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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2012-CP-01-00306
Appellate Case No. 2014-00946

Richard Wilson, Michael J. Antoniak, Jr., Marsha L. Antoniak, Anita L. Belton, Prescott Darren Bosler, Johnny Calhoun, Sallie Calhoun, Cynthia Gary, Robert Wayne Gary, Eugene P. Lawton, Jr., Jeanette Norman, James Robert Shirley, Robert W. Spires, Crystal Spires Wiley, Lewis S. Williams, Janie Wiltshire, Benjamin Franklin Wofford, Jr., and Rebecca Hammond Wofford, ... Respondents

v.

LAURA B. WILLIS and JESSE A. DANTICE, individually, and as agents and/or brokers for Southern Risk Insurance Services LLC, Travelers Casualty Insurance Co. of America, Allied Property and Casualty Insurance Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co., SOUTHERN RISK INSURANCE SERVICES, LLC, TRAVELERS CASUALTY INSURANCE CO. OF AMERICA, ALLIED PROPERTY AND CASUALTY INSURANCE CO., PEERLESS INSURANCE CO., MONTGOMERY MUTUAL INSURANCE CO., SAFECO INSURANCE CO. OF AMERICA, and FOREMOST INSURANCE CO., ... Defendants,

Of whom Peerless Insurance Company, Montgomery Mutual Insurance Company, and Safeco Insurance Company of America are..... Appellants.

APPELLANTS' INITIAL REPLY TO BRIEF OF RESPONDENTS (EXCLUDING RESPONDENT LAURIE WILLIAMS)

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This appeal arises from the trial court's denial of Peerless Insurance Company's, Montgomery Mutual Insurance Company's, and Safeco Insurance Company of America's (collectively "the Insurers") motions to compel arbitration of the claims made against them and to dismiss them from 14 related suits. The Respondents subsequently filed two briefs: one on behalf of Respondent Laurie Williams and the other on behalf of the other named Respondents ("Respondents"). The Insurers now submit this reply brief rebutting the arguments raised in the brief of the Respondents.

ARGUMENT

As explained in the Insurers' primary brief, the plaintiffs' claims against the Insurers should be compelled to arbitration despite the fact that the plaintiffs did not personally sign the Agency Agreements containing the arbitration agreement. Various binding Agency Agreements between co-defendant Southern Risk Insurance Services, LL ("Southern Risk") and the Insurers contain valid and enforceable arbitration provisions that encompass the claims and allegations made here, and South Carolina courts have recognized that one who has not signed an arbitration agreement may nevertheless be bound by the agreement. *See Pearson v. Hilton Head Hospital*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012). In an attempt to avoid this result, Respondents raise several arguments in their brief, each of which is rebutted below.

I. There are valid contracts between Southern Risk and the Insurers containing arbitration agreements.

As explained in detail in the Insurers' primary brief, the 2010 Agency Agreement establishing the Insurers' relationship with and the rights and obligations toward Southern Risk, Jesse Dantice, and Laura Willis was a valid, binding contract. *See* App.'s Brief at 8-11. In addition, the Insurers explained that even if the absence of a signed copy

of *that* agreement were significant, there still existed a prior, signed agency agreement that was in force during the time of Willis' alleged wrongdoing and which also contain arbitration provisions. *Id.* at 11-12. The Respondents' arguments to the contrary are unavailing.

A. The agreements conclusively prove that Southern Risk agreed to arbitrate disputes with the Insurers.

As explained in the Insurers' primary brief, multiple agreements definitively show that at all times relevant to Willis' alleged wrongdoing, Southern Risk had agreed to arbitrate any disputes it had with the Insurers. *See* App.'s Brief at 5-7, 9-10. The Respondents nevertheless argue that "the Insurers failed to meet their burden of proof in producing any evidence to establish Southern Risk agreed to arbitration." Resp.'s Brief at 10. As explained below, this conclusion is incorrect and is premised on a series of mistaken, misleading, or erroneous statements of fact and law.

1. The Insurers have and continue to rely on multiple agency agreements spanning the period of Willis' alleged wrongdoing.

