THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2017-002241

Stephanie Walker Weaver,.....Respondent,

v.

Brookdale Senior Living, Inc., HBP LeaseCo, LLC d/b/a Brookdale Charleston, Terri Robinson, John Does, and Richard Roe Corporations, ...Defendants,

Of whom Brookdale Senior Living, Inc., HBP LeaseCo, LLC d/b/a Brookdale Charleston, and Terri Robinson are the .....Appellants.

FINAL BRIEF OF RESPONDENT

Kenneth L. Connor, SC Bar No. 100298
C. Caleb Connor, SC Bar No. 100517
CONNOR & CONNOR, LLC
224 Park Avenue SE
Aiken, SC 29801
Phone: (803) 226-0543

Eliza H. Cantwell, SC Bar No. 101689
Joshua P. Cantwell, SC Bar No. 76368
CANTWELL LAW FIRM, LLC
P.O. Box 600
Charleston, SC 29402
Phone: (843) 801-4104
Attorneys for Respondent

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P.O. Box 600
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Phone: (843) 801-4104
Attorneys for Respondent

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STATEMENT OF THE CASE

This action arises out of a 2016 incident in which Respondent Stephanie Walker Weaver ("Weaver" or "Respondent") found her grandmother, Bonnie Walker, dead after being mauled and dismembered by an alligator when she was permitted to wander from Appellants' Brookdale Senior Living, Inc., and HBP LeaseCo, LLC d/b/a Brookdale Charleston (collectively "Brookdale") assisted living facility. On June 19, 2017, Respondent filed a Complaint asserting causes of action for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress/outrage. (R. pp. 10-13). On July 19, 2017, Brookdale filed a motion to dismiss or, in the alternative, to compel arbitration. (R. p. 15). On August 28, 2017, Respondent

filed a Response in Opposition to Defendants' Motion to Dismiss or, in the alternative, to Compel Arbitration. (R. p. 51). On August 31, 2017, the Honorable J.C. Nicholson, Jr., held a hearing on the motion. (R. p. 1). On September 28, 2017, the lower court filed an order denying the motion to dismiss and compel arbitration. On October 27, 2017, Appellants filed a notice of appeal. (R. p. 78).

Respondent filed a motion to dismiss as unappealable the appeal of the denial of Appellants' Rule 12(b)(6), SCRCP, motion to dismiss.[1] One judge of this Court denied the motion.

FACTS

On May 31, 2016, Bonnie Walker and HBP Leaseco, LLC d/b/a Brookdale Charleston entered into a residency agreement. (R. p. 36). James H. Walker, Mrs. Walker's son and power of attorney, executed the residency agreement on her behalf. (R. pp. 36, 38). The Agreement states it "is made by and between HBP LeaseCo, L.L.C. d/b/a Brookdale Charleston (the 'Company,' 'us,' 'we,' or 'our') and Bonnie Walker ('Resident,' 'you' or 'your')." (R. p. 24). Brookdale is an assisted living facility and Appellant Terri Robinson worked as the facility administrator. (R. p. 5, ¶¶ 4-5).

Mrs. Walker lived at Brookdale from June 4, 2016, until her death on July 27, 2016. (R. p. 7, ¶ 18). Appellants knew that Mrs. Walker had a history of wandering and sleep-walking. *Id.* at ¶ 21. Despite this knowledge, Appellants permitted Mrs. Walker to wander away from the facility at around 12:15 a.m. on July 27, 2016. (R. p. 8, ¶ 23). Appellants did not discover that she was

[1] "[T]he denial of a motion to dismiss is not directly appealable." *Levi v. N. Anderson Cnty. EMS*, 409 S.C. 374, 381-82, 762 S.E.2d 44, 48 (Ct. App. 2014) (internal quotation marks omitted) ("Courts cannot review a decision that has not been made. . . . the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings." (internal quotation marks and citations omitted)).

missing until around 7:15 a.m., at least seven hours after she disappeared. *Id.* at ¶ 24. Mrs. Walker was ninety-years-old. (R. p. 51).

Before looking for Mrs. Walker, Appellants notified her family that she was missing from the facility. (R. p. 8, ¶ 25). Her family, including Weaver, went to the facility to help find Mrs. Walker. *Id.* at ¶ 26. Appellants failed to find Mrs. Walker by the time Weaver and her parents arrived. *Id.* at ¶ 26. Weaver began searching for her grandmother. *Id.* at ¶ 27. She walked to the back of the facility property, where a retention pond is located. *Id.* at ¶ 27. Weaver found the remains of her grandmother's dead body floating in the pond, where she had been dismembered by an alligator. *Id.* at ¶ 29.

Weaver suffers injury from the horror of finding her grandmother's dead, dismembered body. (R. p. 9, ¶ 32). Among other injuries, Weaver suffers from anxiety, disturbed sleep, loss of enjoyment of daily activities, shame, dread and fear, and impairment of personal relationships and the ability to concentrate. *Id.*

The estate of Bonnie Walker brought survival and wrongful death claims. (R. p. 16). Appellants settled those claims. *Id.* Weaver received no recovery from the wrongful death action as she was not a statutory beneficiary. (R. p. 83 lns. 8-12).

