79101

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., and Laurie Williams, ... Defendants,

Of Whom Peerless Insurance Co., Montgomery Mutual Insurance Co., and Safeco Insurance Co. of America are,..... Appellants,

Of Whom Laurie Williams is, ... Respondent.

PETITION FOR REHEARING

This petition is filed pursuant to Rule 221, SCACR. This Court issued its decision March 2, 2016. *See* Op. No. 5387 (Shearouse Adv. Sh. No. 9 at 73).

Respondents filed a motion to extend the deadline for this petition. This Court granted the request, extending the deadline to April 1, 2016.

The Respondents resubmit all arguments from their Final Briefs on the merits and additionally submit that the Court may have overlooked or misapprehended the following points in its decision:

1. The issues in this case are novel and the Court's opinion mistakenly extends the federal arbitration umbrella further than any South Carolina precedent and to the detriment of Respondents' constitutional right to a jury trial.

a) In the instant case, the Court considered a variety of novel issues regarding an arbitration contract, to include the fact that Respondents were non-signatories and non-parties, the agreement was unsigned and backdated, and the agreement involved entities not parties to the instant litigation. Further, the Court in this case subjects the Respondents, who are plaintiffs, to the arbitration provision found in an alleged agreement between defendants, including Appellants, in this case. By failing to address each of these novel issues in detail, the Court extended the arbitration umbrella further than any South Carolina court to date, basically holding if there is a contract (signed or unsigned) and if it touches upon the issues in the litigation, the arbitration provision contained within it controls. Under the holding in the instant case, an agency agreement containing an arbitration clause must only be signed by the insurance company and not the agent. The agreement also does not have to be authenticated by anyone in Court and it can be backdated to fit the time frame in question. The holding in this case is expansive. For example, it could be used by an insurance company "A" to force arbitration on a pedestrian injured by a negligent automobile driver insured by company "A" if there is an issue about the negligent driver's application or coverage limits. Under

the holding in this case, that dispute, and any other that is related, would require arbitration as long as company "A" can produce a purported copy of an unsigned agreement between it and the negligent driver's insurance agent, as long as the agreement contains an arbitration clause. That is exactly what is happening to some of the Respondents here, as is explained on Section 9 of this petition. Another example of the extension of this decision can occur when the arbitration clause in the agency agreement between company "A" and its agent is used as an offensive shield to deny a third party's right to a jury trial on a tort claim against insurance company "A" and its agent. This holding would be applicable in the future even when the third-party plaintiff has no contractual relationship whatsoever with insurance company "A" or its agent. *See* (Record pp. 78-88, 115-126, 376-386) (Complaints of Agents Wilson and Shirley).

b) The Court in its opinion has forced parties and *non-parties* to resolve their disputes through means not intended at the time of the formation of the contract. "The [United States] Supreme Court has reiterated the contractual nature of arbitration agreements, careful to avoid forcing parties to resolve their disputes through means not intended at the time of contract formation." *Dell Webb Communities, Inc. vs. Carlson*, No. 15-1385, 2016 WL 1178829, at *5 (4th Cir. Mar. 28, 2016) (citing *Stolt–Nielsen S.A. vs. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010)) ("[T]he FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'"); s*ee also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.") (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)); *First*

Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945 (1995) ("[A] party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration....").

As explained in detail hereafter, there is no evidence in the record from which the Court could conclude that the parties to this case intended to arbitrate any dispute, much less a dispute involving non-parties. The only evidence before this Court, which was not authenticated, is a signed agreement between the Appellants and entities that are not even parties to this litigation.