Respondents wrongly state that the Insurers' motions to compel arbitration "relied exclusively" on the 2010 Agency Agreement. *See id.* at 10-11. This is incorrect. In actuality, the Insurers relied on multiple binding agency agreements in their motions, replies, oral arguments, and motions to alter or amend.

In each of the 14 motions to compel arbitration, the Insurers relied on the agency agreements relevant to that particular plaintiff's claims. For example, in lawsuits where the alleged wrongdoing occurred in or before early 2010, the Insurers' motion to compel relied on both the 2007 agency agreements and the 2010 agency agreement. *See, e.g.*, Motion to Compel Arbitration in *Wilson v. Willis*; Motion to Compel Arbitration in

Lawton v. Willis; *see also* Hearing Transcript at 7, 15, and 32 (relying on and discussing a 2007 agency agreement).[1] Similarly, in instances where Safeco but not Montgomery was named as a defendant, the motion relied on the 2007 and 2010 agency agreements between Safeco and Southern Risk, but not on agreements between Montgomery and Southern Risk. *See, e.g.*, Motion to Compel Arbitration in *Wofford v. Willis*.

The Insurers' reliance on multiple agency agreements is significant because, as explained in the Insurers' primary brief, even assuming *arguendo* that the unsigned 2010 Agency Agreement is not binding—an assumption with which the Insurers disagree—the prior binding agreements also compel arbitration. *See* App.'s Brief at 11-12. The Respondents incorrectly state that this argument is unpreserved because it was not raised to the trial court. *See* Resp.'s Brief at 12 n.5 and accompanying text. In fact, the Insurers *did* argue to the trial court that past agency agreements were relevant and contained binding arbitration agreements. *See, e.g.*, Motion to Compel Arbitration in *Lawton v. Willis* at 2 ("During the entire period of Willis' alleged wrongdoing, Peerless' relationship with Willis and Southern Risk was established and governed by *two* contracts.") (emphasis added);[2] Insurers' Reply in Support of Mot. to Compel Arbitration in *Wilson v. Willis* at 4 ("Dantice and Southern Risk were bound by contracts [note: plural], both signed and unsigned . . ."); Hearing Transcript at 15:6-16:2 ("[T]here is a signed writing in this case. Exhibit A is a signed agreement, Your Honor, between our company and him. There's a

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[1] Of course, in instances where the alleged wrongdoing arose in 2012, the motion to compel cited solely the 2010 Agency Agreement. *See, e.g.*, Motion to Compel Arbitration in *Spires v. Willis*.

[2] The motions to compel also noted that the 2010 Agency Agreement stated it replaced and superseded any prior agreements, thus the Insurers stated the relevant arbitration provision is the one found in this Agreement. *See, e.g.*, Motion to Compel in *Lawton v. Willis* at 3. As noted above, however, the Insurers made clear that, assuming the unsigned 2010 agreement was not enforceable, there were prior signed agreements upon which they relied.

2007 agreement. . . . He's either operating under the other one [*i.e.*, the 2007 agreement], the terms of it says [it] continues in force until there's another one . . . so we've got a written agreement."); Insurers' Motion to Alter or Amend at 3 ("[T]he Companies' argument relies not only upon the 2010 Agency Agreement, but also upon an entire series of agreements, as set forth in the Companies' briefing and arguments."). In sum, Respondents are simply incorrect in their assertion that the Insurers "relied exclusively" on the unsigned 2010 Agency Agreement.

2. The pre-2010 agency agreements are binding on Southern Risk, Dantice, and Willis.

As explained above, the Insurers' arguments seeking to compel arbitration relied on multiple agency agreements in force between 2003 and 2012. *See* App.'s Brief at 5-7, 11-12. The Respondents, however, wrongly argue that these agreements are ineffective because "none of these prior agreements on which the Insurers relied are signed by Southern Risk" and "the Insurers have failed to establish any relationship between Assure Alliance"—who signed the 2007 agreement—"and Southern Risk." *See* Resp.'s Brief at 13. This is incorrect.

