

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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 Company 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 Co., Montgomery Mutual Insurance
Co., and Safeco Insurance Co. of America are..... Appellants,

Of Whom Laurie Williams is Respondent.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. The trial court was correct in ruling no valid agreement containing an arbitration provision existed between the parties.
2. The trial court correctly refused to compel arbitration on the non-signatory respondents where the specific dispute fell outside of the scope of the alleged agreement and where the respondents in no way relied upon the alleged agreement in support of their claims.
3. The trial court correctly ruled that, even if the alleged agreement were potentially applicable to the allegations of the complaints, it was simply too “narrowly worded” to encompass the causes of action at issue.
4. The trial court correctly held Appellants waived their right to compel arbitration in this matter.
5. The trial court was without error in determining that the potential liability of the appellants could be based on a statutory duty making the corporate defendant liable for the “outrageous conduct” of their authorized and/or acting agents under the *respondeat superior* doctrine.

STATEMENT OF THE CASE

This appeal arises from the trial court’s denial of Appellants Peerless Insurance Company, Montgomery Insurance Company and Safeco Insurance Company’s (“the Insurers”) Motions to Compel Arbitration and Dismiss Claims in a total of fourteen actions involving the respondents. The Insurers seek to enforce against Respondents an arbitration provision contained in an alleged agreement between Jesse Dantice (“Dantice”), a defendant in each of the fourteen actions, and the Insurers.

Beginning in November 2012, Respondents Lewis Williams, Johnny and Sally Calhoun, Robert Spires, Crystal Spires Wiley, Prescott Darren Bosler, Benjamin and Rebecca Wofford, Robert and Cynthia Gary, Janie Wiltshire, Marsha and Michael Antoniak, Eugene Lawton, Anita Belton and Jeanette Norman (“the Insureds”) filed suit in Abbeville County against two local insurance agents, Defendants Laura Willis (“Willis”) and Dantice, and their agency, Southern Risk Insurance Services, LLC (“Southern Risk”), alleging, among other causes of action, violations of the S.C. Unfair Trade Practices Act, common law unfair trade practices, fraud and conversion. (*See, e.g.*, R. pp. 323-26, ¶ 15-35¹). The Insureds also named several national insurance companies, including the Insurers, as defendants in the action under a *respondeat superior* theory, alleging the Insurers failed to supervise or audit Willis or the Southern Risk agency, resulting in various harms to the individual Insureds. (*See* R. pp. 320-21, ¶ 9).

Respondents Richard Wilson and James Robert Shirley (“the Agents”) are two local insurance agents who worked in direct competition with Defendants Willis, Dantice and Southern Risk. These Agents allege Willis, Southern Risk and the Insurers engaged in illegal business practices, effectively prohibiting them from competing in the local insurance market and resulting in a substantial loss of clients and revenue. (*See* R. p.120, ¶ 13.²)

In October 2013, the Insurers filed Motions to Compel Arbitration, seeking to apply against the Insureds and Agents an arbitration provision found in an alleged agreement entered into between the Insurers and the Southern Risk agency. As a basis for their Motions

¹ The *Antoniak* Complaint and other pleadings are representative of and substantially similar to all complaints, and the pleadings in *Antoniak* and will be referenced throughout.

² The *Wilson* Complaint and other pleadings are representative of and substantially similar to the complaint filed by Shirley, the other Agent in this case, and the pleadings in *Wilson* will be referenced throughout.

to Compel, the Insurers argue that because the Insureds and Agents seek to recover against them based on duties that would not exist but for the alleged agency agreement at issue, the court should compel arbitration based on the arbitration provisions found in the subject agreement. (R. pp. 562-65). The Insureds and Agents filed a Memorandum in Opposition to the motions, asserting no valid or enforceable agreement to arbitrate exists because the agreement on which the Insurers base their motions is unsigned by any representative of Southern Risk. (R. pp. 619-20). Furthermore, the Insureds and Agents were neither signatories nor parties to the alleged agreement, and their claims against the Insurers are not within the scope of the arbitration clause contained within the agreement. (R. pp. 624-26). The Court heard oral arguments on the motions on January 21, 2014, and the Insureds and Agents filed their briefs in opposition to the motions the same day. The Insurers filed a reply memorandum on February 11, 2014 and attached additional evidence for the court to consider, including an opinion affidavit of an employee of Insurers.³

On March 25, 2014, the Court issued an order denying the Insurers' motion, finding the Insurers "have failed to meet their burden of proof in establishing a valid, binding contract by which the [Insureds and Agents] should be forced to arbitrate their claims." (R. p. 10). Thereafter, on April 8, 2014, the Insurers filed Motions to Alter or Amend. The court denied the Motions to Alter or Amend on April 21, 2014. (*See* R. pp. 20-21).

The Insurers filed their Notice of Appeal on April 25, 2014. (*See* Notice of Appeal). Thereafter, the Insurers filed a Consent Motion to Consolidate Appeals in all fourteen cases.

³ The presiding judge granted the Insurers' request to file a reply brief only to address two points raised in the Insureds' Memoranda in Opposition. He specifically declined to leave the record open for the addition of any new evidence. (R. p. 436, lines 7-11 (Hite: "So I'm assuming that by allowing them to do a reply brief, you're not leaving this hearing open." Court: "No. Just to respond to the issues that you raised that they were not apprised to it. It's just two as I understand it.")).

(*See Consent Mtn. to Consolidate*). The Court granted the Motion, consolidating the appeals pursuant to Rule 214, SCACR, on June 18, 2014. (*See Order*).

STATEMENT OF THE FACTS

From 2008 until 2012, Laura Willis and Jesse Dantice, defendants in the underlying actions, operated an independent insurance agency in Abbeville, South Carolina, selling insurance products offered by national insurance companies including the Insurers. The Insureds in this case were all customers of Willis and Dantice and their agency, Southern Risk. The Insureds allege while customers of Willis and Dantice, they were “the victims of many illegal and improper tactics used by [Willis, Dantice and the Insurers] to corner the retail insurance market in Abbeville County, South Carolina and destroy all competition.” (R. pp. 320-21, ¶ 9). Specifically, the Insureds allege Willis, as agent for the Insurers, forged insurance documents; issued policies on unsigned applications; changed or omitted information on insurance applications, without the permission of the Insureds, to reduce quoted premiums; submitted applications using her own personal identifying information, such as driver’s license and social security numbers to reduce quoted premiums; accepted cash payments for which she converted to her own use and issued bogus insurance policies unbeknownst to the customers, among other illegal and fraudulent activity. (*Id.*) The Insureds allege all of these actions resulted in harm to them and to their credit rating within the insurance industry. (R. pp. 326-27, ¶ 41).