c) This decision further creates an exception to Rule 901, SCRE, by allowing counsel's arguments at the motion hearing *alone* to authenticate a copy of a document. Rule 901 requires a document's authentication before it can be received into evidence since a document is not subject to cross-examination. Authentication requires presenting competent evidence of the genuineness of a document and its execution by the party by whom it purports to be executed. *Williams v. Milling-Nelson Motors*, 209 S.C. 407, 410, 40 S.E.2d 633, 634 (1946). Here, Appellants made no effort to authenticate the arbitration agreement at the hearing before the circuit court. In fact, Appellants have never even been able to locate the original arbitration agreement at issue. Appellants attempted to authenticate the arbitration agreement *after* the hearing by submitting an affidavit of an employee, but as this Court correctly recognized, the circuit court excluded this untimely affidavit from consideration. Op. No. 5387 (Adv. Sh. at 77 n.4) ("While the Insurers attached an affidavit of one of their employees to the reply memorandum, the court specifically declined to leave the record open for the addition of new evidence. Because the affidavit was not properly admitted into evidence below, we do not consider it as part of the record on appeal.").

By affirming that the record was closed following the motion hearing, this Court should not have considered any of the additional evidence submitted after the hearing by the Appellants to authenticate the Agency Agreement at issue. Without consideration of such evidence, Appellants failed to authenticate and prove the existence of the contested documents at the motion hearing and thus removed any basis for overruling the trial court's finding that the agreements were not enforceable.

2. The Court overlooked or misapprehended critical issues regarding the 2010 Agency Agreement in establishing the agreement's validity.

In holding that the arbitration agreement was a valid contract, the Court discusses in detail the requirements for compelling a non-signatory to arbitration. In so doing, however, the Court never distinguishes between non-signatories who are parties to the agreement, and non-signatories who are *not* parties to the agreement. The Court overlooked the fact that the various agreements submitted by the Appellants/Insurers were between a variety of parties, some not even involved in the instant suit and none of whom were the Respondents. The Court further overlooked that none of the agency agreements were ever authenticated in any manner at the motion hearing by Appellants. *See* Section 1, *supra*. The agreements were only signed by one party, the Respondents have no legal ties to either of the parties to the agreement, and the effective dates of the agreements preceded the signature dates.

In order to enforce an unsigned contract, South Carolina law clearly establishes that the contract must be "accepted and acted on by [the non-signatory party]." *Jaffe v. Gibbons*, 290 S.C. 468, 473, 351 S.E.2d 343, 346 (Ct. App. 1986). This Court held "Southern Risk, Dantice, and Willis accepted and acted upon the 2010 Agency Agreement," Op. No. 5387 (Adv. Sh. at 80), but the Court failed to distinguish that

Respondents neither accepted the agreement nor acted on it. The Court never acknowledges the fact that Respondents were not parties to the arbitration agreement.

In *Malloy v. Thompson*, 409 S.C. 557, 762 S.E.2d 690 (2014), the Supreme Court considered whether a non-party/alleged third-party beneficiary of a contract containing an arbitration clause may be compelled to arbitrate as a non-signatory. The *Malloy* court held where the plaintiff's claims were based on duties owed to all persons generally and not specifically on the duties in the alleged contract, the plaintiff would not be bound to arbitrate. 409 S.C. at 562, 762 S.E.2d at 692-93. The facts in the instant case mirror those in *Malloy*, with the exception of the fact that the arbitration agreement considered here was not even signed by the other party and was also backdated with no evidence in the record concerning when the agreement became effective. The Court's decision effectively overrules *Malloy* but does not acknowledge its precedent or explain why arbitration can be foisted upon innocent citizens who had no knowledge of the underlying arrangement between an insurance agent and the agent's parent company and were not "intended beneficiaries" of that agreement.[1]

In support of the Motion to Compel Arbitration, Appellants submitted two different arbitration agreements to the circuit court, including their addendums, with one containing a signature and the other without a signature. The first agreement submitted in support of the Motion to Compel Arbitration contained an effective date of August 15, 2007, was signed on August 21, 2007 by a representative of Liberty Mutual Insurance Company, and signed on January 5, 2008 by a representative of Assure Alliance, Inc.

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[1] Respondents addressed *Malloy* in their Final Brief, (Final Brief of Respondents, pp. 15, 18), and during oral arguments.