As explained in the Insurers' primary brief, at the time of Southern Risk's formation in 2004, Southern Risk and Dantice were agencies, sub-agents, or sub-producers of the South Carolina Agent Network ("SCAN"). *See* App.'s Brief at 5 (citation omitted); *see also* March 14, 2007 Limited Agency Agreement (noting that Southern Risk was appointed for the purpose of "placing Safeco Insurance products in the name of SOUTH CAROLINA AGENT NTWRK Inc.," and signed by Jesse

Dantice).[3] Both Montgomery and Safeco had agency agreements with SCAN that contained binding arbitration provisions. *See* App.'s Brief at 5.

When SCAN changed its name to Assure Alliance in 2007, Safeco and Montgomery entered into new agency agreements with Assure Alliance. *Id.* These agreements contained arbitration provisions that expressly applied to Assure Alliance's sub-producers and employees such as Southern Risk, Dantice, and Willis. *See id.*; *see also* Sept. 13, 2007 Agency Agreement with Assure Alliance at 1 and 6-7 (noting that the agreement applied to sub-producers and required arbitration of disputes).[4] In short, contrary to the Respondents' arguments, the Insurers *have* established a relationship between Assure Alliance and Safeco and *have* demonstrated that the arbitration agreements apply to Southern Risk, Dantice, and Willis.

In addition, the Respondents quote Dantice's and Southern Risk's counsel for the proposition that "'[t]here is no written agency agreement'" between Southern Risk and the Insurers, and that "his client had not agreed to arbitration." *See* Resp.'s Brief at 11 (quoting Hearing Transcript at 36:2-4). When this snippet of argument from the hearing is placed in its context, however, it reveals that Southern Risk's counsel was asserting his position that he had not seen "an agency agreement *signed by Jesse Dantese* [sic] or Southern Risk." Hearing Transcript at 35:19-22 (emphasis added).[5] As the Insurers explained at the hearing, in the motions to compel, and in the Insurers' primary brief,

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[3] This agreement was attached as Ex. J to Insurers Reply in Support of Motion to Compel Arbitration.

[4] This agreement was attached as Ex. I to Insurers Reply in Support of Motion to Compel Arbitration.

[5] As a factual matter, this comment from counsel was incorrect. Dantice signed a March 14, 2007 Limited Agency Appointment and Agreement with Safeco. *See* Ex. J to Insurers Reply in Support of Motion to Compel Arbitration.

however, the absence of Dantice's signature on the 2010 Agency Agreement is inconsequential here and, in any event, prior agency agreements with arbitration provisions were binding on Southern Risk even if signed by someone under whom Dantice and Southern Risk were operating rather than by Dantice himself. *See, e.g.*, Hearing Transcript at 15-16, 32; App.'s Brief at 11-12.

3. The apparent retroactive effective date of the 2010 Agency Agreement has no effect on its validity and enforceability.

The Respondents argue that the 2010 Agency Agreement "is back-dated" and that this fact "is devastating to the Insurers' argument." Resp.'s Brief at 11. However, South Carolina law establishes that contracts *may* be made retroactively effective. *See Dixon v. W. Assur. Co.*, 251 S.C. 511, 521, 164 S.E.2d 214, 219 (1968) ("It is a general rule that the parties to an insurance contract may, by the terms of their contract, make it effective as of the time of the issuance, as of an earlier time, or as of a later time.") (citation omitted).

The courts of other jurisdictions have likewise held that a contract with an effective date prior to the date of signature or delivery is permissible. *See, e.g., Mutual Life Ins. Co. of N.Y. v. Hurni Packing Co.*, 263 U.S. 167, 175-76 (1923) ("It was competent for the parties to agree that the effective date of the policy should be one prior to its actual execution or issue; and this, in our opinion, is what they did."); *Brewer v. Nat. Surety Corp.*, 169 F.2d 926, 928 (10th Cir. 1948) ("It is competent for the parties to agree that a written contract shall take effect as of a date earlier than that on which it was executed, and when this is done, the parties will be bound by such agreement."); *B-S Stel of Kan., Inc. v. Tex. Indus.*, 327 F. Supp. 2d 1252, 1257 (D. Kan. 2004) (noting that in a prior order the court had held that an arbitration agreement in a contract "signed in

February 1997 and effective after July 1, 1996 was 'valid and enforceable'"); *Viacom Int'l Inc. v. Tandem Prods., Inc.*, 368 F. Supp. 1264, 1270 (S.D.N.Y. 1974) ("When a written contract provides that it shall be effective 'as of' an earlier date, it generally is retroactive to the earlier date."); *S&B Mining Co. v. N. Comm. Co.*, 813 P.2d 264, 268 (Alaska 1991) ("It is undisputed that the parties may agree to give retroactive effect to their contracts."); *Goldstein v. Ipswich Hosiery Co.*, 122 SE2d 339, 345 (Ga. Ct. App. 1961) ("It is elemental that contracting parties may agree to give retroactive effect . . . to their contracts as they may see fit.").