The Insureds seek to recover against Dantice, Southern Risk, and the Insurers on the basis these parties, as principals of agent Willis, had a duty to investigate, train and supervise her, especially after Willis “was fined, publicly reprimanded and placed on probation for dishonesty by the South Carolina Insurance Commission in October 2011.” (R. p. 320, ¶ 8).

The Insureds further allege because Willis at all times acted as an agent for the Insurers, her actions “should have been discovered and stopped by the [Insurers], through reasonable direct supervision ... as well as through auditing computer programs which reveal fraud and/or misconduct of agents and/or customers.” (R. p. 321, ¶ 9). The Insureds also allege the Insurers should have been on notice of Willis’s illegal and fraudulent activities based on the sheer volume of new business she generated in a short amount of time, but the Insurers failed to investigate Willis’s activities because doing so would have “slowed down the rapid growth of the [Insurers’] insurance business and profits.” (R. p. 322, ¶ 10).

In their Answers, the Insurers denied the majority of substantive claims raised by the Insureds and set forth the following defenses: failure to state a claim; statutory bar by § 39-5-40(c); comparative fault; intervening actions of third party; scope of agency⁴; set-off; failure to properly allege special damages; unconstitutionality of punitive damages and limitation on or bar to punitive damages. (R. pp. 344-46, ¶ 44-53). Notably, the Insurers failed to raise arbitration as a defense in any of the Answers filed in the instant cases.

The Complaints filed by Agents Wilson and Shirley set forth the same allegations of illegal and improper conduct of Defendant Willis. The Agents assert causes of action against Willis, the Insurers and other Defendants for violations of the S.C. Unfair Trade Practices Act, common law unfair trade practices/unfair competition, civil conspiracy, and tortious interference with existing contractual relations and future contractual relations. (*See* R. pp. 122-25, ¶¶ 15-33). The Agents allege that due to the illegal and improper tactics of the Defendants, including the Insurers, premiums in the Abbeville insurance market were

⁴ The Insurers expressly deny any agency relationship existed between them and Willis in their Answer, but assert that in the event Willis was their agent, she was acting outside of the scope of the agency relationship in committing the actions alleged in the complaints. (*See* R. p. 345, ¶ 48).

artificially lowered “so that legitimate and responsible insurance agents, like [Wilson and Shirley], could not compete and lost many existing and prospective new insurance customers.” (R. p. 122, ¶ 14).

In answering the Agents’ Complaints, the Insurers expressly denied that Willis was their ““authorized and acting agent and/or servant”” and denied she acted with any permission of the Insurers. (R. p. 197, ¶ 13). They denied each of the factual allegations set forth in support of the causes of action raised by the Agents and asserted a variety of defenses. In responding to the Agents’ Complaints, the Insurers reserved their rights to raise additional defenses not stated in their Answer, but failed to raise arbitration as a defense. (R. p. 204, ¶ 48).

On October 31, 2013, almost a full year after the Insureds first began filing their actions in November 2012, the Insurers filed the instant Motions to Compel Arbitration and Dismiss Claims. The Insurers grounded their Motions to Compel Arbitration on a 2010 Agency Agreement between Liberty Mutual Insurance Company, a parent company of Insurers Montgomery and Safeco, and the Southern Risk agency. This 2010 Agreement contains an arbitration provision, requiring the parties to arbitrate in the event “any dispute or disagreement arises in connection with the interpretation of this Agreement, its performance or nonperformance.” (R. p. 456, ¶ 12.A). The Insurers allege that because the Insureds’ Complaints center on an alleged agency relationship and duties arising therefrom, the Insureds are bound by the 2010 Agency Agreement and the arbitration clause contained within it. (R. pp. 562-65).

In opposition to the Motion, the Insureds and Agents argue no valid agreement exists in which to compel arbitration because no representative of Southern Risk ever signed the

2010 Agreement or any of the agreements timely presented to the court by the Insurers. (R. pp. 619-20). The Insureds and Agents point out they were not parties to the 2010 Agreement and never signed any agreements, whether the 2010 Agreement or any prior agreements. They further dispute the Insurers' claims that they relied on the alleged agreements, noting they could not possibly have based their claims against the Insurers on these agreements because they were unaware these agreements even existed. (R. p. 626). In fact, the Insureds and Agents first learned of the alleged agreements upon receipt of the Insurers' Motions to Compel Arbitration. Incredibly, the Insurers failed to raise the issue of arbitration in their responsive pleadings, objected to producing the alleged agreements during discovery, despite a specific request for the same, and failed to produce the alleged agreements after the court issued a Consent Discovery Order protecting any document which could be deemed confidential. Additionally, in the *Gary* action, the Insurers filed declaratory judgment, first in federal court and then in state court, regarding the insurance policy at issue. The Insurers did not seek arbitration when filing those actions and sought relief from the court under the same factual scenario at issue here. The Insureds and Agents had no knowledge of the existence of these alleged agreements for almost one year during the pendency of these cases. As non-signatories to the agreements and with no knowledge of the agreements or their substance, the Insureds argue they could not possibly have based their claims against the Insurers on these agreements; therefore, the circuit court judge correctly denied the Motions to Compel Arbitration and Dismiss Claims.

STANDARD OF REVIEW

“The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise.” *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 596,

553 S.E.2d 110, 118 (2001). “The determination whether a claim is subject to arbitration is subject to *de novo* review.” *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). “Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings.” *Id.* (citing *Aiken v. World Fin. Corp. of South Carolina*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007)); *see also Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010).

ARGUMENT

The Insureds and Agents argue ample evidence exists to reasonably support the trial court’s denial of the Insurers’ Motion to Compel Arbitration and Dismiss Claims, where the Insurers seek to apply an unsigned arbitration provision contained in an alleged agency agreement to the Insureds and Agents, who are third parties and non-signatories to the alleged agreement.

I. The trial court correctly ruled the Insurers and Southern Risk never entered into a valid contract containing an arbitration provision applicable to the facts of these cases.

The trial court was correct in first ascertaining if a valid contract containing an arbitration clause existed in this case. The Court correctly determined because the Insurers failed to produce a valid, signed agency agreement, they failed to establish that Southern Risk ever agreed to submit any dispute to arbitration and therefore the Motions should be denied.