Weaver brought this separate action for her personal injuries suffered from finding her grandmother's dead body floating in a pond after being dismembered by an alligator. Weaver does not seek wrongful death damages from the death of her grandmother such as wounded feelings and grief and sorrow. Rather, she seeks damages she suffered personally, beyond the loss of her grandmother, because she found Mrs. Walker's dead, dismembered body after Appellants called the family, failed to locate Mrs. Walker themselves in over seven hours of her disappearance, and failed to warn Weaver of the dangers of the retention pond. (R. pp. 9-10, ¶¶ 32, 36, 38).

Weaver asserted causes of action for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress/outrage. (R. pp. 10-13). Appellants filed a motion to dismiss or, in the alternative, to compel arbitration. (R. p. 15). Appellants argued the sole remedy available to Weaver was a wrongful death claim. (R. pp. 16-17). Appellants further argued Weaver could not recover for negligent infliction of emotional distress because she did not witness the alligator attack and could not recover for intentional infliction of emotional distress because they allegedly did not direct conduct towards her. (R. pp. 17-18). In a memorandum in support of the motion, Appellants argued Weaver could not state a negligence claim because they do not owe her a duty. (R. p. 67).

Appellants' motion to compel arbitration is based on the residency agreement entered into between Mrs. Walker and HBP LeaseCo, L.L.C. d/b/a Brookdale Charleston. (R. pp. 18-20). Weaver is neither a party nor a signatory to the residency agreement. The arbitration agreement at issue is a section within the residency agreement and is approximately two-and-a-half pages. (R. pp. 30-33). The arbitration agreement states it "binds third parties not signatories to this Arbitration Provision, including any spouse, children, heir, representatives, agents, executors, administrators, successors, family members, or other persons ***claiming through the Resident***, or persons ***claiming through the Resident's estate***, whether such third parties make a claim in the representative capacity or in a personal capacity." (R. p. 32, ¶ 14) (emphasis added). Regardless of its validity, this provision related to third parties applies only to a person claiming through the Resident. *Id.* Weaver does not claim through Mrs. Walker. Rather, she makes an independent, personal claim based on her unique injuries.

The Honorable J.C. Nicholson, Jr., held a hearing on Appellants' motion. On September 28, 2017, the lower court denied the motion in its entirety. (R. pp. 1-3). The lower court denied

the Rule 12(b)(6) motion to dismiss because it found "Plaintiff has sufficiently plead each cause of action." (R. p. 2). It also denied the motion to compel arbitration because "[n]othing in the [arbitration] agreement shows that Plaintiff was a party to the arbitration agreement or that Mr. Walker had any authority to bind Plaintiff to such an agreement." (R. p. 3). Further, Appellants failed to show any facts "to justify binding Plaintiff to arbitration under" any theory of assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary, waiver, or estoppel. (R. pp. 2-3). Finally, the lower court found "Plaintiff's tort claims appear to be separate and distinct from any wrongful death or survival claims arising out of the decedent's injuries and death." (R. p. 3). Appellants did not file a Rule 59(e), SCRCP, motion to reconsider.

STANDARD OF REVIEW

"In considering a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, the circuit court must base its ruling solely upon the allegations set forth on the face of the complaint." *Charleston Cnty. Sch. Dist. v. Harrell*, 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011). "The motion may not be sustained if the facts alleged in the complaint and the inferences drawn therefrom would entitle the plaintiff to relief under any theory. [P]leadings in a case should be construed liberally and the Court must presume all well pled facts to be true so that substantial justice is done between the parties." *Id.* at 557, 713 S.E.2d at 607 (internal quotation marks and citation omitted).

"Arbitrability determinations are subject to de novo review." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 47, 790 S.E.2d 1, 3 (2016). "However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.* at 48, 790 S.E.2d at 3.

ARGUMENT

The lower court correctly held Weaver pled valid causes of action and her claims are not subject to arbitration. Appellants attempt to contort the allegations of the case by viewing them

through the lens of the injuries to Mrs. Walker and the negligence related to her death. However, Weaver brings this case for her own injuries based on Appellants' conduct towards her. Therefore, the relevant inquiry is the allegations related to Weaver and her damages.

Weaver is not subject to arbitration because, among other reasons, she did not sign the agreement. Her claims do not fall within the terms or scope of the arbitration agreement because she does not make a claim through Mrs. Walker, does not seek to enforce or benefit from the residency agreement, and may bring her claims in the absence of the residency agreement. Further, Appellants' conduct falls within the outrageous and unforeseeable exception to arbitration. For any one of these reasons, the Court should affirm the lower court's decision.

I. The Wrongful Death Statute is Not the Exclusive Remedy for Weaver because She Does Not Assert a Wrongful Death Claim and the Statute Provides No Remedy to Her

This case does not present a wrongful death action. The wrongful death statute and the law interpreting and related to it are not applicable to this action. Therefore, this Court should affirm the lower court's denial of Appellants' motion to dismiss on this issue.

