of THI of South Carolina d/b/a Riverside Health and Rehab (“Riverside”) and that these defendants were negligent in said management and operations. (Compl. filed June 11, 2021, ¶¶28-29). The instant case is styled *William Haynes, as Personal Representative of the Estate of Elizabeth Varner vs. Fundamental Administrative Services LLC, Fundamental Clinical and Operational Services LLC, and Jerrolyn Montgomery-Small*, CAFN: 2021CP1002744 (“Case 2744”). The Complaint specifically alleged Small was an alter ego and/or an agent/servant of FAS and FCOS (Compl. filed June 11, 2021, ¶43) and was involved in a joint venture with FAS and FCOS (*Id.*, ¶47).

A separate lawsuit was filed against Riverside, alleging negligence, wrongful death, and survivorship against the employees of Riverside. (Compl. filed March 25, 2021). This case was styled *William Haynes, as Personal Representative of the Estate of Elizabeth Varner vs. THI of South Carolina at Charleston LLC d/b/a Riverside Health and Rehab*, CAFN: 2021CP1001437 (“Case 1437”).

The claims in Case 1437 involved medical malpractice due to employee negligence and vicarious liability (Compl. filed March 25, 2021, ¶¶ 14-16); the claims in Case 2744 involve corporate negligence claims (Compl. filed June 11, 2021, ¶¶ 27-29, 34-43) and the same claims of negligence against Riverside employees that were alleged in Case 1437. (Compl. filed March 25, 2021). The remaining allegations in both complaints involve injuries sustained by Elizabeth Varner and her family. (Compl. filed March 25, 2021, ¶¶ 17-33; Compl. filed June 11, 2021, ¶¶ 45-61).

Riverside moved to Compel Arbitration against all claims asserted against it (Riverside Mot. to Compel Arb.) while FAS and FCOS moved to stay Case 2744 (FAS and FCOS Mot. for Stay). Appellant Smalls moved to compel those claims involving her role as an employee to arbitration. (Smalls Memo. in Supp. of Mot. to Compel Arb.). Respondent argued all Appellants (Riverside, Smalls, FCAS, and FOS) should be included in the arbitration if the Motion to Compel was granted. (Tr. of Record, Feb. 10, 2022). Appellants FCAS and FOS argued directly against being compelled to arbitrate. (*Id.*) Appellant Smalls argued she was entitled to arbitration because she was an employee of Riverside and the allegations against Riverside necessarily included her as an employee. (*Id.*)

A hearing was held on February 10, 2022, regarding these motions before the Honorable Roger M. Young, Sr. During the hearing and in support of their Motions for Stay, Appellants FAS and FCOS specifically stated the allegations against FAS and FCOS were separate and distinct. (*Id.*) Appellants also argued there was a “very clear distinction between an employee like Ms. Montgomery-Small’s” and the corporate entities. (*Id.* at p.30: 3-8).

The Circuit Court granted Riverside’s (and by extension Appellant Smalls as an employee of Riverside) Motion to Compel Arbitration on February 24, 2022, on the allegations of negligence relating to Riverside’s employees along with Appellants FAS and FCOS Motions to Stay all

matters in Case 2744. (Order Granting Mot. to Compel Arb. and Mot. to Stay, filed Feb. 24, 2022). The only issues compelled to arbitration were those allegations of negligence involving Case 1437 and Appellant Smalls in her role as an employee of Riverside. (*Id.*).

Riverside, Appellant Smalls, and Respondent engaged in arbitration from April 3-6, 2023, that encompassed the allegations of employee negligence and vicarious liability only. The Arbitrator issued an Order finding the employees of Riverside were negligent in the care and treatment of Elizabeth Varner. (Arb. Order dated May 16, 2023). A Subsequent Order was issued stating, “I find the Plaintiff failed to prove by the preponderance of the evidence that defendant Montgomery-Small deviated from the standard of care in her care of or investigation of the fall.” (Arb. Order dated May 26, 2023). Neither order contained findings of fact or law relating to the corporate negligence claims in Case 2744.

Proof of ADR was filed on May 23, 2023, and a Final Order was entered by the Honorable Roger M. Young, Sr., regarding arbitration. (Order Granting Pet. for Final Order filed Feb. 12, 2024). The Order also lifted the corresponding stays involving this lawsuit over objections from Appellants FAS and FCOS. (Defs.’ Pet. for Final Order). Appellants filed their own Petition for a Final Order, which was not entered by the Circuit Court, and argued the claims in Case 2744 were non-arbitrable. (*Id.*).

Respondent served discovery on Appellants FAS and FCOS on February 14, 2024. (Plf’s Mot. for Rule to Show Cause, Ex. A). Despite numerous extensions of time granted by Respondent, Appellants FAS and FCOS failed to provide any responses. Respondent filed a Motion to Compel discovery responses on May 29, 2024. (Plf. Mot. to Compel). In response to Respondent’s Motion to Compel, Appellants filed a Motion for Summary Judgment on June 28, 2024. (Defs.’ Mot. for Summary Judgment). Appellants’ Memorandum in Support for Motion for Summary Judgment

argued the Arbitration Order compelled all claims to arbitration, including those involving Case 2744, and Respondent was barred from pursuing those claims against all Appellants due to the doctrines of res judicata and collateral estoppel. (Defs.' Memo. in Supp. of Mot. for Summary Judgment, Secs. I and II).