A. The Agreements at Issue are Unsigned and Improperly Dated, and the Insurers Have Failed to Establish a Meeting of the Minds

South Carolina law is clear that “[a]rbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.” *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118 (citations omitted). Our courts have held “where there has been no agreement to arbitrate, a party cannot be forced into compulsory

arbitration.” *Hilton Head Resort Four Seasons Ct. Horizontal Prop. Regime Council v. Resort Inv. Corp*, 311 S.C. 394, 397-98, 429 S.E.2d 459, 462 (Ct. App. 1993) (citation omitted). In this case, the Insurers attempt to bind the Insureds and Agents to an arbitration provision contained within an alleged agency agreement between the Insurers and Southern Risk. However, the Insurers failed to meet their burden in producing any evidence to establish Southern Risk agreed to arbitration.

“South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement.” *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989)(emphasis in original); *see also Potomac Leasing Co. v. Otts Mkt., Inc.*, 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct.App.1987) (“It is well settled in South Carolina that in order for there to be a binding contract between parties, there must be a mutual manifestation of assent to the terms.”). “The necessary elements of a contract are an offer, acceptance, and valuable consideration.” *Clardy v. Bodolosky*, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) (quoting *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct.App.1997)). The Insurers in this case produced absolutely no evidence to the trial court of an offer, acceptance and valuable consideration between them and Southern Risk. In support of their motion, the Insurers initially relied exclusively on the 2010 “Liberty Mutual Agency Corporation Agency Agreement” allegedly entered into by the Insurers and Southern Risk. (See R. pp. 451-59). The 2010 Agency Agreement put into evidence at the motion hearing, that is at the center of the Insurers’ claim for arbitration, is without dispute, unsigned by Southern Risk Insurance Services, LLC. In fact, counsel for Southern Risk acknowledged to the court during the hearing on Insurers’ Motion that he had no knowledge of the 2010

Agency Agreement and that his client had not agreed to arbitration. (*See* R. p. 433, lines 2-4 (“There is no written agency agreement that my client Jesse Dantese [sic] and Southern Risk have entered into with [the Insurers].”)).

Not only is the 2010 Agency Agreement unsigned, but also the Agreement is back-dated with the date affixed thereto by the Insurers of May 2012, a time period after which most of the Insureds’ and Agents’ claims arose. A close review of page 9 of 9 of the 2010 Agreement reveals the following contradicting language: “This agreement is effective April 01, 2010.” (R. p. 459). However, the signature block for Southern Risk Insurance Services, LLC contains a different date affixed thereto by the Insurers, May 31, 2012 – a fact that is devastating to the Insurers’ argument. (*See id.*). A common sense analysis reveals the alleged agreement on which the Insurers so doggedly rely apparently was never even presented to Southern Risk for a signature until May 31, 2012, when the causes of action in most of the instant complaints had already occurred. All of the Insureds’ and Agents’ allegations of wrongdoing against the Insurers, Willis and Dantice occurred prior to May 31, 2012. The Insurers are, in effect, against every principal of the law of contracts, trying to retroactively enforce an unsigned and back-dated agency agreement of which even counsel for Southern Risk disputes the validity.

The Addendums to the 2010 Agency Agreement are of no help to the Insurers because they are also unsigned. Additionally, these Addendums are dated May 31, 2012, and therefore should not be considered because they fall outside of the time period in which the majority of the Insureds’ and Agents’ claims arose. (*See* R. pp. 460-66). On the second page of the document entitled Montgomery Insurance Addendum to Agency Agreement, Exhibit “B” to Motion to Compel, there is a signature under Montgomery Insurance by Michael J.

Plavnický with the same critical May 31, 2012 date, but there is no signature of any kind for Southern Risk and no date affixed where the Southern Risk representative was supposed to sign. (*See* R. p. 461). The agreement entitled Safeco Insurance Addendum to the Liberty Mutual Agency Corporation Agency Agreement is also not signed and dated May 31, 2012. (*See* R. p. 466). There is no signature from anyone representing Southern Risk Insurance Services, LLC and no date where the signature could have been affixed. (*See id.*). For all of the reasons stated above, this Court should affirm the ruling of the lower court denying the Motions to Compel Arbitration because no valid contract containing a valid arbitration clause exists.

In their Motions to Compel, the Insurers conceded any prior agreements were “replaced and superseded” by the 2010 Agency Agreement discussed above, and asserted the only relevant arbitration provision was found in the 2010 agreement. (R. p. 560; *see also* R. p. 419, lines 21-25 – p. 420, lines 1-2). In their brief before this Court, however, the Insurers take a contrary position and attempt to revive several alleged earlier agreements in support of their claim for arbitration, in the event the 2010 unsigned agreement is not binding⁵. (*See* Brief of Appellants, p. 8 (arguing “the absence of a signed copy of [the 2010] agreement ... is entirely mitigated by the existence of prior, signed agency agreements”). The Insureds and Agents submit any arguments regarding previous agency agreements must fail because (1) the issue of the validity of these prior agreements was not raised below; and (2) just like the 2010 agreement, none of these prior agreements on which the Insurers relied are signed by Southern Risk.

⁵ Insureds and Agents argue these prior agreements should not be considered because this issue was not raised below. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (At a minimum, issue preservation requires that an issue be “raised to and ruled upon by the trial judge.”); *see also Malloy v. Thompson*, 409 S.C. 557, 762 S.E. 2d 690 (2014).

In reviewing the preceding agreements relied upon by the Insurers, only the 2007 Agreement is signed, albeit by two separate parties, unrelated to the instant actions. (*See* R. p. 447). This agreement, however, is between AssureAlliance, Inc. and Liberty Mutual Insurance Company.

The Insureds and Agents submit that the Insurers have failed to establish any relationship between AssureAlliance and Southern Risk, and therefore, the Court should disregard this Agreement. The only document ever produced in this case at any time by the Insurers which was actually signed by Jesse Dantice, as representative of Southern Risk, was a one-page document drafted by Insurer Safeco, entitled Safeco Limited Agency Appointment and Agreement (*See* R. p. 503). This document, however, contains no arbitration or dispute resolution language whatsoever and has no date affixed.⁶ This document, obviously, cannot be utilized to compel arbitration, but did create legal duties between Insurer Safeco and Southern Risk which the Insurers want this court to ignore.