(Record pp. 439-50). Other than oral arguments presented by counsel, Appellants submitted no evidence at the hearing before the circuit court to establish the relationship between Assure Alliance, a corporate entity which is not a party to this case, and Southern Risk Insurance, one of the named defendants. After the hearing, Appellants attempted to establish a relationship by submitting additional documentation with their reply brief, to include an affidavit of a Liberty Mutual employee. The circuit court, however, closed the record after the hearing and thus none of the additional evidence was considered. *See* Op. No. 5387 (Adv. Sh. at 77 n.4). The Court's decision overlooked the fact that the 2007 Agreement is between an entity that is not a party to this litigation and the Court's decision never addresses the fact that no evidence was submitted to establish a relationship between that party and Southern Risk. Further, **and significantly**, the Court misapprehended the 2007 Agreement as being signed by a representative of Southern Risk. *See id.* (Advance Sheet at 81 n.9) ("we note the 2007 Agency Agreement—which contains an identical arbitration provision and was signed by a Southern Risk representative—would have remained in effect during the period of Willis's alleged wrongdoing."). The 2007 Agreement was in fact signed by a representative of Assure Alliance.[2]

The second agreement before the Court, coined the 2010 Agency Agreement, contained no signature of Southern Risk Insurance and included an effective date of April 1, 2010. (Record, pp. 451-467). The signature line for Southern Risk is dated May 31, 2012, but was never signed, and neither were the addendums to the agreement from

[2] As discussed in Section 6, *infra*, the only agreement in the Record that was actually signed by a representative of Southern Risk was the 2007 Safeco Limited Agency Appointment and Agreement (Record p. 503), submitted after the record was closed. Significantly, this Agreement does *not* contain any arbitration provision.

Safeco and Montgomery. The Court addresses at length the issue of the agreement never being signed, but overlooks the fact that the 2010 Agreement was dated for signature some two years after the effective date. It is difficult to believe the law in South Carolina would allow an unsigned contract to be in effect for two years before the other party is required to sign it. Finally, the Court overlooked the fact that there were no original copies of the 2007 Agreement or the 2010 Agreement produced to this Court or to the circuit court, creating the evidentiary issues as outlined in Section 1 above.

Finally, the Court's decision ignored basic principles of contract law that "when a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense." *Cobb v. Benjamin,* 325 S.C. 573, 578, 482 S.E.2d 589, 591 (Ct. App. 1997). The contract does not envision or discuss fraudulent acts of agents, as occurred in the instant case. It is difficult to imagine the parties to these contracts would (or could) have reasonably foreseen the wrongful acts that this insurance agent is alleged to have perpetrated. Respectfully, the Court erred in holding that the Respondents' allegations of wrongdoing "arose out" of the 2010 Agency Agreement.

3. The Court overlooked general principles of agency law in holding that "but for" the Agency Agreements, the Appellants/Insurers would owe no duty to the Respondents/Insureds.

The opinion, as it stands, overturns a well-established body of case law in South Carolina in which liability for the wrongful acts of an insurance agent can be imputed to the insurance companies with whom the agent works. *See Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 298, 468 S.E.2d 292, 296-97 (1996) ("The doctrine of apparent authority focuses on the principal's manifestation to a third party that the agent has

certain authority. Accordingly, the principal is bound by the acts of its agent when it places the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe that the agent has certain authority and they in turn deal with the agent based upon that assumption.") Pursuant to *Rickborn,* insurance companies are liable for the wrongful acts of their agents under the doctrine of respondeat superior and under agency principles of apparent authority. This is so even when an agent acts against the principal's instructions.