In sum, none of the Respondents' erroneous arguments alter the fact that valid, binding contracts containing arbitration agreements existed and the trial court thus erred by refusing to compel arbitration.

B. The agreements at issue controlled the relationship between the Insurers, Southern Risk, Dantice, and Willis.

As explained above and in the Insurers' primary brief, the various agency agreements at issue created, established, and controlled the relationship between the Insurers and Southern Risk, Dantice, and Willis. In the absence of those agreements, there would be no relationship and Southern Risk, Dantice, and Willis would be unable to sell the Insurers' products. But for those agreements, there would be no basis upon which Plaintiff's could claim the Insurers had an obligation to train, supervise, audit, and investigate Willis.

Nevertheless, the Respondents argue that the Insurers have failed to establish that the agency agreements controlled their relationship with Southern Risk. *See* Resp.'s Brief at 14. The Respondents' sole basis for this argument is speculation that a handwritten notation in an affidavit indicates that the affiant—a non-lawyer—was uncertain about the

legal question of whether an unsigned contract could be binding. *See id.* The Respondents' speculative argument should be rejected. There are any number of reasons the affiant, Mr. Berry, might have added the handwritten words, "Uppon [sic] information and belief," prior to one paragraph of his affidavit. Respondents' guess as to what the reason might be is simply speculation and supposition. In short, the Respondents have offered no viable basis to question the fact that the agreements at issue controlled the Insurers' relationship with Southern Risk, Dantice, and Willis.

C. The Statute of Frauds does not bar application of the agency agreements.

As explained in the Insurers' primary brief, the statute of frauds does not apply to contracts such as the 2010 Agency Agreement that are for an indefinite term and are terminable at will. *See* App.'s Brief at 10-11. The Respondents nevertheless argue that a contract with an indefinite term cannot be performed within one year's time and thus the statute of frauds required that the agreement be signed by Southern Risk. The Respondent's argument is contrary to South Carolina case law, which clearly states that an indefinite contract terminable at will does not fall within the statute of frauds. *See Weber v. Perry*, 201 S.C. 8, 21 S.E.2d 193 (1942) ("A permanent employment contract is not within the Statute of Frauds, for it is deemed possible of performance within one year.") (citations omitted); *Cline v. Southern R. Co.*, 110 S.C. 534, 554, 96 S.E. 532, 538 (1918) ("The period of its performance was left uncertain. . . . The contract pleaded does not fall within the statute."); *see also Center State Farms v. Campbell Soup Co.*, 58 F.3d 1030, 1032 (4th Cir. 1995) ("The contract claimed by Center State Farms was indefinite in time and was to continue so long as Center State Farms performed satisfactorily. Under South Carolina law, such an arrangement is terminable at will, subject to

reasonable notice. [] A contract terminable at will does not fall under South Carolina's statute of frauds.").

Accordingly, contrary to the Respondents' assertion, the 2010 agency does not fall within the statute of frauds, and the fact the Insurers have not yet located a copy of the agreement signed by Southern Risk does not prevent enforcement of that agreement.

II. The claims against the insurers are premised on and seek to enforce the rights, duties, and obligations found solely in the agency agreements.

In the Insurers' primary brief, they explained and demonstrated that each of the plaintiffs' allegations against the Insurers is premised on the Insurers' alleged rights or duties that would not exist but for the Agency Agreements. *See* App.'s Brief at 13-17. In response, the Respondents argue their claims are premised on *statutory rights*, not on the rights, duties, and obligations found in the agreements. *See* Resp.'s Brief at 16-20. As explained below, their argument falls short for a number of reasons.