Weaver is not a wrongful death beneficiary. A wrongful death action "shall be for the benefit of the wife or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none such, then for the benefit of the heirs of the person whose death shall have been so caused." S.C. Code Ann. § 15-51-20 (2005). Mrs. Walker died with children alive, including Weaver's father, so they are her statutory beneficiaries. Weaver, as her grandchild, is not a statutory wrongful death beneficiary. Therefore, the wrongful death statute provides no remedy whatsoever to Weaver. *See Burroughs v. Worsham*, 352 S.C. 382, 406, 574 S.E.2d 215, 227 (Ct. App. 2002) (finding "a plaintiff's verdict on wrongful death and a defense verdict on loss of consortium" are not inconsistent since "the parties benefiting from the actions may be separate

and distinct. Only the spouse may bring a loss of consortium claim. However, the spouse, children, parents, or other heirs may be the beneficiaries of the wrongful death award.").

Judge Duffy affirmed this principle in *White v. United States*, 907 F. Supp. 2d 703 (D.S.C. 2012), when he held that, under South Carolina law, "Plaintiff's claims for loss of consortium and wrongful death are separate and distinct. Both the beneficiaries of the causes of action and the purposes of those causes of action are different. Only the spouse may bring a loss of consortium claim, while any heirs to an estate may be the beneficiaries of the wrongful death award. As such, the parties who may benefit from such an award are separate, and deserve compensation for the effect the injury had upon them." *Id.* at 708. Therefore, the law is that a wrongful death claim is not always the exclusive remedy for an injury related to the loss of a family member. In this case, the personal representative of Mrs. Walker's Estate could not have brought Weaver's claims or made any recovery on her behalf. The wrongful death statute cannot be Weaver's exclusive remedy when it is no remedy at all.

Weaver also does not seek the damages of a wrongful death beneficiary. First, she is not a beneficiary. *See Welch v. Epstein*, 342 S.C. 279, 304, 536 S.E.2d 408, 421 (Ct. App. 2000) ("In a wrongful death case, the issue of damages is not directed toward the value of the human life that was lost, but rather the ***damages sustained by the beneficiaries*** as a result of the death." (emphasis added)). Second, Weaver seeks damages for the personal horror she suffered due to finding her grandmother's dismembered body floating in an alligator pond. *See* R. p. 8, ¶ 29 ("Plaintiff was shocked and horrified to find the remains of her grandmother's body floating in the pond where it had been dismembered by an alligator."). She does not seek the "[d]amages recoverable in a wrongful death action [that] include: (1) pecuniary loss; (2) mental shock and suffering; (3) wounded feelings; (4) grief and sorrow; (5) loss of companionship; and (6) deprivation of the use

and comfort of the intestate's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries." *Welch*, 342 S.C. at 304, 536 S.E.2d at 421. Rather, Weaver alleges independent, personal injuries caused by Appellants' failure "to act to prevent the horrific discovery of Plaintiff Bonnie Walker's dismembered remains in the retention pond" and their "mishandling, mistreating, and failing to safeguard the human remains of Bonnie Walker." (R. p. 10, ¶ 38, p. 13, ¶ 53).

"The character of an action is primarily determined by the allegations contained in the complaint." *Stoneledge at Lake Keowee Owners' Ass'n v. Clear View Constr., LLC*, 413 S.C. 615, 620, 776 S.E.2d 426, 429 (Ct. App. 2015) (internal quotation marks omitted). Appellants should not be permitted to contort the allegations of Weaver's Complaint to their advantage. "It is well established that the plaintiff is the master of his complaint." *Chavis v. Fid. Warranty Servs.*, 415 F. Supp. 2d 620, 627 (D.S.C. 2006) (internal quotation marks omitted). Weaver's Complaint seeks damages separate and independent from wrongful death damages.

Appellants cite to *Ballard v. Ballard*, 314 S.C. 40, 443 S.E.2d 802 (1994) for the proposition that Weaver's damages "are directly akin to those recoverable for a wrongful death action." (Br. of App. p. 16). However, Appellants omit that *Ballard* states "[d]amages recoverable for wrongful death are the ***damages sustained by the statutory beneficiaries*** resulting from the death of the decedent." *Ballard*, 314 S.C. at 41-42, 443 S.E.2d at 802 (emphasis added). As noted above, Weaver is not a wrongful death beneficiary. Further, she seeks damages for her personal suffering as a result of finding her grandmother's mauled body in an alligator pond. This is separate and distinct from the damage of the death of her grandmother.

Finally, Appellants do not cite to a single case that states the remedy of a family member of a decedent for any claim related to the death is limited to a wrongful death action. As noted

above, that is not the law of South Carolina. *See White*, 907 F. Supp. 2d at 708; *Burroughs*, 352 S.C. at 406, 574 S.E.2d at 227. Appellants cite only to cases that state a personal representative is the person who may assert a wrongful death claim[2] and a wrongful death action is the exclusive remedy for damages due to a death.[3] (Br. of App. p. 14). These cases do not in any way prohibit Weaver's case.

This case does not involve a wrongful death action, and the Court should affirm the lower court's holding on this issue.