B. Insurers Cannot Establish the Agreements at Issue Controlled their Relationship with Southern Risk

In support of their claims, the Insurers also introduced as part of their Reply Brief (*see FN 1 above*), an affidavit of James E. Berry who was identified as the territory manager for Safeco Insurance Company and Montgomery Ins. Company. (R. pp. 504-06). The affidavit was submitted to support the Insurers' contention that any relationship between Southern Risk and them was governed by the 2010 Agency Agreement and/or any prior agreement. A close review of the document, however, establishes that Mr. Berry could not affirmatively establish that the relationship between the Insurers and Southern Risk was in fact so governed. In his

⁶The only date contained on this document is a fax date of 4/13/2007 at the top of the page.

affidavit, Berry struck out the printed words of the affidavit, initialed the change, and wrote on the document that his understanding of the relationship between Southern Risk and the Insurers was based only “upon information and belief”. (R. p. 506, ¶ 13). The Insureds and Agents respectfully submit that the reason Mr. Berry would not sign the paragraph as written, instead marking the document with the handwritten words “*upon information and belief,*” was because he knew the agency agreements at issue had never been signed by anyone from Southern Risk Insurance Services LLC and were therefore not binding on anyone. This is another ground and basis for this court to uphold the ruling of the lower court.

A close review of the documents submitted in support of the Insurers’ Motions to Compel Arbitration conclusively establishes no contract between the Insurers and Southern Risk ever existed, and clearly there was no meeting of the minds regarding arbitration between any of these parties.

C. The Statute of Frauds Bars Application of the Arbitration Clause Contained Within the 2010 Agreement

The lower court also denied the Insurers’ Motions to Compel Arbitration on the basis of the Statute of Frauds. Although the Insurers argue the court erred, the Insureds and Agents submit the court correctly ruled on this ground as well. South Carolina law requires certain agreements be in writing and signed to be enforceable. *See* S.C. Code Ann. § 32-3-10. If such agreements are not signed or in writing, “no action shall be brought” under the agreement. *Id.* As is well-established by our courts, “[t]o satisfy the Statute of Frauds, every essential element of the contract must be expressed in a writing *signed* by the party to be compelled.” *Fici v. Koon*, 372 S.C. 341, 346, 642 S.E.2d 602, 604 (2007) (citations omitted)(emphasis added). Further, “[t]he burden of proof is on the party seeking to enforce the contract.” *Id.* “In addition, the Statute of Frauds requires that a contract that cannot be

performed within one year be in writing and signed by the parties.” *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005) (citing S.C.Code Ann. § 32–3–10 (1991)).

The Insureds and Agents submit that in the instant case, the agreement at issue, and its provisions regarding arbitration, is unenforceable because it cannot be performed within one year’s time and was not signed by Southern Risk. *See* S.C. Code Ann. § 32-3-10(d). The unsigned agency contract on its face has a beginning date of April 1, 2010 but no termination date, and by the terms of the agreement, it was not capable of being performed within one year.⁷ Even counsel for the Insurers admitted during oral argument that these agreements were continuing in nature, which implies they could not be performed in one year. (*See* R. p. 413, lines 22-24 (“the terms of [the agreement] says [sic] continues in force until there’s another one where there’s a termination”)). South Carolina law is clear that, where there is no contingency expressed upon the face of the contract, or implied from the circumstances, upon the happening of which within a year the contract or agreement will be performed, the agreement would be void under the Statute of Frauds. *Roberts*, 327 S.C. at 484, 486 S.E.2d at 774 (Ct. App. 1997). Therefore, the lower court was correct in denying the Motions to Compel Arbitration on this additional ground.

II. The trial court correctly refused to compel arbitration on the non-signatory Insureds and Agents, where their claims were based on a statutory duty unrelated to any of the alleged agreements and where they in no way relied on the agreements to support the causes of action in their complaints.

The claims at issue in the instant litigation are in no way derived from the alleged agency agreements relied upon by the Insurers to support their motion. Because the Insureds

⁷ As argued in Section I.A above, the 2010 Agency Agreement contains two different dates. Without having a clear effective date or signature, there is no way to say with certainty that this agreement could be performed within a year’s time.

and Agents did not rely on the provisions of the alleged agency agreements to support their claims, they cannot be bound to arbitrate as non-signatories of the agreements.

South Carolina law only allows non-signatories to be bound by arbitration provisions in certain specific circumstances. In the recent case of *Malloy v. Thompson*, 409 S.C. 557, 762 S.E.2d 690 (2014), the court recognized “five theories ‘aris[ing] out of common law principles of contract and agency law’ could provide a basis ‘for binding non-signatories to arbitration agreements: 1) incorporation by references; 2) assumption; 3) agency; 4) veil piercing/alter ego; and 5) estoppel.” *Malloy*, 409 S.C. at 562, 762 S.E.2d at 692 (quoting *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 601 (Ct.App.2012)). “In addition to these theories, some federal courts have recognized that a third-party beneficiary of a contract containing an arbitration clause may be compelled to arbitrate as a non-signatory.” *Id.* (citing *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347 (5th Cir.2003)).

In this case, the Insureds and Agents do not rely upon common law principles of contract or agency law, or on any of the five grounds stated in *Malloy*, to support their causes of action. Instead, the Insureds and Agents 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.

In all times relevant to the allegations in the underlying complaints, Willis and Dantice were producers of insurance, acting on behalf of the Insurers pursuant to the definition set forth in § 38-43-10. Further, pursuant to § 38-51-10(h), Willis and Dantice were agents of the Insurers. *See* S.C. Code Ann. § 38-51-10(h) (“Any person who ... (h) shall do or perform any ... act or thing in the making or the consummating of any contract of insurance for or with any

such [insurance] company, other than for himself ... whether any such acts shall be done by an employee of such insurance company or at the instance or request of such insurance company, shall be held to be acting as the agent of such insurance company for which such act is done or risk is taken.”). Any liability the Insureds and Agents assert against Willis, Dantice, and the Insurers derives from this section alone, not from the agency agreements submitted in support of the Motions to Compel.

Under these statutory sections, Willis and/or Jesse Dantice are agents of the Insurers, and as such, the companies are liable for the wrongful acts of their agents under the doctrine of *respondeat superior*. As is well-established in South Carolina, a principal is liable under the doctrine of *respondeat superior* for the acts of his agent acting within the scope of employment, even where the agent acts against the express instructions of his principal. See *S. Carolina Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 180, 348 S.E.2d 617, 622 (Ct. App. 1986) (holding if a master-servant relationship exists between the defendant and the tortfeasor, the law imputes the negligent act of the servant to the master). The allegations of the Insureds and Agents which seek to impose liability on the appellants pursuant to § 38-51-10, under the *respondeat superior* doctrine, are totally unrelated to any agency agreement. Further there are no allegations in the subject tort complaints which allege or relate to any dispute or disagreement in connection with the interpretation of the agreement, its performance or nonperformance, or its termination and therefore the contract and the arbitration agreement contained therein clearly do not apply to these cases.