This Court held "the allegations in [the Respondents'] complaints necessarily depend upon the terms, authority and duties created and imposed by that agreement." *See* Op. No. 5387 (Adv. Sh. at 86-87). But none of the 14 Complaints filed by Respondents cite to or reference the agency agreements or outline any duties arising from the agreements. (Record, pp. 78-97, 104-193, 314-337, 348-388) (referencing all Complaints of Respondents). The Court overlooked *Rickborn* and its progeny in stating that Respondents cannot reach the Appellants/Insurers without the 2010 Agency Agreement. Op. No. 5387 (Adv. Sh. at 87) (holding Respondents "would not be able to reach the Insurers with their claims in the absence of the agreement establishing the agency relationship between the Insurers, and Southern Risk, Dantice and Willis"). *But see Noisette v. Ismail,* 299 S.C. 243, 250, 384 S.E.2d 310, 314, *rev'd on* other grounds at *Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d 122 (1991) (citing J. Appleman and J. Appleman, Insurance Law and Practice § 8693 at 259–61 (1981)) ("The restrictions and limitations existing upon the authority of a general agent as between such agent and the company are not binding upon policyholders in their dealings with such agent, in the absence of knowledge of [sic] their part of such limitations.").

By overlooking *Rickborn* and clear principles of agency theory, the Court effectively created a new rule that third parties cannot recover against a principal for an agent's actions without the existence of some contractual relationship between agent and principal. Finally, as the circuit court correctly distinguished, Respondents would not be permitted to stand in the shoes of the parties to the Agency Agreement and seek relief therefrom. (Record, p. 420). Their claims are based on apparent authority—that the actions of an agent are imputed to a principal—and the Court overlooked this distinction.

4. This Court repeatedly and erroneously construed opposing counsel's statements (both written and spoken) as facts, with absolutely no evidence in the record to substantiate the same.

It is well-established in South Carolina, and our courts have "repeatedly held that statements of fact appearing only in argument of counsel will not be considered." *McManus v. Bank of Greenwood,* 171 S.C. 84, 171 S.E. 473, 475 (1933); see also *Shinn v. Kreul,* 311 S.C. 94, 102, 427 S.E. 2d 695, 700 (Ct. App. 1993). "[W]here there is no stipulation, a representation of fact by counsel in written briefs, memoranda, or made during oral argument may not be considered by the court where it is unsupported by the record." *Cobb,* 325 S.C. at 581, 482 S.E.2d at 593 fn.2 (citing *Gilmore v. Ivey,* 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct.App.1986)). In footnote 4 of its Opinion, the Court noted that the circuit court "specifically declined to leave the record open for the addition of new evidence" following the motion hearing. Op. No. 5387 (Adv. Sh. at 77 fn.4). This Court correctly excluded a contested hearsay affidavit on this ground, but erroneously considered additional evidence that was submitted to the circuit court after the hearing and cited by Appellants in their brief. (Record, pp. 468-503) (documents submitted by Appellants after record was closed). Specifically, the Court referenced the

2007 Agency Agreement between Assure Alliance and Appellant. Without considering documents submitted after the record was closed, the Court would not have evidence to establish a relationship between Assure Alliance and Southern Risk, other than by argument of Appellants' counsel. For this reason, the 2007 Agency Agreement should not have been considered.

The Court held "Southern Risk, Dantice and Willis accepted and acted upon the 2010 Agency Agreement." Op. No. 5387 (Adv. Sh. at 80). There is nothing in the record to prove this fact as stated by the Court. In fact, the Appellants' responsive pleadings *denied* that Willis was their agent. (Record p. 197 at ¶13) (denying Willis was an agent of the Insurers or acted with their permission in regard to the acts alleged). Further, Dantice's attorney told the trial court that his client had no knowledge of an arbitration agreement. (*Id.* p. 433) ("There is no written agency agreement that my client Jesse Dantese [sic] and Southern Risk have entered into with Liberty Mutual.").