First, the Respondents state that they "ground their Complaints *exclusively* on South Carolina Code § 38-43-10, *et. seq.*, and § 38-51-10 to establish the Insurers' liability for the acts of agents Laura Willis and Jesse Dantice as producers of insurance." *Id.* at 17 (emphasis added). This is incorrect. Not one of the plaintiffs' complaints cites these statutes or makes any claim or suggestion that the Insurers are vicariously liable for Willis' tortious acts. Rather, the complaints clearly allege that the Insurers are liable for their *own* alleged failure to supervise, train, investigate, audit, etc. *See* App.'s Brief at 13-17. Respondents may not now tack on a statutory claim that is absent from the complaints.

Second, the Respondents' argument hinges on a definition of "agent" supposedly found in S.C. Code Ann. § 38-51-10. *See* Resp.'s Brief at 17. Specifically, the

Respondents note that "Willis and Dantice were producers of insurance" pursuant to section 38-43-10,[6] but then proceed to argue that "pursuant to § 38-51-10(b) Willis and Dantice were agents of the Insurers." *Id.* The Respondents then purport to quote section 38-51-10 at length and state, "Any liability the Insureds and Agents assert against Willis, Dantice, and the Insurers derives from *this section alone*," *Id.* (emphasis added). The quoted material found in Respondent's brief, however, no longer appears in section 38-51-10 or anywhere in the Code,[7] and thus Willis' status as an "agent" is not established by statute.

Third, the Respondents argue that under these supposed statutory definitions, the Insurers "are liable for the wrongful acts of their agents under the doctrine of *respondeat superior*." Resp.'s Brief at 17. Yet again, this argument falls short. As noted above, none of the complaints assert any claim, theory, or cause of action based on vicarious liability or *respondeat superior*. Furthermore, as also noted above, none of the complaints claim or allege that the Insurers are responsible for *Willis'* wrongful acts. Rather, they allege the Insurers are liable for their *own* supposed failings to perform adequate background checks, properly train and supervise her, conduct computerized audits, and the like.

Even assuming the Respondents had properly raised the doctrine of *respondeat superior*, that claim would fail. This Court has previously considered conduct similar to Willis' alleged conduct and has held the insurer was not vicariously liable for it. *See Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991). In *Vereen*, an insurance agent procured an insurance policy "by lying on the application" and

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[6] This statute states that a person who performs acts related to the making of an insurance contract "must be an appointed producer of the insurer." S.C. Code Ann. § 38-43-10.

[7] The closest analog is in section 38-43-10, which, as the Respondents concede and as noted above, at most indicates that Willis was an appointed producer for the Insurers.

subsequently assisted the beneficiary in making "a fraudulent claim for benefits." *Id.* at 428, 412 S.E.2d at 429. The court held such conduct was outside the scope of the agent's authority and thus rejected the plaintiff's claim that the doctrine of *respondeat superior* made the insurer liable for the agent's acts. The court noted that the agent was not acting in furtherance of the insurer's business as evidenced by the fact that he lied about his conduct, falsified the application for insurance, never attempted to deliver the policy to the insured, and personally profited financially from his wrongdoing. *Id.* at 429, 412 S.E.2d at 429. Here, Willis is alleged to have engaged in the same type of wrongful acts as the agent in *Vereen*, and thus her conduct was outside the scope of her authority.

Next, the Respondents argue their claims are unrelated to the Agency Agreements because "there are no allegations in the subject tort complaints which allege or relate to . . . [the agreements'] performance or nonperformance." *See* Resp.'s Brief at 18. This argument ignores the fact that every claim made against the Insurers is premised on alleged rights and duties that would not exist but for the Agency Agreement. *See* App.'s Brief at 13-17. The Insurers' alleged supervisory authority over Willis, their alleged ability to perform a background check on her, their alleged duty to train and supervise her, and their ability to audit her work are all grounded in and made possible solely by the agency agreements. The alleged failures to exercise these rights and perform these duties are issues relating to the agreements' "performance or nonperformance," and thus fall within the arbitration provision.