The Insurers argue the lower court erred in refusing to compel arbitration on a non-signatory on the basis of equitable estoppel. According to the Insurers, because the Insureds and Agents relied on the Agency Agreements to assert their claims, they should be equitably

estopped from denying the existence of the agreement containing the arbitration clause. In *Pearson*, the Court of Appeals addressed the limited instances when a non-signatory to an arbitration agreement could be compelled to arbitrate. The *Pearson* court held that the doctrine of equitable estoppel in the arbitration context “recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.” *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601 (quoting *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)). In this case, the Insureds and Agents do not seek to benefit from the agency agreements at issue. The agency agreements set forth only the business relationship between the Insurers and Southern Risk, and do not address the types of conduct on which the Insureds and Agents ground their Complaints.

Unlike the factual pattern in *Pearson*, in the instant litigation absolutely no evidence whatsoever exists to establish that the Insureds and Agents have maintained that the provisions of the agency agreement between Insurers and Southern Risk should be enforced to benefit them. In fact, as mentioned above, the Insureds and Agents assert they had no knowledge of and had never even seen the instant contract prior to the filing of the Insurers’ motions. Further, a close reading of the 2010 Agency Agreement reveals that the allegations for which the Insureds and Agents seek to recover – stealing, misappropriation of funds, artificial premium calculations, fraud, and forgery – are not contemplated by the agency agreement at hand.

The Fourth Circuit Court of Appeals has applied a “direct benefits test” in determining whether the doctrine of equitable estoppel applies in enforcing arbitration clauses. *See Int’l*

Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411 (4th Cir. 2000). Under the direct benefits analysis, the Fourth Circuit has held “a nonsignatory is estopped from refusing to comply with an arbitration clause when it [is seeking or] received a direct benefit from a contract containing an arbitration clause.” *R.J. Griffin & Co. v. Beach Club II Homeowners Ass’n, Inc.*, 384 F.3d 157, 161 (4th Cir. 2001) (citations and quotations omitted). A close reading of the unsigned agency agreement at issue in these motions and presented to the Court reveals the agreement controls only the business relationship between the Insurers and Southern Risk, including payment of commissions, limits on advertising, and use of the company’s name by the agency. The agency agreement does not control acts of negligence by agents, which is an issue of South Carolina law.

In their complaints, the Insureds and Agents do not seek to receive any benefits from the alleged agency agreement, and their claims do not hinge on any alleged rights found in the agency agreement. As outlined above, the Insureds’ and Agents’ claims are grounded exclusively on specific South Carolina statutes. As this Court recently held in *Malloy, supra*, where the claim is not based on a duty specifically derived from the arbitration agreement at issue, a non-signatory cannot be compelled to arbitrate under that agreement. The trial court in this case, therefore was correct in finding that the Insureds and Agents sought *no direct benefit* from the agency agreement and in denying the Motions to Compel on this ground.

III. The trial court was correct in ruling that, even if the arbitration provision was potentially applicable to the allegations of the complaints, it was simply too “narrowly worded” to encompass the causes of action raised by the Insureds and Agents.

The Insurers argue the arbitration clause, as found in the 2010 Agency Agreement, is sufficient in scope to cover the instant dispute. The Insureds and Agents, however, aver the clause in the subject agreement is “too narrow” for enforcement in this case, and the lower

court correctly agreed in denying the Motions to Compel on this ground. It is respectfully submitted that a “broadly worded ” arbitration clause between parties to an agreement would be substantially similar to the following: “The parties to this contract acknowledge and agree that **all claims, demands, disputes, or controversies of every kind or nature that may arise between them or relate to any of terms of this contract shall be settled by binding arbitration.**” (Emphasis added). Recently, our Supreme Court provided guidance regarding what is a broadly worded arbitration agreement, holding “[a] clause which provides for arbitration of all disputes ‘arising out of or relating to’ the contract is construed broadly.” *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213-14 (2013); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967) (labeling as “broad” a clause that required arbitration of “[a]ny controversy or claim arising out of or relating to this Agreement”).

In *In re Kinoshita & Co.*, 287 F.2d 951, 953 (2d Cir.1961), the Second Circuit discussed the language “arising out of *or relating to*” as the standard language recommended by the American Arbitration Association to make an arbitration clause “broad”. The court further stated that when an arbitration clause “refers to disputes or controversies ‘under’ or ‘arising out of’ the contract,” arbitration is restricted to “disputes and controversies relating to the Interpretation of the contract and matters of performance.” *Kinoshita* at 953. The Ninth Circuit Court of Appeals, in considering the same issue, held the phrase “arising under” is narrower in scope than the phrase “arising out of or relating to.” *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983).

Courts are confronted often with arbitration language in a contract that is both “broad” and “narrow,” and the discussion of the difference between the language could shed some

light on the language at issue in the 2010 Agency Agreement relied upon by the Insurers. In *Masztal v. Meritplan Ins. Co.*, 586 F. Supp. 2d 662 (S.D. Miss. 2008), when confronted with this issue, the court stated: “The contract in this case contains both narrow language, “arising out of,” and broad language, “relating in any manner to.” *Masztal* at 667. “[C]ourts distinguish ‘narrow’ arbitration clauses that only require arbitration of disputes ‘arising out of’ the contract from broad arbitration clauses governing disputes that ‘relate to’ or ‘are connected with’ the contract.” *Pennzoil Exploration & Prod. Co. v. Ramco Energy*, 139 F.3d 1061, 1067 (5th Cir.1998). Insureds and Agents assert South Carolina should adopt a similar common sense rule.