The Honorable William C. McMaster, III, presided over Respondent's Motion to Compel and Appellants' Motion for Summary Judgment on September 11, 2024. Judge McMaster denied Appellants' Motion for Summary Judgment and granted Respondent's Motion to Compel. (Order of Multiple Motions filed Sept. 20, 2024). The Order stated, "Plaintiff's Motion to Compel discovery is Granted and the Defendants are ordered to comply with discovery within 30 days." (*Id.*). Appellants filed a Motion to Reconsider on September 30, 2024, which was denied. (Order Defs.' Mot. to Reconsider Denied filed Oct. 4, 2024). Appellants did not comply with Judge McMaster's Order to respond to discovery by October 20, 2024, and Respondent filed a Rule to Show Cause on October 22, 2024. (Mot. Rule to Show Cause).

On November 14, 2024, Appellants filed a Motion to Compel Arbitration. (Mot. to Compel Arb. and Stay Proceedings). Appellants again argued the Arbitration Order compelled all claims involving Smalls to arbitration, including the corporate negligence claims in Case 2744, and requested another stay on those claims involving FAS and FCOS. (Dfts.' Memo. in Supp. of Mot. to Compel Arb. and Stay Proceedings). The Honorable Jennifer B. McCoy denied Appellants' Motion and granted Respondent's Rule to Show Cause, with the Court ordering Appellants to respond to discovery within fifteen (15) days. (Order Granting Mot. for Rule to Show Cause, Denying Mot. to Compel Arb. and Stay Proceedings filed Feb. 3, 2024). Appellants' filed a Motion to Reconsider, which was denied. (Order Denying Mot. to Reconsider). The instant Notice of Appeal was filed on February 18, 2025.

STANDARD OF REVIEW

"Absent some specialized statute, determining if an interlocutory order is immediately appealable depends on whether the order falls within one of the several categories of appealable judgments, decrees, or orders listed in S.C. Code Ann. § 14-3-330." *Woodard v. Westvaco Corp.*, 319 S.C. 240, 242, 460 S.E.2d 392, 393 (1995), overruled on other grounds *Sabb v. South Carolina State University*, 350 S.C. 416, 567 S.E.2d 231 (2002). "The determination of whether a claim is subject to arbitration is subject to de novo review. Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Gissel v. Hart*, 676 S.E.2d 320, 382 S.C. 235 (2009) citing *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 644 S.E.2d 705 (2007). Appellate courts apply a de novo review to a circuit court's finding on whether a non-signatory is bound to an arbitration contract. *Wilson v. Willis*, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019) (citing *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. at 148 and *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012)). However, under a de novo review, the circuit court's factual findings will not be reversed so long as "any evidence reasonably supports those findings." *Wilson*, 426 S.C. at 335, 827 S.E.2d at 172. To the extent a discovery order is properly before the Court, the party must prove an abuse of the circuit court's discretion. *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 576, 813 S.E.2d 292, 309 (Ct. App. 2018) (quoting *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016)).

ARGUMENT

- I. The Circuit Court's Orders on Appellants' Motion for Summary Judgment and Motion to Compel Arbitration were properly denied.**
 - A. The Arbitration Agreement and Order compelling arbitration do not apply to corporate negligent claims, which are non-arbitrable and not subject to the Arbitration Agreement.**

The Arbitration Agreement that was purportedly executed between Respondent and Appellant Smalls applies only to Riverside. Nothing in the Arbitration Agreement applies to corporate negligence claims against FAS and FCOS, including Appellant Smalls as an alleged alter ego or agent/servant of these entities. The Arbitration Agreement contained the following provision:

It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim...then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided in the South Carolina Alternative Dispute Resolution/Mediation Rules.

(See Facility – Resident/Representative Agreement to Arbitrate)

Appellants agreed the corporate negligent claims were not related to the Facility's Admission Agreement as stated in the Arbitration Agreement, which is apparent by the very terms of the Arbitration Agreement. (See Tr. of Record, Feb. 10, 2022). Although Respondent argued all claims should go to arbitration if the motion was granted, Appellants argued to the Circuit Court that the corporate negligence claims were not arbitrable, were separate and distinct from those claims involving an employee like Smalls, they were not third-party beneficiaries of the Arbitration Agreement, and would not agree to submit them to arbitration.

Our contention is that the Fundamental defendants are separate and distinct...

Id., at p.6: 8-9.

And certainly what I know today is I'm not in a position to consent to have the Fundamental defendants lumped in with the facility and the individual defendant, Ms. Montgomery-Small, she's the administrator of the facility.

Id., at p.6: 12-14.