Finally, the Respondents argue they cannot be compelled to arbitration because they have not sought to enforce the provisions of the agency agreement to their benefit, stating that the allegations for which they seek to recover—"stealing, misappropriation of

funds, artificial premium calculations, fraud, and forgery—are not contemplated by the agency agreement at hand." Resp.'s Brief at 19. Here, yet again, the Respondents ignore or obfuscate the difference between their claims against Willis and their claims against the Insurers. No one alleges that the Insurers' stole, misappropriated funds, or committed fraud or forgery, and the Respondents are not seeking to recover from the Insurers for those acts. Rather, as explained above, the Respondents are seeking to enforce contractual provisions relating to hiring, training, supervising, auditing, and the like. *See also* App.'s Brief at 20-21. Because they rely on and seek to benefit from right and duties in the agency agreements, the Respondents cannot avoid those agreements' arbitration provisions.

III. The arbitration agreements at issue encompass the claims made here.

As explained in the Insurers' primary brief, the arbitration agreements at issue here are worded broadly enough to encompass the claims here and to compel those claims to arbitration. *See* App.'s Brief at 12-13. The Respondents, however, argue that the arbitration agreements here are too narrow to encompass their causes of action. *See* Resp.'s Brief at 20-24. The Respondents' argument is summarized thusly: where an arbitration agreement refers to disputes "arising out of *or related to*" the contract, it is broad; but where the arbitration agreement merely refers to disputes "arising out of" the contract, it is narrow. The Respondents cite a handful of out-of-jurisdiction cases that supposedly support this distinction. The courts of South Carolina, however, do not adhere to this formulaic and mechanical approach. *See Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 127, 647 S.E.2d 249, 252 (Ct. App. 2007) ("[O]ur law resists a formulaic approach and motions to compel arbitration are resolved only after a fact-intensive inquiry.").

Indeed, our courts have held that "[t]he phrase 'arising out of' should be broadly construed in a clause of inclusion." *Town of Duncan v. State Budget & Control Bd., Div. of Ins. Servs.*, 326 S.C. 6, 13, 482 S.E.2d 768, 772 (1997) (citation omitted); *see also Howard v. State Farm. Mut. Auto. Ins. Co.*, 316 S.C. 445, 450, 450 S.E.2d 582, 585 (1994) (requiring "clauses of inclusion to be broadly construed" and noting a "broad construction of 'arising from' includes 'causal relation to,' 'incident to,' 'flowing from,' or 'having connection with'") (citations omitted).

In any event, regardless of whether the relevant arbitration agreements are described as "broad" or "narrow," the fact-intensive inquiry required by *Rhodes* indicates that the plaintiffs' claims against the Insurers fall within the scope of the arbitration agreements. As explained in prior sections of this brief, the plaintiffs' claims against the Insurers undoubtedly arise out of the performance or nonperformance of rights and duties that would not exist but for the Agency Agreements. Accordingly, these claims fall squarely within the ambit of the arbitration agreements.

IV. The Insurers did not waive their right to compel arbitration.

In their primary brief, the Insurers explained that, in light of the limited lapse of time, extremely limited discovery, and lack of prejudice, they had not waived their right to compel arbitration. *See* App.'s Brief at 22-24. In response, the Respondents concede that, in most of these lawsuits the Insurers waited only six or seven months after the complaints were filed (and in one case 11 months) before moving to compel arbitration, but nevertheless argue that these delays were unreasonably long and constituted a waiver of the right to compel arbitration. The Respondents do not point to a single South Carolina case—and the Insurers' counsel is aware of none—holding that a delay of six or seven months after a complaint is sufficient delay to waive the right to compel

arbitration.[8] Although there are no bright-line rules as to what length of delay constitutes a waiver, the absence of any case law finding waiver in this time frame weighs heavily against finding waiver here.

In addition, the Respondents argue that "extensive discovery had begun" at the time the Insurers filed their motions to compel arbitration. This statement is not correct. What had, in fact, occurred was that written discovery *requests* had been served by the plaintiffs on the Insurers and vice versa. No depositions of the Insurers had been (or have been) taken, and the Insurers have taken no depositions. Once the Insurers moved to compel arbitration, the Insurers alerted Respondents in writing that the Respondents need not respond to the Insurers' written discovery.[9] No South Carolina court has held that the mere service of discovery requests waives the right to compel arbitration, and the trial court here erred by holding otherwise.