The 2010 Agency Agreement on which the Insurers base their claims is a “narrowly worded” document, only compelling arbitration in the following instance: “If any dispute or disagreement arises in connection with the *interpretation of this Agreement, its performance or nonperformance, its termination, the figures and calculations used or any nonpayment of accounts*, the parties will make efforts to meet and settle their dispute in good faith informally....” (See R. p. 456, ¶ 12.A (emphasis added)). The Insurers conceded this fact during oral argument. (R. p. 429, lines 24-25). As set forth above, the language applicable to this case is not only the judicially recognized restrictive phrase, “*arises in connection with*” used but that phrase is followed by even more restrictive language, “*the interpretation of this agreement.*” A narrow arbitration clause only submits certain, denominated disputes to arbitration, or it may exclude from arbitration specific issues. Where a narrow clause is used, if an issue of arbitrability arises, then the court must rule whether or not the parties have contracted to arbitrate a given dispute. See 83 Am. Jur. Proof of Facts 3d 1. The court in *Gerling Global Reinsurance Co.-U.S. Branch v. Ace Prop. & Cas. Ins. Co.*, 42 F. App'x 522,

523-24 (2d Cir. 2002), for example, held that the arbitration clause found in the contract in that case lacked the all-encompassing language requisite to a broad arbitration clause. *Gerling* at 523 (citing *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224-26 (2d Cir.2001)). The *Gerling* court found that the arbitration clause in that case was narrow, applying only to “irreconcilable difference[s] of opinion that concern the interpretation of the certificates.” *Id.* In the case at hand the arbitration clause is limited to disagreement to the interpretation of the agency agreement itself, and it is understandable why Appellants admitted to the court during argument that the agreement was “narrow”.

Despite conceding at oral argument that the Agency Agreement was “narrow,” Appellants in their brief now try to convince the Court that the agreement is “broadly worded.” Whether an arbitration agreement is “broadly worded” or “narrowly worded” is critical to the State and Federal Courts interpreting the contract provision. A clause which provides for arbitration of all disputes “arising out of or relating to” the contract is construed broadly. *See, e.g. Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967) (labeling as “broad” a clause that required arbitration of “[a]ny controversy or claim arising out of or relating to this Agreement”). The Fourth Circuit has held that such broad clauses are “capable of an expansive reach.” *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir. 1996). Both the Fourth Circuit Court of Appeals and this Court have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained. *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir.1988); *see also Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119. Thus, the scope of the clause does “not limit arbitration to the literal interpretation or performance of

the contract [but] embraces every dispute between the parties having a significant relationship to the contract.” *J.J. Ryan*, 863 F.2d at 321. In applying this standard, this Court “must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim.” *Id.* at 319; *see also Landers*, 402 S.C. at 109-10, 739 S.E.2d at 213 and *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118.

Unlike broad arbitration clauses as analyzed above, our courts have held “narrowly worded” arbitration clauses, as found in the case at hand, are subject to strict scrutiny. Therefore, when it “may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute,” arbitration should not be ordered. *Am. Recovery*, 96 F.3d at 92 (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960)); *see also Zabinski*, 346 S.C. at 597, 553 S.E.2d at 119 and *Landers*, 402 S.C. at 109, 739 S.E.2d at 213. The lower court, therefore, correctly ruled the clause at issue was too “narrowly worded” to be enforced.

IV. The trial court was correct in ruling the Insurers waived their right to compel arbitration.

“It is generally held that the right to enforce an arbitration clause may be waived.” *General Equipment & Supply, Co., Inc. v. Keller Rigging & Const., SC, Inc.*, 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001) (citing *Hyload, Inc. v. Pre-Engineered Prods., Inc.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct.App.1992)). “Waiver is the voluntary and intentional relinquishment of a known right.” *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct.App.1994). “In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration.” *General Equipment & Supply*, 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)). “There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case.” *Hyload, Inc.*, 308 S.C. at 280, 417 S.E.2d at 624.

Our courts have looked to the following factors to determine whether a party waived its right to compel arbitration: “(1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration.” *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). At least as to Wilson, Williams, Calhouns, Spires, Wiley, Bosler, Woffords, Garys, Wiltshire, Antoniaks and Lawton, if not all the Insureds and Agents, all three relevant factors are met.

The first factor to consider in analyzing waiver is the length of time between the filing of the action and the filing of the motion to compel arbitration. In the case of Agent Wilson, for example, he filed his action in November 2012. Approximately 11 months later, after answering the Complaint, serving and responding and/or objecting to extensive discovery⁸, and filing a Motion for Judgment on the Pleadings and/or Motion to Dismiss, the Insurers filed the Motion to Compel Arbitration. Eleven months is certainly an unreasonable length of time to delay seeking arbitration considering that the alleged binding agency agreement was intentionally withheld from the Insureds and Agents in the course of discovery. As to the Insureds, Williams, Calhoun, Spires and Wiley, for example, filed the Summons &

⁸ Agent Wilson specifically asked for any contracts between the Insurers and Dantice, Southern Risk or Willis to be produced in discovery. The Insurers stated a standard objection and refused to produce any responsive documents.

Complaints in their respective cases on December 13, 2012. On approximately April 4, 2013, the Insurers answered. On October 31, 2013, almost seven months after appearing and answering and after serving respondents with extensive discovery requests, the Insurers filed the instant motion. Likewise, Insureds Bosler, Woffords, Garys and Wiltshire filed their Complaints in February 2013. By April 2013, the Insurers had served and filed answers. After these cases had been pending in excess of six months and after the Insurers served extensive discovery requests, the Insurers filed the Motions to Compel.

Since Agent Wilson filed the first of these related actions in December 2012 and through the time the parties presented oral arguments, these cases currently had been pending approximately thirteen months.⁹ The Insureds and Agents argue that thirteen months, or more than one year, is an unreasonable length of time for the Insurers to seek arbitration, particularly given the nature of the instant case, the amount of discovery served, and the time devoted by counsel in establishing (or defending) the instant claims.

The Insurers argue that South Carolina cases involving waiver typically involve time frames of “18 months to five years.” (Brief of Appellants, p. 23). This argument is flawed because as the Court in *Hyload* held, the analysis in determining a substantial length of time involves not the number of months or years but is dependent upon “the facts of each case.” *Hyload*, 308 S.C. at 280, 417 S.E.2d at 624 (“There is no set rule as to what constitutes a waiver”). Likewise, the *Rhodes* court held “[w]hat is a ‘substantial length of time’ varies from one case to the next, depending on the extent of discovery conducted and the corresponding presence or absence of prejudice to the party opposing arbitration.” *Rhodes*, 374 S.C. at 127, 647 S.E.2d at 251.

⁹ From the time of the initial action filed by Wilson through the date the Insured and Agents filed their Respondents’ Brief, twenty-one months have passed.

The second factor South Carolina courts consider in analyzing waive involves whether the parties engaged in “extensive discovery before moving to compel arbitration.” *Id.* In this case, the Insureds and Agents submit extensive discovery had begun at the time the Insurers filed their motions, given the sheer volume of discovery requests served and exchanged. Although no depositions had yet been taken, the Insurers had served the Insureds and Agents with extensive discovery requests, and the parties had spent months gathering documents to respond to discovery and preparing and serving initial discovery requests. Additionally, counsel for the Insureds and Agents had begun consultation with expert witnesses and spent considerable amounts of time and money preparing these cases.