[W]e're saying the arbitration should be Mr. Pinkston's clients against the facility and Ms. Montgomery-Small, and then outside

of that arbitration, not as a part of that arbitration, should be the Fundamental defendants.
Id., at p.29: 13-16.

They're not third-party beneficiaries to this arbitration agreement. The arbitration agreement talks about agents, servants, and employees, they are none of those things. That's why there's a very clear distinction between an employee like Ms. Montgomery-Small and these other entities.
Id. at p.30: 3-8.

And as for the Fundamental defendants, that the action should be stayed as to them. He has no right to compel them to arbitration, the third-party beneficiary theory doesn't work for two, at least two very significant reasons. One, they're not third-party beneficiaries; two, he doesn't have the ability to compel them to arbitration as third-party beneficiaries; three, there's no motion to do it
Id. at p.34: 6-12.

When petitioning for a Final Order, Appellants again stated the corporate negligence claims were non-arbitrable. "Accordingly, the Defendants request that this Court exercise its discretion to maintain the stay of all non-arbitrable claims [those in Case 2744] as necessary to avoid duplicative discovery and trials, to avoid piecemeal litigation and the potential for inconsistent obligations, and for the sake of the orderly administration of the Court's own docket." (Defs.' Pet. for Final Order, at p. 2). "[T]he stay of all non-arbitrable claims should remain in effect..." (*Id.*, at p. 4). Following Appellants' own logic, the Arbitration Agreement that was the basis of the Motion to Compel Arbitration does not apply to corporate negligence claims, to include those involving Smalls.

Appellants conflate the role of Smalls as an employee of Riverside with that of an alter ego and/or an agent/servant of FAS and FCOS who, in those capacities, was involved in a joint venture with FAS and FCOS. They do so in attempt to get the Arbitration Agreement to apply to Smalls as it relates to Case 2477. However, Appellants admitted there is a clear distinction between the corporate entities, Smalls, and the Arbitration Agreement when they argued, "The arbitration

agreement talks about agents, servants, and employees, they are none of those things. That's why there's a very clear distinction between an employee like Ms. Montgomery-Small and these other entities." (Tr. of Record, Feb. 10, 2022, at p.30: 3-8).

The only potential claims, if any, contained in Case 2477 that could have been subject to the Arbitration Agreement were those involving the negligence of Riverside's employees, including Appellant Small. (*See* Compl. filed June 11, 2021, ¶¶ 23-25). Appellant Small likewise argued the Arbitration Agreement only applied to her as an employee of Riverside and not to the allegations of corporate negligence:

As set forth below, the arbitration agreement not only covers the allegations raised against the Facility, but also the allegations raised against this Defendant as an 'employee' of the Facility. (Small Memo. in Supp. of Mtn. to Compel Arb., p. 2).

By its terms, the Arbitration Agreement is binding on the Facility's **"agents, employees, and servants"** as well. (*Id.*, p. 4) (emphasis original).

Although this Defendant is not a signatory to the Arbitration Agreement, the parties manifested their intent to make all employees of the Facility beneficiaries of the rights and obligations created under the Arbitration Agreement through the inclusion of the Facility's "employees" as parties to the agreement. (*Id.*, p. 7)

The arbitration agreement talks about agents, servants, and employees, they are none of those things. That's why there's a very clear distinction between an employee like Ms. Montgomery-Small and these other entities. (Tr. of Record, Feb. 10, 2022, at p.30: 3-8).

Aside from the corporate negligence allegations being outside the scope of the Arbitration Agreement, Appellants are also not entitled to pursue arbitration on any of the corporate negligence claims based on our Supreme Court's holding in *Morrow v. Fundamental Long-Term Care Holding, LLC*, 412 S.C. 534 (2015), which addressed the issue of the distinct and separate nature

of nursing home negligence and corporate negligence. Again, Appellants admit there is a clear distinction between Smalls' employment status and the corporate negligence claims contained in Case 2744. It is likewise clear that by its very terms the Arbitration Agreement involved Riverside and **its employees only**.

Our Supreme Court addressed the distinction between facility negligence and corporate negligence in *Morrow* and held corporate negligence is a separate duty running from the corporate entity directly to patients. Corporate negligence does not involve the negligence of the employees controlled by the corporate entities, which would include Appellant Smalls, but rather involves those decisions made by parent corporations regarding the funding, staffing, and training of those subservient entities.

The Morrows alleged the Fundamental Entities were vicariously liable for the negligence of Magnolia Place, and furthermore were directly responsible for Lawrence's injuries by way of their conscious disregard for his health in underfunding Magnolia Place, which led to issues with staffing, training, and nutrition.

The Fundamental Entities thereafter filed a motion to bifurcate the trial pursuant to Rule 42(b), SCRPC between the nursing home negligence claims and the corporate negligence claims, and further, to stay discovery related to the corporate negligence claims. The Fundamental Entities argued bifurcation was proper because the issues of nursing home negligence and corporate negligence were distinct, and the Morrows could only move forward on the corporate negligence claims if they were first successful against Magnolia Place.

