THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

Case No. 2018-CP-26-06576

Cleo Bertiaux as Guardian for Kathryn G. Parrish, Appellant,

v.

NHC Healthcare/Garden City, LLC, Respondent.

REPLY BRIEF OF APPELLANT

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February 10, 2020

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ARGUMENT

I. THE LOWER COURT'S ORDER IS IMMEDIATELY APPEALABLE BECAUSE THE ORDER DISMISSED PLAINTIFF'S ACTION AND DID NOT STAY THE ACTION PENDING ARBITRATION.

In their brief, Respondent acknowledges Widener v. Fort Mill Ford, 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009) is controlling. In Widener, this Court specifically held Carolina Care Plan, Inc. v. United HealthCare Services, Inc., 361 S.C. 544, 606 S.E.2d 752 (2004) did not bar an immediate appeal when the lower court dismissed an action to compel arbitration. "By dismissing Widener's action, the court finally determined the rights of the parties; therefore, we have jurisdiction pursuant to section 14-3-330 of the South Carolina Code (Supp. 2007)." To avoid this holding, Respondent's offer two reasons: That the issue was not preserved for appeal or in the alternative that this court should merely remand this action and order the lower court to stay the action even though Respondent's never asked the lower court to stay the action. Neither argument is compelling and each should be rejected by this court.

An issue is preserved for appeal "[s]o long as the judge had an opportunity to rule on an issue, and did so..." State v. McDaniel, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995) *quoting* Dunn v. Coca-Cola Bottling Co., 311 S.C. 43, 426 S.E.2d 756 (1993). In the case before this Court, Respondent filed a "Motion to Dismiss and Compel Arbitration." Respondent also filed a supporting "Memorandum of Law in Support of the Motion to Dismiss and Compel Arbitration on Behalf of Defendants." In response, Appellant filed a "Memorandum of Law in Opposition to Defendant's Motion to Dismiss and Compel Arbitration" and made oral arguments in opposition to the Motion to Dismiss and Compel Arbitration. The lower court ruled on the only Motion before it: a Motion to Dismiss and Compel Arbitration. Because the lower court "had an

opportunity to rule on an issue, and did so..." the issue is preserved for appeal. State v. McDaniel, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995)

It is noteworthy and significant that at no point did Respondent ever ask the lower court to stay the pending action while the case was arbitrated. Respondent's Initial Brief is the first time they have ever asked any court to stay this proceeding pending arbitration. To this point, Respondent's position has always been that the action should be dismissed, not stayed. Respectfully, Respondent's cannot seek from this court relief they did not seek from the lower court.

Moreover, Respondent's cannot shift their burden to Appellant by claiming Appellant should have asked the lower court to stay the action through a Rule 59(e) motion. Appellant opposed the only Motion filed by Respondent and that was a Motion to Dismiss. It was not and is not Appellant's duty to redraft Respondent's Motion to Dismiss through a 59(e) Motion. If Respondent's had wanted the action stayed pending arbitration or if Respondent had wanted the lower court to consider a stay in addition to a motion to dismiss, it was incumbent on them, not on Appellant, to make such a Motion.

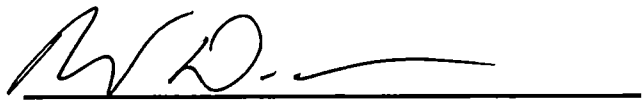
In Widener this Court never reached the issue of whether the arbitration clause before it was valid and enforceable. However, in the case now before this Court the procedural posture and motions presented to the lower court are different and mandate a different result. Specifically, the Respondent in Widener "moved to dismiss or stay the proceedings and compel arbitration." Thus, in Widener this Court had before it an alternative motion to stay the proceedings and as part of its ruling this Court acted upon that alternative motion. In this case, Respondent never sought or received a stay from the lower court. Unlike the Respondent in Widener, Respondent in this case moved only to dismiss the case in its entirety. There is simply

no motion to stay in the record like there was in Widener. Accordingly, this Court should address the issue of arbitration on its merits.

CONCLUSION

For the reasons outlined above and as more fully explained in Appellant's Brief, this Court should reverse the lower court order dismissing this action and compelling arbitration.

Respectfully submitted,



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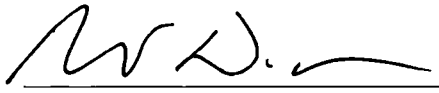
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Reply Brief of Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules. Counsel further certifies that the reply brief of appellant complies with the Order of the Supreme Court of South Carolina, *Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings,* 407 S.C. 607, 757 S.E. 2d 421 (April 15, 2014).



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February 10, 2020

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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Re: Cleo Bertiaux for Kathryn G. Parrish v. NHC Healthcare, et al.
Case No. 2018-CP-26-06576

Dear Ms. Kitchings:

Enclosed for filing is a Reply Brief of Appellant in the above case. Also enclosed are the following:

1) Proof of service; and,
2) Certificate of Counsel.

February 10, 2020

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