The third factor for the court’s consideration in determining whether waiver applies involves considering prejudice to the non-moving party by the delay in seeking arbitration. In this case, the delay in seeking arbitration was highly prejudicial to the Insureds and Agents. Although the Order of the lower court does not address this factor in detail, the Insureds and Agents clearly described this factor in their brief and at oral argument. In reviewing the record in this case, the Insureds and Agents would point out to the court that between November 1, 2012 and October 31, 2013, in the *Wilson* case for example, the parties filed forty-five documents in the Abbeville County Clerk of Court’s office. These documents included original complaints, amended complaints, original answers, amended answers, one amended answer and counterclaim, certificates of service of multiple interrogatories and requests to produce, certificates of service for answers to two different sets of interrogatories and requests to produce of the Insurers, two motions to dismiss filed by the Insurers which were set for hearings which were later cancelled by the Insurers, and memorandums by the parties on the motions to dismiss which were pending before the court. Additionally, the

Insurers consented to Agent Wilson's Motion for a Protective Order that was issued by Judge Griffith on August 7, 2013.

Despite all of this activity, the Insurers waited until October 31, 2013 to file their Motions to Compel Arbitration and waited until November 6, 2013 to withdraw their motions to dismiss which were set for a hearing on November 14, 2013. During this year, the Insurers availed themselves of assistance by the Court on four occasions, filing two motions and accompanying briefs which were set for hearing, preparing one letter to the court withdrawing the motion and cancelling the hearing, and agreeing to a consent motion for a protective order to apply to discovery. Also during this time, the Insureds and Agents retained two expert witnesses but delayed taking depositions until the voluminous discovery of all parties had been answered, including what had been objected to by the Insurers. Although no depositions were taken, the parties had spent considerable amounts of time and resources litigating these cases. To force the parties to arbitrate when the Insurers intentionally delayed in filing their Motions to Compel Arbitration would substantially prejudice the Insureds and Agents.

As an alternative ground, the Insureds and Agents submit the Insurers' delay in filing for arbitration is prejudicial on the basis the Insurers have affirmatively asked this court as plaintiffs in a declaratory judgment action in the *Gary* litigation to rule on the same factual issues at issue in the instant cases, yet now seek to prevent litigation and arbitrate these claims. The Insureds and Agents have spent considerable amounts of time, money, and other resources preparing for litigation in this case. The Insurers at all times have actively litigated the claims, even filing for declaratory judgment, and then at the last minute, filed Motions to Compel Arbitration. This delay tactic is highly prejudicial to the Insureds and Agents, and the Court should affirm the trial court on this ground as well.

As stated above, from the time the parties filed their initial pleadings until the time the Insurers filed their Motions to Compel, both sides of this litigation had a great deal of time invested in review of documents, research, expert witness consultations, and discovery, and a substantial length of time passed and a substantial amount of resources were spent in litigating these cases. To allow the Insurers to succeed in compelling arbitration after such a substantial amount of time and a substantial amount of work had transpired, all while intentionally withholding allegedly applicable arbitration documents and knowing all along that this defense was available to them, would be contrary to the test set forth in *Rhodes*. Therefore, the lower court correctly denied arbitration on this ground.

V. The trial court was correct in determining that the potential liability of the corporate Insurers could be based on a statutory duty which could make the Insurers liable for the “outrageous conduct” of their authorized and/or acting agents under the *respondeat superior* doctrine.

The Insureds and Agents assert, as the plaintiff did in *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 493-95, 689 S.E.2d 602, 604-05 (2010), that even if the Court held that their claims are encompassed by language of the arbitration clause, the clause does not apply because the alleged actions of the Insurers constitute “illegal and outrageous acts” unforeseeable to a reasonable consumer in the context of normal business dealings. The Court in *Partain, supra*, followed this reasoning in refusing to uphold an arbitration clause, as did the lower court in the instant case. (*See R. pp. 14-15*).

The Insureds and Agents base their complaints on allegations of fraudulent conduct and misrepresentations of the Insurers as principals for agent Willis and Dantice, arguing these Insurers are liable under S.C. Code § 38-43-10 and the *respondeat superior* doctrine. The trial court correctly found that the Insureds and Agents could not have foreseen outrageous actions of Willis and therefore cannot be bound to arbitration under the unsigned

agency agreement between the Insurers and Defendant Southern Risk Insurance Services LLC. The Insurers argue in their brief before this Court that the trial court “conflated” the actions of Willis with the actions of the Insurers. The Insureds and Agents respectfully disagree, and submit that a close review of the Order and other pleadings in this case will support the fact that the Insurers and Dantice and Willis acted illegally and fraudulently in procuring and issuing insurance policies. The Insurers, as the principals of Dantice and Willis and under a respondeat superior doctrine, are liable for Dantice and Willis’ actions, which could not be foreseen by a reasonable consumer in the context of normal business dealings. Therefore, the rule espoused in *Partain* applies equally to the Insurers, as principals, as it does to Dantice and Willis, and arbitration should not be compelled.

Finally, the Insurers argue that the lower court erroneously denied the motion on this ground because it failed to consider the recent case of *Landers v. FDIC*, 402 S.C. 100, 739 S.E.2d 209 (2013), where the South Carolina Supreme Court held even claims for intentional infliction of emotional distress may be subject to arbitration. The *Landers* case is clearly distinguishable from the facts at issue in the instant case. First, the Insureds and Agents do not seek to recover under a theory of intentional infliction of emotional distress. The outrageous conduct discussed in the complaints and the type of conduct held to be outside of the scope of arbitration in *Partain* is conduct not foreseeable by a consumer in normal business dealings and not the same as the type of conduct comprising the tort of outrage arising from an employer-employee relationship which is arguably foreseeable. Secondly, the *Landers* case involved an employment contract containing an arbitration provision and the outrageous conduct for which Landers sought to recover stemmed *directly* from that employment contract. In this case, the type of conduct for which the Insureds and Agents

seek to recover is completely outside of the scope of the purported agency agreement between the Insurers and Southern Risk. Further, the Insureds and Agents were not parties to the agreement containing the arbitration provision. Therefore, *Landers* is inapplicable to the facts at hand, and the trial court correctly denied the motion on the ground the conduct at issue was outrageous.