The Morrows correctly assert that the theory of vicarious liability is different than the theory of direct corporate liability. See Martin C. McWilliams, Jr. & Hamilton E. Russell, III, *Hospital Liability for Torts of Independent Contractor Physicians*, 47 S.C. L. Rev. 431 (1996). Vicarious liability attaches to a parent company or employer as the result of negligence on behalf of its employees, such as through the doctrine of respondeat superior. Id. at 439. **Conversely, direct corporate liability attaches due to a breach of a duty which runs directly between a parent company and a patient,**

arising from negligence in actions such as leaving a hospital underfunded, understaffed, or undertrained so as to provide substandard care. *Id.* at 462. Accordingly, the two theories of vicarious liability and corporate liability can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of the other. See *Scampono v. Highland Park Care Ctr.*, 618 Pa. 363, 57 A.3d 582, 596–600 (2012) (holding that claims of vicarious liability and direct liability could be brought either concomitantly or alternately in case against nursing home); see also *Montgomery Health Care Facility, Inc. v. Ballard*, 565 So.2d 221, 225–26 (Ala.1990) (finding parent corporation of nursing home could be held liable for patient's death where corporation controlled day-to-day operations of home); cf. *Forsythe v. Clark USA, Inc.*, 224 Ill.2d 274, 309 Ill.Dec. 361, 864 N.E.2d 227, 237 (2007) (recognizing direct corporate liability as a valid theory of recovery in the context of workplace accidents).

The order treats these claims as based solely on vicarious liability that can be tried only after a finding of negligence on the part of Magnolia Place, when instead they are grounded in direct corporate liability which follows independent, albeit interconnected, duties owed to the Morrows. By considering the Morrow's claims against the Fundamental Entities as dependent upon their claim against Magnolia Place, the trial court's order effectively grants the Fundamental Entities potential summary judgment on the issues of direct corporate liability.

The effect of this order is to prevent the Morrows from being architects of their own complaint, and deprives them of bringing their case against the defendant of their own choosing. See *Neeltec Enters., Inc., v. Long*, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2012) (“The right of the plaintiff to choose her defendant is a substantial right within the meaning of [section 14–3330(2)(a)]”).

Morrow, 412 S.C., at 536-539 (emphasis added).

As our Supreme Court noted in *Morrow*, the issue of corporate negligence involves separate and distinct duties. For all intents and purposes, the issues of employee negligence, including the negligence alleged against employees at Riverside, including Appellant Smalls, and

vicarious liability were judicially bifurcated with the arbitration. At the direct request of these Appellants, only those issues involving the negligence of Riverside's employees in both Complaints were included in the arbitration. Likewise, all issues relating to corporate negligence as contained in Case 2477 were stayed at the request of Appellants. The Arbitration Agreement does not apply to those claims in Case 2477 and accepting Appellants' arguments would deprive Respondent of bringing his case against the defendants of his choosing.

Appellants have engaged in bad faith arguments by taking contradictory positions throughout this litigation regarding the arbitrability of the corporate negligence claims. These bad faith arguments have prejudiced Respondent by causing repeated delays in the timely prosecution of his claims. Appellants' own admission that Smalls' role as an employee at Riverside is clearly distinct from any alleged role with the FAS and FCOS and their pleadings specifically stating these claims are non-arbitrable lead to the ultimate conclusion that the Arbitration Agreement and Order Compelling Arbitration do not apply to the corporate negligence claims in Case 2477.

B. Appellants' Motion for Stays were properly denied by the Circuit Court.

Appellants' reliance on the Federal Arbitration Act ("FAA") in support of its argument for Motions for Stays is misplaced. The FAA requires a stay **only** when there are issues referable to arbitration **and** when there is an enforceable arbitration agreement. Section 3 of the FAA states:

Section 3. Stay of proceedings where issue therein referable to arbitration

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.

Title 9, US Code.

Appellants FCOS and FAS explicitly and unambiguously argued they are not subject to any arbitration agreement and that the corporate negligence claims are non-arbitrable. (*See* Tr. of Rec., Feb. 10, 2022; Defs.' Pet. for Final Order). They also argued there is a very clear distinction between an employee such as Appellant Smalls and the corporate entities. (Tr. of Record, Feb. 10, 2022, at p.30: 3-8). Based on Appellants' own arguments and admissions, there is no issue in Case 2477 referable to arbitration and a stay is not permissible pursuant to the FAA.

The United States Supreme Court has stated the FAA provides a means for enforcing an arbitration agreement. "The Act provides two parallel devices for enforcing an arbitration agreement: **a stay of litigation in any case raising a dispute referable to arbitration**, 9 U.S.C. § 3, **and** an affirmative order to engage in arbitration, § 4." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S.Ct. 927, 22 (1983)(emphasis added). In upholding a reversal of a stay entered by a state court, the United States Supreme Court held, "[I]n a case such as this, where the party opposing arbitration is the one from whom payment or performance is sought, a stay of litigation alone is not enough. It leaves the recalcitrant party free to sit and do nothing—neither to litigate nor to arbitrate. If the state court stayed litigation pending arbitration...[plaintiff] would have no sure way to proceed with its claims...." (*Id.* at 27).