Next, the Respondents argue that the delay in seeking arbitration was "highly prejudicial" to them. *See* Resp.'s Brief at 27. In support of this assertion, the Respondents state that in one of the lawsuits, the parties had filed a combined total of 45 documents with the court prior to the motion to compel. *Id.* The Respondents concede, however, that this number includes numerous pleadings (*e.g.*, "complaints, amended complaints, original answers, amended answers, [and] one amended answer and counterclaim") and numerous certificates of service associated with discovery requests. *Id.* Yet again, no

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[8] Similarly, as noted in the Insurers' primary brief, one case holding a 10-month delay was sufficient to constitute waiver is easily distinguishable from the cases at bar. *See* App.'s Brief at 23 n.11.

[9] This letter exists but was not submitted to the trial court as there was no anticipated claim that there had been "extensive discovery" in this matter. No "extensive" discovery has occurred as a matter of fact in this case.

South Carolina court has held that the mere filing of pleadings constitutes prejudice or creates a waiver of the right to compel arbitration.

Lastly, the Respondents argue that the Insurers "availed themselves of the assistance of the court," supposedly by filing and then withdrawing[10] two motions and by agreeing to a consent order. *Id.* The Insurers are unsure how filing and then withdrawing a motion (before a hearing and before it was ruled upon) or agreeing to a *consent* motion constitutes seeking or relying on the assistance of the court. In any event, there is no South Carolina authority stating that such actions as these, either independently or in concert with the other minimal progress of these lawsuits, waives the right to seek to compel arbitration. Put simply, the case law does not support waiver in these circumstances.

V. The Insurers' alleged failures are not "outrageous conduct" that falls outside the scope of arbitrability.

As explained in the Insurers' primary brief, the trial court erred by ruling that the Insurers' alleged wrongdoing was so "outrageous" as to be unforeseeable and thus not subject to arbitration. *See* App.'s Brief at 21-22. The Respondents' arguments in response are easily rebutted.

First, the Respondents argue that they "base their complaints on allegations of fraudulent conduct and misrepresentations of the Insurers as principals . . . arguing these Insurers are liable under S.C. Code [Ann.] § 38-43-10 and the *respondeat superior* doctrine." Resp.'s Brief at 29. As explained in Part II, *supra*, not one of the plaintiffs'

[10] *See* Letter from the Insurers' counsel to the Honorable Frank R. Addy, Jr., withdrawing the Insurers' prior Motions for Judgment on the Claims for Civil Conspiracy, Unfair Trade Practices, and Common Law Unfair Trade Practices. Mailed November 6, 2013 in *Wilson v. Willis et al.* (No. 2012-CP-01-306).

complaints cites this statute or makes any claim or suggestion that the Insurers are vicariously liable for Willis' tortious acts.[11] Rather, the complaints allege the Insurers are liable for their *own* alleged failure to supervise, train, investigate, and audit. No South Carolina case has held an insurer's allegedly inadequate training, supervision, investigation, or auditing was conduct so outrageous and unforeseeable that it could not be subject to arbitration, and the trial court erred by holding otherwise.

Second, the Respondents attempt to distinguish *Landers v. FDIC*, 402 S.C. 100, 739 S.E.2d 209 (2013) by noting it involved a different cause of action and that the wrongdoing in that case stemmed directly from the contract. *See* Resp.'s Brief at 30. This argument misses the point for which the Insurers cited *Landers*, namely that if a claim involving intentional infliction of emotional distress—the very definition of an "outrage" claim—can be subject to arbitration, surely the much more benign claims leveled against the Insurers are subject to arbitration.

VI. The Insurers did not nefariously withhold the agency agreements from the plaintiffs' discovery requests.

The Respondents purport to raise an additional sustaining ground, arguing that the trial court *could* have denied the motions to compel arbitration on the ground that the Insurers had intentionally withheld the agency agreements from the plaintiffs in discovery to prevent the plaintiffs' from challenging them. *See* Resp.'s Brief at 31-32. The Respondents are incorrect. The Insurers did not sneakily withhold the agency agreements nor is there any rational basis to accuse them of doing so. Their objections to the plaintiffs' discovery requests were legitimate, legally supported, reasonable, and not

[11] Even if the complaints did allege vicarious liability, South Carolina case law has held that an insurer is not vicariously liable for conduct such as Willis' conduct here. *See Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991).

unusual. To now impute some evil motive and speculate that the trial court might have sanctioned the Insurers by denying their motions on that basis must be rejected.