ADDITIONAL SUSTAINING GROUNDS

The Insureds and Agents argue two additional grounds exist on which this Court should affirm the ruling of the lower court denying the Motions to Compel Arbitration.

- 1. The trial court could have denied the Insurers' motions on the ground that the alleged agreements containing the arbitration clauses were intentionally withheld from the Insureds and Agents in discovery to prevent the same from being challenged by them.**

Substantive due process and the S. C. Rules of Civil Procedure require that critical documents to a matter pending in court, which could potentially end the trial and compel arbitration, must be timely provided to the other parties in the case in order that the documents can be appropriately challenged through discovery and appropriate cross-examination of the person or persons having knowledge concerning the documents. Specifically a portion of the attorney's oath requires "...fairness, integrity, and civility, not only in court, but also in all written and oral communications." Rule 402, SCACR. Further, Rule 37 of the South Carolina Rules of Civil Procedure prohibits situations where a party intentionally refuses to respond to specific questions in interrogatories and requests for production. In the Wilson case, the trial court issued an extensive discovery Order on August 9, 2013 (R. pp. 1-7), to which Insurers' attorneys consented, which protected the confidentiality of the agency agreement, and still Insurers did not produce the agency agreement until the filing of the Motions to Compel almost two months later on October 31, 2013.

Sanctions for discovery abuse are left to the sound discretion of the trial court. *See Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2010). However, severe sanctions, such as the dismissal of an action, should only be imposed in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights. *See Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996); *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 108-09, 410 S.E.2d 537, 541-42 (1991); *McNair v. Fairfield Cnty.*, 379 S.C. 462, 466, 665 S.E.2d 830, 832 (Ct. App. 2008); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198-99, 511 S.E.2d 716, 719 (Ct.App.1999).

It is respectfully submitted that this case is analogous to *Hilton Head Beach & Tennis Resort v Sea Cabin Corp.*, 305 S.C. 517, 409 S.E.2d 434 (Ct. App. 1991), wherein this court found that a trial court abused its discretion in admitting into evidence a copy of a gummed paper warning label which the defendant lumber supplier claimed was on the lumber at issue in the plaintiff's case. The crux of the *Hilton Head* case was whether the supplier had adequately warned the builder that the lumber at issue was not to be used outdoors. The court found the warning label should not have been admitted into evidence where the label had not been produced during discovery, although the defendant had been served a request for production at the time he was added to the litigation 15 months prior to trial and his responses were provided 11 months later, and the builder pushed the case to trial over the supplier's objection that discovery was not complete. In the case at hand, the agency agreements were specifically requested in discovery. The Insurers objected to responding to this request, and instead, waited months to file the Motions to Compel Arbitration. Based on the reasoning in

Hilton Head, the trial could have found the 2010 Agency Agreement, and the prior agreements later submitted by the Insurers, inadmissible in ruling on the instant motions.

It is not disputed that neither the Insureds and Agents nor any other adverse parties were ever given the opportunity to challenge the alleged agency agreements relied on by the Insurers to try to compel arbitration in this case. Judge Griffith could have denied the Insurers' motion on that basis alone and would have been correct had he done so.

2. The Insurers' Motion to Compel Arbitration as to the Insureds should be denied on the basis of S.C. Code Ann. § 15-48-10 which specifically exempts any insured or beneficiary under any insurance policy from arbitration.

In their Memorandum in Opposition to the Insurers' Motion to Compel, the Insureds raised S.C. Code § 15-48-10, arguing arbitration cannot be enforced against them as insureds under policies of insurance issued by Insurers. (R. p. 616). As argued in their Memorandum but not ruled upon either way by the trial judge, the Insureds assert South Carolina's Uniform Arbitration Act specifically exempts any insured under any insurance policy from being bound by arbitration provisions. (*Id.*, citing S.C. Code Ann. § 15-48-10(b)(4)). As held by this Court, the purpose of § 15-48-10(b) is to regulate the business of insurance. *See Cox v. Woodmen of the World Ins. Co.*, 347 S.C. 460, 468, 556 S.E.2d 397, 401 (Ct. App. 2001). This statutory section "reverse preempts" the Federal Arbitration Act through the application of the McCarran-Ferguson Act and specifically exempts insurance arbitration clauses. *Cox*, 347 S.C. at 468, 556 S.E.2d at 401. It is without dispute that each of the Insureds in this case were insureds under policies either issued, or paid for and purported to have been issued, by the Insurers. Although no South Carolina court has spoken as to whether this exemption may be applied to exempt insureds from arbitration clauses found in documents other than insurance policies, the Insureds and Agents submit the Court should so extend the exemption

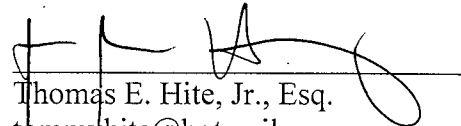
in keeping with the intention of the legislature in adopting the statute. To allow insurance companies to force third party insureds to arbitrate claims found in various contracts between the companies and their agencies would effectively prohibit insureds from litigating any insurance disputes. The exception outlined in § 15-48-10(b) above, therefore, should apply in the instant case, and the lower court could have correctly denied arbitration on this ground as well.

CONCLUSION

For the reasons stated above the Motions to Compel Arbitration were appropriately denied by the trial court and the appeal in this matter should be dismissed with costs.

Respectfully Submitted,

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Abbeville, South Carolina
January 23, 2015

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 Company 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 Co., Montgomery Mutual Insurance
Co., and Safeco Insurance Co. of America are.....Appellants,

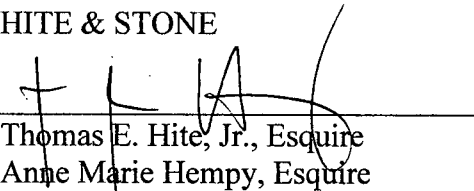
Of Whom Laurie Williams isRespondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

January 23, 2015

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THE STATE OF SOUTH CAROLINA
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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 Co., Montgomery Mutual Insurance
Co., and Safeco Insurance Co. of America are.....Appellants,

Of Whom Laurie Williams isRespondent.

PROOF OF SERVICE

I, the undersigned attorney with the law offices of Hite and Stone, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) herein below specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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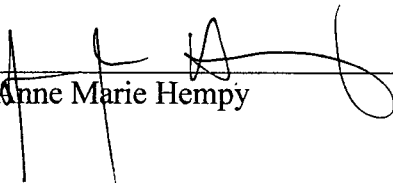
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January 23, 2015