Appellants have argued there is no arbitration agreement between the corporate entities and there is no allegation against them referable to arbitration. They have also admitted the Arbitration Agreement only applies to Appellant Smalls as an employee of Riverside and that Appellant Smalls is not an employee, servant, and/or agent of FAS and FCOS. Therefore, Section 3 of the FAA does not apply and a stay on Case 2477 would prevent Respondent from proceeding with his claims. As

the United Supreme Court has stated, to allow such a result would allow FAS and FCOS to do nothing and prevent the Respondent from moving forward with his substantive right to litigate his claims.

Appellants FCOS and FAS decided not to avail themselves of the Arbitration Agreement presented to the Circuit Court, have pled the claims against them are non-arbitrable, have admitted the Arbitration Agreement only applies to employees of Riverside, and yet continue to pursue stays of the corporate negligence claims. Appellants' approach ignores the plain language of the FAA regarding the issuance of stays only upon any issue referable to arbitration under a valid arbitration agreement and the Circuit Court's Order denying a stay was properly entered.

II. Appellants' Notice of Appeal ought to be dismissed due to the interlocutory nature of the underlying Orders.

A. Appellants' Motion to Compel Arbitration, which is the basis of the Notice of Appeal, is nothing more than a Rule 59(e) SCRCP successive motion to reconsider the arguments in their summary judgment motion.

Appellants' Motion for Summary Judgment and Motion to Compel Arbitration are nearly identical in that Appellants essentially argued the same thing - the corporate negligent claims in Case 2477 were subject to Arbitration. (*See* Defs.' Memo. in Supp. of Mot. for Summary Judgment; Tr. of Record, Sept. 11, 2024; Memo. of Supp. of Mot. to Compel and Stay Proceedings; Tr. of Record, Jan. 27, 2025). As demonstrated below, Appellants relied on the same exhibits in both motions, while adding to the Motion to Compel, the summary judgment memos, and Order denying that summary judgment motion. This clearly shows Appellants' Motion to Compel Arbitration was nothing more than an impermissible successive Rule 59(e) SCRCP:

Motion for Summary Judgment	Motion to Compel Arbitration
Ex A – Complaint in Case 1437	Ex A – Complaint in Case 1437
Ex B – Complaint in Case 2744	Ex B – Complaint in Case 2744
Ex C – Answer of Defendant Smalls	Ex C – Answer of Defendant Smalls

Ex D – Order Compelling Arbitration	Ex D – Order Compelling Arbitration
Ex E – Arbitration Agreement	Ex E – Arbitration Agreement
Ex F – Order Appointing Arbitrator	Ex F – Arbitration Order
Ex G – Arbitration Order	Ex G – Supplemental Arbitration Order
Ex H – Supplemental Arbitration Order	Ex H – Check paying Arbitration Award
Ex I – Check paying Arbitration Award	Ex I – Final Order Case 1437
Ex J – Final Order Case 1437	Ex J – Memorandum of Law in Support of Defendants’ Motion for Summary Judgment
	Ex K – Plaintiff’s Memo in Opposition to Defendants’ Motion for Summary Judgment
	Ex L – Order Denying Summary Judgment
	Ex M – Order Denying Motion to Reconsider Order Denying Summary Judgment
	Ex N – Defendants’ Motion to Reconsider Order Denying Summary Judgment

Appellants argued they were entitled to summary judgment on the grounds of *res judicata* and collateral estoppel because the corporate negligence claims were compelled to arbitration, where Smalls “prevailed on the merits.” (Defs.’ Memo. in Supp. of Mot. for Summary Judgment, Secs. I and II; App. Initial Brief, fn. 18, p. 11). This is a mischaracterization of the Arbitration Order. The correct characterization is the Arbitrator issued an Order finding the employees of Riverside negligent in the care and treatment of Elizabeth Varner. (Arb. Order dated May 16, 2023). A Subsequent Order was issued stating, “I find the Plaintiff failed to prove by the preponderance of the evidence that defendant Montgomery-Smalls deviated from the standard of care in **her care of or investigation of the fall.**” (Arb. Order dated May 26, 2023)(emphasis added). Nothing in the Arbitration Order indicates Appellant Smalls prevailed on the merits of the corporate negligent claims. The reason is self-evident: the corporate negligence claims in Case 2477 were not compelled to arbitration.

Appellants’ arguments were first denied by the Circuit Court in their Motion for Summary Judgment (Order of Multiple Mots. filed Sept. 20, 2024) and again when their Motion to Reconsider was denied. (Order Defs.’ Mot. to Reconsider Denied filed Oct. 4, 2024). Undeterred,

Appellants filed a Motion to Compel Arbitration and Stay Proceedings, repeating the same arguments that the Arbitration Order compelled all claims to arbitration, including those involving Case 2744, and again seeking a stay on the corporate negligence claims against FCOS and FAS. (Mot. to Compel Arb. and Stay Proceedings). Appellants' Motion to Compel Arbitration and Stay Proceedings was denied (Order Granting Mot. for Rule to Show Cause, Denying Mot. to Compel Arb. and Stay Proceedings filed Feb. 3, 2024) and their Motion to Reconsider was also denied. (Order Mot. to Reconsider Denied filed Feb. 7, 2025).