II. Weaver States a Negligence Claim by Adequately Pleading Allegations of a Duty that Appellants Owed to Her

The lower court correctly held Weaver sufficiently pled a negligence cause of action. Appellants challenge only whether Weaver asserts a duty owed to her. (Br. of App. p. 16). Taking the allegations pled as true and drawing all inferences in Weaver's favor, the Complaint alleges a claim for Appellants' negligence as to Weaver, including a duty owed specifically to her.

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[2] *See Roberts v. Bodison*, C/A No. 2:14-cv-00750-MGL-MGB, 2015 U.S. Dist. Lexis 189433 (D.S.C. 2015) (finding by a magistrate in a report and recommendation that children of decedent who are not appointed as personal representative of the estate cannot assert a wrongful death claim); *Glenn v. E.I. Du Pont de Nemours & Co.*, 254 S.C. 128, 136, 174 S.E.2d 155, 159 (1970) (dismissing a wrongful death action where the decedent's wife was discharged as the estate administratrix before filing the wrongful death action and, therefore, "there was no one qualified to bring suit under the wrongful death statute").

[3] *See Green v. Southern R. Co.*, 319 F. Supp. 919 (D.S.C. 1970) (finding the decedent's wife could not state a separate claim for loss of consortium after his death because recovery for this is included under the wrongful death statute); *Banks v. Medical Univ. of S.C.*, 314 S.C. 376, 379-80, 444 S.E.2d 519, 521 (1994) (holding mother of minor decedent could not bring claim for breach of implied contract arising from alleged failure to provide medical treatment and "[f]urther" noting the wrongful death statute provides the "exclusive remedy" for the mother "herself"); *Dickey v. Clarke Nursing Home*, Op. No. 2007-UP-344 (S.C. Ct. App. filed June 29, 2007), 2007 WL 8327928, *7-8 (holding an attorney on interim suspension, could not represent the estate of his mother because only a lawyer can represent an estate and its beneficiaries in court, and a PR may bring a negligence claim under the survival statute but an individual may not when he may recover under a wrongful death claim). *Dickey* is an unpublished opinion that has "no precedential value and should not be cited except in proceedings in which [it is] directly involved". Rule 268(d)(2), SCACR.

Appellants' discussion of the allegations in the Complaint omits numerous pertinent allegations. *Id.* at pp. 17-18. Weaver alleges, in part, as follows:

- "Prior to conducting an appropriate search and taking other measures to locate Bonnie Walker, Defendants notified her family of the disappearance."
- "As Defendants had not yet located her grandmother, Plaintiff began searching the property, walking to the rear of the facility towards a retention pond."
- "Upon information and belief, the retention pond and immediately surrounding area were under the control of Defendants."
- "As she walked closer to the pond, Plaintiff was shocked and horrified to find the remains of her grandmother's body floating in the pond where it had been dismembered by an alligator."
- "Defendants knew or should have known that: . . . Family members notified that Bonnie Walker was missing, including Plaintiff, would actively search the property for her; and The search conducted by family members, including Plaintiff, would likely include the retention pond area."
- "Defendants had a duty to use reasonable care in the operation of Brookdale Charleston, and in accordance with all laws . . . industry standards, customs, and practices regarding the ownership and operation of such a facility."
- "Defendants were negligent . . . and breached their duties by failing to maintain property subject to their control in a reasonably safe condition, failing to correct dangerous conditions of which Defendants were aware or should have been aware of in the exercise of reasonable care, and failing to warn Plaintiff of dangerous conditions."
- "Defendants were further negligent . . . and breached their duties by failing to conduct an adequate and timely search for Bonnie Walker; failing to warn Plaintiff of the hazards associated with the retention pond and circumstances foreseeably created if Bonnie Walker had entered the pond known to be inhabited by alligators, and otherwise failing to act to prevent the horrific discovery by Plaintiff of Bonnie Walker's dismembered remains in the retention pond."

(R. p. 8, ¶¶ 25, 27-29; p. 9 ¶ 30.f.-g.; p. 10, ¶¶ 33-36, 38). These allegations demonstrate the assertion of an independent duty owed to Weaver.

Appellants would have the Court read and interpret the Complaint as relating to Mrs. Walker's injuries. However, this is legally impermissible. Liberally construing the Complaint in Weaver's favor and presuming all well pled facts as true, Weaver alleges Appellants owed her an

independent duty of due care to adequately search for a missing resident so that a family member would not first find her in a horrific state, warn family members that it called to come search for a resident that she may be in an area on their property that is inhabited by alligators, and prevent family members it knew would search from a resident from finding her dismembered body. These are all allegations of a duty owed to Weaver and not to Mrs. Walker. They relate to the discovery of Mrs. Walker's body and not to the death itself. Therefore, the duties could not be owed to Mrs. Walker.