The Court further held "Willis ... had no authority to sell insurance on behalf of the Insurers in the absence of the 2010 Agency Agreement the Insurers entered into with her employer, Southern Risk." Op. No. 5387 (Adv. Sh. at 85). There is nothing in the record to prove this. The Court failed to recognize that Respondents' lawsuits are not based on the agency agreement but are based instead on common law agent/principal duties. It is also important for the Court to consider that had the 2010 Agreement never been produced by Appellants, Respondents' claims would still be valid. This is because the Respondents base their suits on common law and statutory duties owed by the insurance company and agent to the general public, and their claims have nothing to do with the insurance company and agent's agency agreement.

In Footnote 8, the Court holds the agency agreement involves interstate commerce. Op. No. 5387 (Adv. Sh. at 79-80 fn.8). In so holding, the Court even analyzed where insurance premiums and commissions would have been sent, without any evidence in the record to support such analysis. *Id.* ("some or all of the insurance premiums ... as well as any resulting commissions ... would have been sent from outside of South Carolina."). But Appellants presented no evidence other than attorney comments made during the motion hearing and in Appellants' brief that determines whether or not the agreement involves interstate commerce.

Finally, in ruling on the additional sustaining grounds regarding failure to produce the agreement in discovery, this Court found the Appellants raised "legitimate objections to discovery in the instant case and did not produce any items." *Id.* (Adv. Sh. at 94). This language is taken directly from Appellants' brief. *See* (Final Amended Reply Brief of Appellants at p. 21); *see also* (Final Brief p. 20) (stating Appellants' objections to discovery were "legitimate, legally supported, reasonable and not unusual."). The Court had no legal basis to rule in Appellants' favor on this point because Appellants did not include *anything* on this point in the record – this Court does not know what objections they raised, the discovery responses are not in the Record on Appeal. *See* Rule 210(h), SCACR (holding the court may not consider a fact which does not appear in the record on appeal); *see also Ravan v. Greenville Cty.*, 315 S.C. 447, 460, 434 S.E.2d 296, 304 (Ct. App. 1993) ("the matters raised by the landowners are completely outside the record and may not form the basis for a reversal").

5. The Court erred in finding Appellants' actions were foreseeable to a reasonable consumer in the context of normal business dealings, incorrectly applying *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 644 S.E.2d 705 (2007).

The Court held "the parties to the 2010 Agency Agreement did contemplate that ordinary claims directly related to their agency relationship would be submitted to arbitration pursuant to the agreement governing that relationship." Op. No. 5387 (Advance Sheet at 88). An insurance agent's stealing and fraud is not "ordinary," and it is not the type of conduct contemplated by the parties to the Agency Agreement.

Additionally, in reaching its decision regarding the outrageous conduct claim, the Court presumes the parties are seeking to recover under a negligent supervision cause of action. None of the Respondents assert a cause of action for negligent supervision, however, and instead seek to recover for causes of action directly against the Appellants as principals of Willis, their agent.

6. In addressing waiver, the Court overlooked important factors which could have been used to sustain the circuit court's holding.

First, the Court mentions the amount of litigation that had been filed prior to the filing of the Appellants' Motion to Compel, but the Court overlooks the fact that the Appellants affirmatively sued two Respondents (the Garys) in federal court and then again sued Respondent Williams in this case, bringing her into this action by way of cross-claim. At no time during either action did the other side allege an arbitration agreement existed. This Court failed to acknowledge that there was evidence on which the trial court could base his decision on waiver. In doing so, this Court's decision violates the standard of review. *See Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009) ("The determination of whether a claim is subject to arbitration is subject to

de novo review. Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the factual findings.").

Additionally, in analyzing the prejudice factor under the waiver claim, the Court overlooked the important fact that the only agreement actually signed by Jess Dantice as a representative of Southern Risk was an agreement that did not contain an arbitration clause. (Record p. 503). This agreement was submitted after the hearing on the Appellants' motion to compel. (*Id.*). By withholding the only agreement that was actually signed and executed – an agreement that coincidentally did not contain an arbitration clause – the Appellants improperly handicapped Respondents' ability to defend the issue in this Court. At the hearing before the trial court while the record was still open, if Respondents had known that there was a signed agency agreement between the Insurance company and Southern Risk *which did not* contain an arbitration clause, they would have been able to argue that the signed agreement should be enforced and not the unsigned agreement; the trial court could have validly ruled for the Respondents on that basis to deny arbitration. This issue regarding the signed agreement *with no arbitration clause* was raised in Respondents' brief and at oral argument but overlooked by the Court.