Thus, on four (4) occasions, two (2) different Circuit Court judges heard and denied Appellants' arguments that the arbitration order was applicable to the corporate negligence claims in Case 2744. Put another way, two (2) different Circuit Court judges determined the claims asserted in Case 2744 were not subject to arbitration – once via denial of summary judgment and again via denial to compel arbitration. Since a denial of summary judgment is interlocutory and their motion for reconsideration was denied, Appellants cleverly, but inappropriately, captioned their subsequent motion as a Motion to Compel in order to create an immediate appeal and create further delay in this case.

In their Motion to Compel Arbitration that is the subject of this appeal, Appellants specifically asked the Circuit Court to enforce the Arbitration Order previously entered in case 1437. “[T]he facts alleged in this case are identical to those that were litigated in the arbitration. And, pursuant to the Court's order compelling arbitration... and the arbitrator's Arbitration Order..., Plaintiff was required to present all of his claims against Defendant Smalls in the arbitration....” (Defs.' Memo. in Supp. of Mot. to Compel, Sec. II, p. 7). The record clearly establishes that Appellants previously filed a Motion for Summary Judgment arguing the exact same thing - the claims in Case 2744 were subject to arbitration. (Defs.' Memo. in Supp. of Mot. for Summary

Judgment, Secs. I and II). The Motion to Compel Arbitration and Stay Proceedings was nothing more than a successive Rule 59(e) motion to reconsider the arguments made in the Motion for Summary Judgment. Appellants have likewise abused the litigation process by recycling arguments in successive motions on issues that have been decided by multiple Circuit Court judges.

B. The Motion to Compel Arbitration and Stay Proceedings is a transparent attempt to get one judge to set aside the order of another.

“This Court has stated as a general principle, ‘One Circuit Court Judge does not have the authority to set aside the order of another.’” *Rice v. Doe*, 442 S.C. 160, 164, 898 S.E.2d 127 (2024) citing *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986); see also *Steele v. Charlotte, Columbia & Augusta R.R.*, 14 S.C. 324, 330 (1880) (“The judge may sometimes reconsider his own orders, but all the authorities agree as to the general doctrine, that the decision of one judge is not subject to be reviewed by another”). As our Supreme Court has long emphasized, “There is no appeal from one Circuit judge to another.” *Rice*, 442, S.C. at 16, quoting *Steele*, 14 S.C. at 329 (1880). This rule promotes consistency and respect for judicial orders by preventing what amounts to an internal appeal from one circuit judge to another.

Below is a side-by-side comparison of oral arguments that shows Appellants' Motion to Compel Arbitration was essentially a Rule 59(e) SCRPC motion to reconsider the order denying summary judgment:

Appellants' Motion for Summary Judgment and Motion to Reconsider

Plaintiff was required to present all of his claims against Defendant Smalls in the arbitration.” (Defs.’ Memo. in Supp. of Mot. for Summary Judgment, p. 7).

[A]ll claims were within the scope of the subject arbitration agreement. Contrary to Plaintiff’s erroneous argument in opposition to Defendants’ motion, all claims asserted in the present lawsuit were or should have been raised at arbitration, including Plaintiff’s causes of action for corporate negligence, joint-venture liability, and corporate veil-piercing liability. (Defs.’ Memo. in Supp. of Mot. for Rec., p. 3)(emphasis original).

Accordingly, the Plaintiff had the opportunity to assert corporate negligence, joint venture, and veil piercing claims against Defendant Smalls at arbitration, in addition to the other causes of action that Plaintiff admittedly asserted and that were without question decided at arbitration.” (*Id.*, at p. 4).

Appellants' Motion to Compel Arbitration and Motion to Reconsider

Now, our position at – before Judge McMaster, was that all claims were already heard at arbitration, and we still contend that all claims asserted in the Complaint against Defendant Smalls were compelled to arbitration by order of Judge Young. (Tr., of Record, Jan. 27, 2025, p. 9: 15-19).

Thus, Plaintiff was required to present all of his claims against Defendant Smalls in the arbitration, where Defendant Smalls prevailed on the merits. (Defs.’ Memo. in Supp. of Mot. to Compel, p. 5).

[S]ince Plaintiffs claims against the facility and Ms. Montgomery Smalls' are clearly within the scope of the arbitration agreement, they should proceed in arbitration, not litigation. (*Id.*, at p. 11: 1-4).

All the claims against Judge -- against Defendant Smalls and the facility were addressed in arbitration, including the corporate negligence, veil piercing, alter ego claims. (*Id.*, at p. 11: 18-20).

[T]he Arbitration Order expressly compelled Plaintiff to arbitrate all of his claims against Defendant Smalls—including Plaintiffs’ claims for corporate negligence, joint venture, and alter ego/veil-piercing. (Defs’. Memo. in Supp. of Mot. to Compel Arb., p. 5

All those claims were asserted against Ms. Smalls in the original complaint, and they were all compelled to arbitration. (Tr. of Record, Jan. 27, 2025, p. 10: 24-25).