Appellants argue that any duty related to warning Weaver of the retention pond with alligators in it is owed to Mrs. Walker because Weaver does not allege she suffered any harm from the danger of the pond. (Br. of App. p. 18). This is factually and legally incorrect.[4] Factually, Weaver does allege she suffered harm from the dangerous condition of the pond. She alleged Appellants failed to warn her "of the hazards associated with the retention pond and circumstances foreseeably created if Bonnie Walker had entered the pond known to be inhabited by alligators, and otherwise failing to act to prevent the horrific discovery by Plaintiff of Bonnie Walker's dismembered remains in the retention pond." (R. p. 10, ¶ 38). She further alleged she "was herself injured by discovering her grandmother's dismembered body floating in the retention pond behind the facility." *Id.* at ¶ 39. Legally, Appellants owed a duty to Weaver because they voluntarily undertook to call Mrs. Walker's family and notify them of her disappearance with no knowledge as to her whereabouts. Appellants knew when Weaver arrived that Mrs. Walker was still missing and Weaver went to look for her. Under these circumstances, Appellants had a duty to reasonably conduct the search and warn Weaver about the existence and dangers of the retention pond. *See,*

[4] Appellants cite to no law for this argument but assert only that it is "a matter of pure logic." (Br. of App. p. 18).

e.g., *Vaughan v. Town of Lyman*, 370 S.C. 436, 446, 635 S.E.2d 631, 637 (2006) ("[A] duty to use due care may arise where an act is voluntarily undertaken."); *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) ("If an act is voluntarily undertaken, []the actor assumes the duty to use due care.").

Finally, Weaver's negligence claim does not "in substance" assert a negligent infliction of emotional distress claim. (Br. of App. p. 18). A general negligence claim and negligent infliction of emotional distress claim have different elements of proof. *Compare Shaw v. City of Charleston*, 351 S.C. 32, 40, 567 S.E.2d 530, 534 (Ct. App. 2002) ("To establish a cause of action for negligence, a plaintiff must prove the following three elements: (1) a duty owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damages proximately resulting from the breach.") *with Bray v. Marathon Corp.*, 356 S.C. 111, 115 n.4, 588 S.E.2d 93, 95 n.4 (2003) (listing the elements for negligent infliction of emotional distress as: "(1) the negligence of the defendant must cause death or serious physical injury to another; (2) the plaintiff bystander must be in close proximity to the accident; (3) the plaintiff and the victim must be closely related; (4) the plaintiff must contemporaneously perceive the accident; and (5) the emotional distress must both manifest itself by physical symptoms capable of objective diagnosis and be established by expert testimony"). These are distinct causes of action, and Weaver pled allegations to support them. That they may both involve an element of emotional damages does not make the assertion of the claims inappropriate.[5] *See, e.g.*, *Oaks at Rivers Edge Prop. Owners Ass'n v. Daniel*

[5] Appellants argue in a footnote that South Carolina does not recognize a duty to warn a third party of danger. (Br. of App. p. 18 n. 3) (citing *Doe v. The Citadel*, 421 S.C. 140, 146, 805 S.E.2d 578, 581 (Ct. App. 2017)). This issue is not preserved because it was not raised to the lower court and is discussed only in a footnote on appeal. Regardless, the argument has no merit because Weaver is a first party to whom Appellants owed a duty and, alternatively, this case falls within two exceptions to the third party rule—"when the defendant voluntarily undertakes a duty [and] when the defendant intentionally or negligently creates the risk." *Id.* at 146, 805 S.E.2d at 581.

Island Riverside Developers, LLC, 420 S.C. 424, 443, 803 S.E.2d 475, 485 (Ct. App. 2017) ("When an identical set of facts entitle the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not recover both." (internal quotation marks omitted)).

Assuming the facts as true and drawing all inferences in Weaver's favor, the Court should affirm the lower court's holding that Weaver sufficiently pled a negligence action.

III. Weaver Sufficiently Pled a Negligent Infliction of Emotional Distress Claim because the Allegations Show She was in Close Proximity to and Contemporaneously Perceived the Accident

The lower court correctly found Weaver sufficiently pled a cause of action for negligent infliction of emotional distress. In *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 336 S.E.2d 465 (1985), the Supreme Court adopted a cause of action for negligent infliction of emotional distress with the following elements:

> (a) the negligence of the defendant must cause death or serious physical injury to another;
>
> (b) the plaintiff bystander must be in close proximity to the accident;
>
> (c) the plaintiff and the victim must be closely related;
>
> (d) the plaintiff must contemporaneously perceive the accident; and
>
> (e) the emotional distress must both manifest itself by physical symptoms capable of objective diagnosis and be established by expert testimony.

Kinard, 286 S.C. at 582-83, 336 S.E.2d at 467 (citing *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968)). Appellants challenge only the second and fourth elements—close proximity and contemporaneous

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Appellants voluntarily undertook to notify the family of Mrs. Walker's disappearance and, when the family arrived to search for her, failed to notify them of the retention pond. Further, Appellants created the risk of the retention pond by maintaining it on the property of an assisted living facility with knowledge it was inhabited by alligators.

perception—in this case. (Br. of App. p. 20). Both elements are satisfied and sufficiently pled in the Complaint.