7. The decision confuses the Insureds/Respondents' allegations with those filed by the Agents/Respondents in addressing the issue of the relationship between the 2010 Agency Agreement and the instant claims. The decision erroneously concludes all claims sound in negligent supervision, but the pleadings establish otherwise.

Respondents Wilson and Shirley are insurance agents who seek to recover against the Appellant Insurance Companies for violation of the Unfair Trade Practices Act, Civil Conspiracy, and Tortious Interference with Contractual Relations. Wilson's Amended

Complaint alleges that Laura Willis acted "with the express or implied permission of the other Defendants," (Record p. 120 at ¶13), that the Insurers, by and through their agent Willis, "made numerous misrepresentations to the general public and have gained an unfair and illegal business advantage in doing so," (Record, p. 123 at ¶18; pp. 123-23 at ¶23), that the Insurers individually and through their agent "conspired together and worked together and coordinated their efforts with a common design and plan to restrain trade by putting the Plaintiff ... out of business and in the process make huge sums of money for the Defendants," (Record, p. 124 at ¶27), and that the Insurers (along with the other Defendants) "repeatedly and intentionally procured the breach and/or termination of [Plaintiff's] contracts by using false statements and illegal and improper acts with no legal justification for doing so, resulting in the virtual destruction of the Plaintiff's business and loss of business profits." (Record, p. 125 at ¶31).

The Court held "all of the duties the Insurers allegedly breached directly arose out of and touched upon the provisions of the agreement." Op. No. 5387 (Adv. Sh. at 85). In so holding, the Court failed to distinguish between the Agent Respondents' claims and the Insured Respondents' claims. The Court held "the main crux of the Insureds' and Agents' claims was that they [the Insurance Companies] failed in their duties to investigate, train and supervise and audit Willis." *Id.* Yes, negligent supervision is part of the claim, but the pleadings also allege active participation in a conspiracy. *See* (Record p. 124) (Am. Complaint of Wilson) (alleging the Insurers acted in conjunction and conspiracy with Willis to increase business by fraudulent claims practices). All of the Respondents' claims were based on duties owed to all persons generally and not specifically on the duties in the agency contract.

8. In ruling on the Statute of Frauds, the Court overturned the circuit court, holding that the contract was capable of performance within one year and overlooked the significance of the varying dates on the agreements at issue.

The Court held "performance of the 2010 Agency Agreement was possible within a one-year period because the agreement was for an indefinite term and either party could terminate it at will—with or without cause—by giving as little as ninety days' notice." Op. No. 5387 (Adv. Sh. at 82). This holding was erroneous because the agreement was signed by the Appellants in 2010 but presented to Southern Risk for signature in 2012, evidencing that the contract was at least expected to span over a period of two years. The Court had no evidence in the record concerning what the parties intended by having an effective date in 2010 but a signature date for at least one of the parties in 2012, and the Court overlooked the importance of the backdating of the agreement itself. No South Carolina court has addressed the implications of backdating in light of the Statute of Frauds. *But see Parker v. Byrd*, 309 S.C. 189, 191, 420 S.E.2d 850, 851 (1992) ("The term 'backdated' is used to identify Byrd's proposal that the transaction be effective at a date earlier than the date the document was signed. No opinion is requested or expressed as to the propriety of such a provision.").

9. Regarding the first alternative sustaining ground, the Court erred in its finding that the exemption from arbitration found in Section 15-48-10(b)(4) is not applicable.