Those claims and issues have already been decided by the arbitrator, Your Honor. (Tr. of Record, Sep. 11, 2024, p. 14: 2-3).

The Arbitration Award thus conclusively resolved all of Plaintiff's causes of action against Montgomery-Small's that were or could have been presented in arbitration. Accordingly, there should be no further claims against Defendants Small's that are still outstanding. (Def's.' Mot. to Recon. Order Denying Mot. to Compel Arb., p. 6).

Arbitration has already been conducted arising from the same facts and circumstances alleged in the present case. (*Id.*, at p. 9).

[A]ll claims asserted against Ms. Small's, all claims asserted against Riverside were subject to arbitration, including the claims asserted against Ms. Small's for corporate negligence, joint venture liability, and corporate veil piercing liability. Those claims were heard in arbitration -- or they were subject to arbitration. (*Id.*, at p. 16-17: 23-3).

Accordingly, to the extent there are any claims or causes of action asserted against Montgomery-Small's that were not previously addressed at arbitration, Defendants assert that those claims must be arbitrated pursuant to the parties' agreement, Judge Young's Arbitration Order, and Judge Early's rulings (as arbitrator) as referenced above. (Def's.' Mot. to Recon. Denying Mot. to Compel Arb., p. 10).

All the claims asserted against Ms. Small's are precluded. It could have been tried at arbitration. They're precluded. (*Id.*, at p. 19: 2-4).

Specifically, as required by the Arbitration Order, this Court should enter a further order compelling Plaintiff to arbitrate, and thus send back to the arbitrator, any remaining claims that the Court intends to allow Plaintiff to pursue against Defendant Small's in this case. (Def's.' Memo. in Supp. of Mot. to Compel Arb., p. 8).

All the claims against Defendant Small's were or should have been presented at arbitration. (*Id.*, at p. 22: 17-19).

Every argument put forth in their recycled Motion to Compel Arbitration was extensively briefed and argued before the Honorable Judge McMaster at the Motion for Summary Judgment hearing. The record demonstrates that Appellants have taken inconsistent positions throughout this litigation regarding the arbitrability of the corporate negligence claims and the application of the Arbitration Agreement to those claims. As outlined above, Appellants argued the corporate negligence claims in Case 2477 were non-arbitrable in pleadings before Judge Young. (Def's.' Pet. For Final Order). They then shifted course and argued all claims were arbitrable in their Motion

for Summary Judgment - an argument twice rejected by the Circuit Court. Unfazed by the rejection of these arguments by the Circuit Court, Appellants again argued the corporate negligence, joint venture, and alter ego/veil-piercing claims were subject to arbitration in their Motion to Compel Arbitration. This approach is nothing more than an end-around the “one judge rule” to create an appealable issue.

The Honorable Judge Jennifer B. McCoy recognized Appellants were essentially filing a motion to reconsider the Order Denying Summary Judgment, when she stated, "Okay. All right. I mean, I get that in a way -- it puts me in this odd position of sort of reconsidering another Judge's ruling, which I can't - I can't do either, but I understand -- I think I understand your position. It's tough. It's a tough one." Tr. of Record, Jan. 27, 2025, p. 16: 3-7.

Although the law-of-the-case doctrine technically applies only to final rulings, its reasoning reinforces the same principle here: once a court has decided an issue, that decision governs the same issue in subsequent stages of the same case. *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 573, 776 S.E.2d 397, 404 (Ct. App. 2015). Under settled South Carolina law, issues resolved by a prior order cannot be revisited absent new facts, an intervening change in controlling law, or manifest error. *Id.* at 574.

The so-called arbitrability of the corporate negligence allegations in Case 2744 was ruled upon by Judge McMaster when he denied Appellants' Motion for Summary Judgment. Appellants did not present any new facts, any intervening change in controlling law, or any manifest error in their Motion to Compel Arbitration. As shown above, they basically argued during the hearing in front of Judge McCoy that Judge McMaster was just plain wrong in denying their Motion for Summary Judgment.

The Motion to Compel Arbitration is an impermissible effort to get one judge to reconsider and overrule another judge, something Judge McCoy certainly commented on during the hearing on said motion. (Tr. of Record, Jan. 27, 2025, p. 16: 3-7). They simply re-captioned the argument as a motion to compel arbitration to create an appealable issue, to continue their obstinance in responding to discovery, and to impose further delay on Respondent's ability to prosecute this case. The record clearly establishes the arguments made in their Motion to Compel Arbitration are nothing more than the reconsideration of matters already decided in the denial of their Motion for Summary Judgment. Their Notice of Appeal ought to be considered an inappropriate interlocutory appeal at best or a frivolous filing at worst that is designed to interpose unnecessary delay on Respondent's ability to prosecute his claims.

C. The Circuit Court's Order on Respondent's Rule to Show Cause was proper and any appeal of this discovery order is interlocutory.