Weaver alleges: "As she walked closer to the pond, Plaintiff was shocked and horrified to find the remains of her grandmother's body floating in the pond where it had been dismembered by an alligator"; and "Plaintiff was in close proximity to where her grandmother's body was discovered and contemporaneously perceived and was herself injured by discovering her grandmother's dismembered body floating in the retention pond." (R. p. 8, ¶ 29, p. 12, ¶ 47). She alleges both close proximity and contemporaneous perception.

Appellants' argument is that Weaver must have been in close proximity to and contemporaneously perceived the actual alligator attack rather than her grandmother's dead, dismembered body. (Br. of App. p. 20; R. p. 86 lns. 9-10). This is incorrect. The elements of a claim for negligent infliction of emotional distress do not state that the claimant must be in close proximity to or contemporaneously perceive the death or serious bodily injury of another. *Kinard* says the defendant's conduct must cause the death or serious bodily injury of another and the claimant must be in close proximity to and contemporaneously perceive "the accident." *Kinard*, 286 S.C. at 582-83, 336 S.E.2d at 467. The accident in this case is Appellants' failure to locate Mrs. Walker for hours and failure to warn of the presence of an alligator pond on its property, which is what Weaver perceived and what resulted in her injury in discovering the dead, dismembered body. (R. pp. 92-93).

In *Strickland v. Madden*, 323 S.C. 63, 448 S.E.2d 581 (Ct. App. 1994), this Court held a claim for negligent infliction of emotional distress survived summary judgment where the plaintiff was not in close proximity to and did not contemporaneously perceive the death or serious bodily injury of another. Strickland sued a hospital and treating physician who told her that her father

died when he was actually alive. *Id.* at 65, 448 S.E.2d at 582. The lower court granted summary judgment on the negligent infliction of emotional distress claim, "holding Strickland failed to meet the bystander liability requirements of *Kinard*." *Id.* at 66, 448 S.E.2d at 583. This Court reversed. It found "a cause of action based solely on emotional trauma without proof of physical injury is limited to bystander recovery as announced in *Kinard*", but the defendants failed to show "Strickland's emotional distress is not compensable because she suffered no physical injuries." *Id.* at 67-68, 448 S.E.2d at 583-584. Therefore, the Court reversed summary judgment "for negligent infliction of emotional distress." *Id.* at 72, 448 S.E.2d at 586. In that case, "the accident" was incorrectly informing the plaintiff of her father's death and not his actual death or serious injury.

Strickland supports Weaver's claim in this case. At the hearing on Appellants' motion, Weaver argued this case is different from a case in which the plaintiff is suing the person who physically caused the injury, such as a car accident. The lower court also noted "its a little difference between being involved in an accident and someone being injured and seeing a mangled body from the alligator tearing on it or chewing on it or biting on it or whatever the alligator did." (R. p. 89 lns. 19-23). An assisted living facility who loses a resident for over seven hours and then calls the family to help it search for her on property it owns and knows contains an alligator pond should expect that the family will find the resident injured and suffer emotional distress.

Further, the remaining cases Appellants rely on do not require the plaintiff be in close proximity to or perceive the death or serious bodily injury. One case did not involve any death or serious bodily injury to another or physical injury to the plaintiff. *See Toney v. LaSalle Bank Nat'l Ass'n*, 896 F. Supp. 2d 455, 478-79 (D.S.C. 2012) (finding in report and recommendation that plaintiff's claim for emotional distress arising out the refusal to acknowledge her mortgage rescission notice failed because she "has not shown any physical injury"). In two cases, the

plaintiffs had no perception of the accident and were not in close proximity to it at all. *See Doe v. Greenville Cnty. Sch. Dist.*, 375 S.C. 63, 66-68, 651 S.E.2d 305, 306-07 (2007) (holding plaintiffs "admit that they did not and cannot allege facts which would support a bystander liability cause of action" where they learned their minor daughter was in a sexual relationship with a substitute teacher); *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 147, 155, 533 S.E.2d 597, 599, 603 (Ct. App. 2000) (holding where wife was "not a witness" to her husband's automobile accident "and was not at the scene" that her damages are "consequential damages" and not "direct bodily injury from the accident"). This is not a case in which the plaintiff did not perceive the accident or even the scene of the accident. Rather, in this case, Weaver was in close proximity to and contemporaneously perceived her grandmother's dead, dismembered body floating in the pond—the accident she alleges caused her harm. She did not learn about this from another person but discovered it and saw it herself.

The Court should affirm because, taking the allegations pled as true and drawing all inferences in Weaver's favor, the Complaint alleges a claim for negligent infliction of emotional distress.

IV. Weaver Sufficiently Pled an Intentional Infliction of Emotional Distress Claim because She Asserts Extreme and Outrageous Conduct that Appellants Directed at Her and Directly Caused her Harm

The lower court correctly found Weaver sufficiently pled allegations of an action for intentional infliction of emotional distress. To establish a claim for intentional infliction of emotional distress, a plaintiff must allege the following:

> (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct, (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community, (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was severe so that no reasonable man could be expected to endure it.

Ford v. Hutson, 276 S.C. 157, 162, 276 S.E.2d 776, 778 (1981) (internal quotation marks and citations omitted) (citing *Restatement (Second) of Torts* § 46).