The Court held the causes of action against the Appellant Insurance Companies "are not the claims of 'any insured or beneficiary under any insurance policy.'" Op. No. 5387 (Adv. Sh. at 95). There are no facts in the record by which the Court can reach this conclusion, and the Court ignores the fact that other than Respondents Wilson and Shirley, none of Respondents have legal standing to sue the Insurers without being an insured. The Appellants admitted in their various answers that the Insured Respondents

were purchasers of insurance policies and referred to them as "Insureds" throughout their pleadings and briefs. In fact, in their Answer to the Complaints of Richard Wilson, the Appellants refer to the "terms and conditions of [the] insurance policies" as an affirmative defense. (Record, p. 201). This Court paradoxically refers to the Respondents over forty times as "Insureds," yet holds the Respondents' causes of action are "not the claim of any insured or beneficiary under any insurance policy." Op. No. 5387 (Adv. Sh. at 95).

Additionally, the Court overlooked and/or failed to address the fact that Section 15-48-10(b) exempts from arbitration "any claim arising out of personal injury." The claims of Respondent Laurie Williams arise directly out of her personal injury after she was struck by a vehicle driven by Respondent Cynthia Gary. But for the personal injury of Respondent Williams and her attempt to recover liability insurance from the Appellants for her injuries, she would not be involved in this litigation. The Court overlooked this fact entirely, and counsel would submit by this omission, the Court extends arbitration to cases arising out of personal injury if in such cases there exists a dispute regarding insurance coverage.

10. On the same date the Court of Appeals issued its opinion, the Court issued another opinion also dealing with the issue of enforcing an arbitration provision on a non-signatory which is contrary to the holding in the case.

In *Thompson v. Pruitt Corporation*, Op. No. 5384 (S.C. Ct. App. filed March 2, 2016) (Shearouse Adv. Sh. No. 9 at 34-49), this Court correctly recognized that the first step in the third-party beneficiary analysis is determining whether a valid contract that the moving party is trying to enforce exists. Op. No. 5384 (Adv. Sh. at 44) (*citing Dickerson v. Longoria*, 995 A.2d 721, 742 (Md. 2010) ("Before one can enforce a contract,

however, whether as a party to the contract or as a third-party beneficiary, there must be a contract to enforce."). In the instant case, the Court failed to look to the four corners of the alleged contracts containing the arbitration clause because if it had done so, the Court would have discussed that no evidence in the record supported the inconsistent dates in the contracts, which spanned over a period of two years.

Also in the *Thompson* case, the Court stated "a third-party beneficiary is a party that the contracting parties intend to directly benefit." Op. No. 5382 (Advance Sheet at 44) (citing *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005)). In the present case the Court overlooked this important analysis and case law. Here, there is no evidence in the record that the contracting parties intended to benefit Respondents in any way.

Finally, in *Thompson* the Court noted "a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement." Op. No. 5382 (Advance Sheet at 44). Here, there is no evidence that Respondents were in any way attempting to enforce an agency agreement between the insurance company and the selling agent, especially considering that they were not even aware that an agreement existed until the motion to compel arbitration was filed by Appellants.

Conclusion

Respondents request this Court grant this petition, withdraw its decision, and issue a decision affirming the circuit court for correctly denying Appellants' motion to compel arbitration.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

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Abbeville, SC
March 29, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
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Eugene C. Griffith, Jr., Circuit Court Judge

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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.

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):

Pleadings: Petition for Rehearing

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March 30, 2016

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March 30, 2016

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
1015 Sumter Street, 5th Floor
Columbia, SC 29201

RE: Richard W. Wilson v. Laura B. Willis, and Jesse A. Dantice, et al.
Appellate Case No. 2014-00946

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of the *Petition for Rehearing* in the referenced case. I have also enclosed a proof of service of this document on counsel of record and a $25.00 check for filing this petition. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

With kind regards, I am,

Very truly yours,

Anne Marie Hempy
Attorney for Respondents

Enclosures

cc: C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
Miles E. Coleman, Esquire
A. Mattison Bogan, Esquire
Robert C. Calamari, Esquire
Jane H. Merrill, Esquire