The case upon which the Respondents primarily rely—*Hilton Head Beach & Tennis Resort v. Sea Cabin Corp.*, 305 S.C. 517, 409 S.E.2d 434 (Ct. App. 1991)—is easily distinguishable. In *Hilton Head*, the defendant had responded to discovery requests but had not produced a particular item. The defendant subsequently introduced that item into evidence at trial. The court of appeals held this was error.

The distinctions between *Hilton Head* and the case at bar are significant. First, in *Hilton Head*, the defendant responded to discovery but withheld one item. Here, in contrast, the Insurers legitimately objected to discovery and did not produce *any* items. Second, the holding in *Hilton Head* is the unsurprising rule that evidence not disclosed prior to trial should not be introduced as evidence at trial. Here, in contrast, there are no evidentiary rules in play and, in any event, the plaintiffs received copies of the agency agreements (which were attached as exhibits to the motions to compel) well in advance of the hearing and with sufficient time to review, challenge, and respond to them.

In sum, there is no conceivable basis upon which the trial court could permissibly have denied the Insurers' motions as a sanction for their legitimate and reasonable objections to discovery.

VII. Code section 15-48-10 does not apply here.

Finally, the Respondents assert a second additional sustaining ground, arguing that the trial court could have denied the motions to compel arbitration on the ground that S.C. Code Ann. § 15-48-10 prohibits the enforcement of arbitration agreements found in

insurance policies. *See* Resp.'s Brief at 33. As explained below, however, this argument suffers from a fatal defect, namely that this Court has previously expressly rejected it.

Section 15-48-10 states that the South Carolina Uniform Arbitration Act "shall not apply to . . . Any claim arising out of personal injury, based on contract or tort, or to any insured or beneficiary under any insurance policy or annuity contract." S.C. Code Ann. § 15-48-10(b). This Court and the federal district court have interpreted this provision as invalidating arbitration agreements found *in insurance policies. See Am. Health & Life Ins. Co. v. Heyward*, 272 F. Supp. 2d 578, 582 (D.S.C. 2003) (holding that section 15-48-10(b)(4) "prohibits the enforcement of arbitration clauses *in insurance policies* governed by South Carolina law") (emphasis added); *Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 210, 731 S.E.2d 324, 326 (Ct. App. 2012) (holding that section 15-48-10(b) "was instead intended to apply directly to an insurance contract"); *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 468, 556 S.E.2d 397, 401 (Ct. App. 2001) (noting that section 15-48-10(b) "expressly invalidates a provision contained *in an insurance policy*") (emphasis added).

Here, the arbitration agreement is not found in an insurance policy and thus section 15-48-10(b) does not apply. Contrary to the Respondents' assertion, it is not a novel question whether this statute applies to documents other than insurance policies. This Court has previously held that this statute does *not* apply to arbitration agreements found in documents other than insurance policies, even if the document has some tangential relationship to insurance. *See Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 209, 731 S.E.2d 324, 326 (Ct. App. 2012) ("The contract in dispute here is not an insurance contract, and the provision in the lease did not create an insurance policy or a

duty to insure. Therefore, Mary's causes of action against Harrelson are not the claims of 'any insured or beneficiary under any insurance policy' that would exempt this action from arbitration."). The *Walden* court expressly held that this statute was *not* intended to apply to "agreements that only have a tangential relationship to an insurance policy, but was instead intended to apply directly to an insurance contract." *Id.* at 210, 731 S.E.2d at 326.

Here, the arbitration agreements at issue are not found in insurance policies, thus the statutory exemption does not apply. Because this Court has previously expressly rejected the argument raised by Respondents, their argument cannot provide an additional sustaining ground for the trial court's erroneous ruling.

CONCLUSION

For the foregoing reasons, the Insurers respectfully request this Court reverse the trial court's order denying the Insurers' Motions to Compel Arbitration and Dismiss the Claims and remand with instructions to the trial court to compel all claims against the Insurers to arbitration and to dismiss the claims against them in these suits.

[*SIGNATURE PAGE ATTACHED*]

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