Appellants' attempt to appeal an Order compelling them to engage in discovery is not immediately appealable. "An order directing a party to participate in discovery is interlocutory and not directly appealable under S.C. Code Ann. § 14-3-330 (1976)." *Ex parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881 (1986), *citing Patterson v. Specter Broadcasting*, 287 S.C. 249, 335 S.E. (2d) 803 (1985); *and Lowndes Products, Inc. v. Brower*, 262 S.C. 431, 205 S.E. (2d) 184 (1974).

Plaintiff served discovery requests on all Defendants on February 14, 2024. (Plaintiff's Mot. for Rule to Show Cause, Ex. A). Counsel by the parties spoke by phone and counsel for Appellants requested, and Respondent's counsel agreed to, a 30-day extension of time to provide responses. No responses were received on the due date of April 18, 2024. Counsel for Respondent followed up on the status of discovery responses on May 6, 2024, with counsel for Appellants requesting an additional thirty (30) days to respond. *Id.* Appellants' counsel asserted he was in the process of finalizing responses with assurances of providing said responses. *Id.* Respondent's

counsel granted an additional two weeks since the responses were almost three (3) months overdue. (*Id.*)

Counsel for Respondent followed up on May 21, 2024, at the conclusion of the two-week extension. Appellants' counsel again assured Respondent's counsel he was working to finalize responses and asked, for a third time, for an extension to do so. (*Id.*) Respondent's counsel agreed to extend the deadline to respond to May 24, 2024, and notified Appellants' counsel a Motion to Compel would be filed if responses were not received by that date. (*Id.*) Counsel for Appellants responded to the May 24th deadline by requesting, now for the fourth time, an extension to respond while stating he was "confident we could get responses by the end of next week," meaning May 31, 2024. (*Id.*) Respondent filed a Motion to Compel discovery responses on May 29, 2024, notifying Appellants' counsel the motion would be withdrawn if responses were received by the end of the week, as Defense counsel had stated. (*Id.*) Appellants failed to respond to any of the written discovery by May 31, 2024. Rather than respond to discovery as repeatedly promised or address the pending Motion to Compel, Appellants filed a Motion for Summary Judgment. (Defs.' Mot. for Summary Judgment).

The Honorable William C. McMaster, III, presided over Respondent's Motion to Compel and Appellants' Motion for Summary Judgment on September 11, 2024. Judge McMaster denied Defendants' Motion for Summary Judgment and granted Plaintiff's Motion to Compel. (Order of Multiple Mots. filed Sept. 20, 2024). The Order stated, "Plaintiff's Motion to Compel discovery is Granted and the Defendants are ordered to comply with discovery within 30 days." (*Id.*) Defendants filed a Motion to Reconsider, which was denied on October 4, 2024. (Order Defs.' Mot. to Reconsider Denied filed Oct. 4, 2024). Appellants failed to comply with Judge McMaster's Order to respond to discovery by October 20, 2024.

Respondent filed the instant Rule to Show Cause based on Appellants' failure to comply with Judge McMaster's Order. (Mot. Rule to Show Cause). Respondent's Rule to Show Cause was granted and the Court ordered Appellants to respond to discovery within fifteen (15) days. (Order Granting Mot. for Rule to Show Cause, Denying Mot. to Compel Arb. and Stay Proceedings filed Feb. 3, 2025). Appellants did not comply with the Rule to Show Cause Order to produce discovery and filed the instant Notice of Appeal on February 18, 2025, attempting to appeal the Order compelling them to engage in discovery. The sole directive in the Order granting the Rule to Show Cause was for Appellants to provide long overdue discovery responses within fifteen (15) days. The Circuit Court did not abuse its discretion in granting Respondent's Motion to Compel Discovery and subsequent Rule to Show Cause.

Appellants have refused to produce discovery despite Respondent granting extensions of time based on seemingly bad-faith assurances that such responses were forthcoming. Appellants have twice been ordered to engage in the discovery process and have ignored those unambiguous orders. Their refusal to provide discovery for more than a year after the stays were lifted in Case 2477, even though they specifically argued to the Circuit Court those claims were non-arbitrable in the Circuit Court, continues to prejudice Respondent by not allowing him to gather the necessary facts to prosecute his case.

Based on the plain language of the Circuit Court's Order granting Respondent's Rule to Show Cause, the Order is interlocutory and not subject to immediate appeal. *See Ex parte Whetstone*, 289 S.C. at 580 (1986). Appellants' attempt to appeal this interlocutory order is yet another abuse of the appellate process that seems designed to interpose more delay by continuing to deny Respondent his fundamental right to discovery and to further prejudice Respondent by causing unjust delay.

CONCLUSION

Based on the above, Respondent respectfully requests this Court Dismiss Appellants' Notice of Appeal based on the interlocutory nature of the Circuit Court Orders forming the basis of the appeal. In the alternative, Respondent requests this Court Affirm the Circuit Court Orders determining the claims in Case No. 2477 are not subject to arbitration.

Respectfully submitted,

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