Weaver alleges Appellants inflicted severe emotional distress or were certain such distress would result from their conduct of failing to find Mrs. Walker for over seven hours, calling the family to help search for her, letting Weaver search the grounds without warning her of the alligator pond, and "mishandling, mistreating, and failing to safeguard the human remains of Bonnie Walker." (R. pp. 8-9, ¶¶ 23-30; pp. 12-13, ¶¶ 52-53). Weaver alleges this conduct was so extreme and outrageous as to exceed all possible bounds of decency and caused her emotional distress. (R. p. 13, ¶¶ 54, 56; p. 9, ¶ 32). Finally, she alleges her emotional distress is so severe that no reasonable person should be expected to experience it. (R. p. 13, ¶ 55). Presuming the facts to be true, the Complaint and inferences drawn from it would entitle Weaver to relief for intentional infliction of emotional distress.

Appellants argue Weaver's allegations do not show extreme or outrageous conduct directed at her and do not show they exposed her to a dangerous condition. (Br. of App. p. 23). This is incorrect. "It is for the court to determine in the first instance whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, and only where reasonable persons may differ is the question one for the jury." *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 167, 321 S.E.2d 602, 609 (Ct. App. 1984), *overruled on other grounds by* 208 S.C. 190, 336 S.E.2d 472 (1985). "There is a distinct difference, however, between determining whether conduct may reasonably be considered outrageous, a legal question, and whether conduct is in fact outrageous, a question for jury determination." *Id.* at 168, 321 S.E.2d at 610.

In *Ford*, the Supreme Court found the evidence "legally sufficient to support the verdict" for the plaintiff. 276 S.C. at 166, 276 S.E.2d at 780. For two years after plaintiff sold defendant a house, defendant confronted and quarreled with plaintiff about making repairs, including the use of profanity on multiple occasions in plaintiff's home, in front of her friends, and in public, as well as threats of physical harm. *Id.* at 163-65, 276 S.E.2d at 779-80. The Court found the "evidence is susceptible of the inference that the conduct complained of herein was not a mere complaint by a dissatisfied homeowner, but was instead a continuing pattern of highly questionable conduct over a period of almost two years." *Id.* at 166, 276 S.E.2d at 780. The same result is warranted in this case.

The evidence is that Appellants' directed extreme and outrageous conduct at Weaver. Appellants knew for some time of the presence of an alligator pond on its premises but failed to remedy the dangerous condition or warn the residents or their family members. (R. p. 8, ¶¶ 27-28; p. 9, ¶ 30.c.-g.; p. 10, ¶¶ 36, 38; pp. 12-13, ¶¶ 52-53). Appellants knew when Weaver and her family arrived that they had not located Mrs. Walker and she could be in or near the alligator pond but failed to tell Weaver about the dangerous condition of the pond. (R. p. 8, ¶¶ 24-27; p. 13, ¶ 53). This is susceptible of the inference that the conduct complained of was a continued pattern of harboring a dangerous condition on Appellants' premises and directed at Weaver by blatantly failing to tell her, after Appellants invited the family to the facility to help them look for Mrs. Walker, about the alligator pond or otherwise preventing Weaver from discovering the dismembered remains of her grandmother. *See Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 401, 596 S.E.2d 42, 48-49 (2004) (finding a hospital's conduct in refusing to let a mother see her child because she was not the adopting parent and forcing her to sign a form against her will authorizing removal of her child from the hospital "might well constitute outrageous conduct that

we would find utterly intolerable in a civilized community"). This conduct may reasonably be regarded as directed at Weaver and so extreme and outrageous as to permit recovery.

The cases Appellants cite regarding the requirement that conduct be directed at the plaintiff are distinguishable from this case.[6] In the cases cited by Appellants, the conduct was not directed at the plaintiff. (Br. of App. pp. 22-23); *See Settle v. Slager*, C/A No. 2:15-1802-RMG-MGB, 2015 U.S. Dist. LEXIS 76388, *6-7 (D.S.C. May 20, 2015) (finding in report and recommendation that prisoner who saw news video of Michael Slager shooting Walter Scott could not state a claim for intentional infliction of emotional distress because the conduct "is not . . . directed towards Plaintiff. . . . [and] the harm allegedly suffered by Plaintiff arose indirectly from Defendants' actions"); *Roberts v. Simmons*, C/A No. 2:14-MGL-WWD, 2014 U.S. Dist. LEXIS 171265 (D.S.C. Dec. 11, 2014)[7] (holding defendant's conduct of falsely representing to the probate court that she was the surviving spouse of plaintiff's father to become executrix of the estate was not extreme and outrageous conduct); *Fulghum v. Wise Seats, Inc.*, C/A No. 4:10-02112-JMC, 2012 WL 1032594, *9, 11 (D.S.C. March 27, 2012) (finding employer's conduct of using vulgar, racist language in front of plaintiff and asking him to unfairly treat black employees was not directed towards him and, therefore, his alleged harm "arose indirectly"); *Doe 2 v. The Citadel*, 421 S.C. 140, 143-44, 153, 805 S.E.2d 578, 579-80, 585 (Ct. App. 2017) (dismissing claim for intentional infliction of emotional distress alleging The Citadel knew about ReVille's sexual abuse and failed

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[6] In addition to the cases discussed below, Appellants also cite to the unpublished opinion of *Doe v. Rojas*, Op. No. 2007-UP-195 (S.C. Ct. App. filed April 26, 2007). The opinion has "no precedential value and should not be cited except in proceedings in which [it is] directly involved". Rule 268(d)(2), SCACR. Regardless, it is also distinguishable because the conduct in *Doe* regarding a sexual relationship between plaintiff's daughter and a teacher was directed at the daughter and not at her parents. In this case, Appellants called Weaver to come to the facility to help in the search and failed to warn her about the alligator pond.

[7] Appellants cite to this order but quote from the underlying report and recommendation adopted by the order, 2014 U.S. Dist. LEXIS 17162 (Oct. 7, 2014).

to prevent further abuse of victims such as Doe, who met ReVille at a camp unaffiliated with The Citadel, because it "was unaware of Doe's very existence" before the lawsuit and did not direct conduct towards him), *Upchurch v. New York Times Co.*, 314 S.C. 531, 534-57, 431 S.E.2d 558, 560-62 (1993) (holding conduct not directed at plaintiffs where defendant published an article intended for the public that suggested plaintiffs' son died due to cocaine use when he died due to a heart condition and parents' harm "arose only indirectly" from article).

In contrast to the above-cited cases, the facts of this case involve conduct directed at Weaver that directly caused her harm. Appellants called Mrs. Walker's family to come to the facility and, when the family arrived (including Weaver), Appellants enlisted their help to search for Mrs. Walker. Appellants failed to warn Weaver about the alligator pond although it knew she was searching the grounds for a patient that Appellants let wander from their facility. This is conduct directed at Weaver that directly caused her harm. The Court should affirm the lower court's ruling that Weaver sufficiently pled a cause of action for the intentional infliction of emotional distress.

V. Weaver's Claims are Not Subject to Arbitration because they do Not Fall within the Terms or Scope of the Arbitration Agreement and She Does Not Seek to Enforce or Receive a Benefit from the Residency Agreement

Weaver's claims do not fall within the terms or scope of the arbitration agreement because they do not arise out of or relate to Mrs. Walker's stay at Appellants' facility and she does not assert a claim through Mrs. Walker. Weaver may not be compelled to arbitrate because did not sign the residency agreement. She does not seek to enforce any term or obligation of the residency agreement and did not receive a benefit from it. Appellants acknowledge that Weaver did not sign the arbitration agreement but argue she is bound to its terms because she allegedly seeks to benefit from the Residency Agreement by asserting a tort claim based on breaches of duty that arise out of the contract and, thus, is equitably estopped from rejecting the arbitration provision. (Br. of

App. pp. 29-30). This argument is factually and legally incorrect. Appellants rely solely on one allegation of the Complaint for this entire line of argument, again ignoring that the issue in this case is not Mrs. Walker's death[8] but Weaver's discovery of the dead, dismembered body.

A. Public Policy Favoring Arbitration Does Not Mandate that Every Claim is Subject to Arbitration

Appellants go to great lengths to point out the public policy favoring arbitration. (Br. of App. pp. 24-26). However, the public policy favoring arbitration is not absolute. "Although [a court is] constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis." *Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007). In this case, careful judicial analysis leads to the conclusion that the lower court correctly denied Appellants' motion to compel arbitration.

B. The Arbitration Agreement, by its Terms, Does Not Apply to Weaver's Claims

Weaver's claims do not fall within the terms of the arbitration agreement and, therefore, are not subject to arbitration. "[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." *Aiken v. World Fin. Corp.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007). A review of the language of the arbitration agreement at issue, the allegations of this case, and applicable case law, show that the lower court correctly denied the motion to compel arbitration.

The arbitration agreement states:

> Any and all claims or controversies ***arising out of, or in any way relating to, this Agreement or any of your stays at the Community***, excluding any action for involuntary transfer or discharge or eviction, and including disputes regarding interpretation, scope, enforceability, unconscionability, waiver, preemption and/or violability of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory

[8] *See, e.g.*, Br. of App. p. 31 (incorrectly arguing Weaver is "attempt[ing] to hold Brookdale liable in connection with Ms. Walker's death").

> duties, irrespective of the basis for the duty or the legal theories upon which the claim is asserted, shall be submitted to binding arbitration . . . .

(R. pp. 30-31) (emphasis added). Weaver's claims do not arise out of or relate to the Residency Agreement or Mrs. Walker's stay at Brookdale. Appellants' assertion to the contrary is incorrect. (Br. of App. pp. 26-27).

"[E]ven the most broadly-worded arbitration agreements still have limits founded in general principles of contract law." *Aiken*, 373 S.C. at 151, 644 S.E.2d at 709. Accordingly, our courts "will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." *Id.* "[C]ourts generally hold that broadly-worded arbitration agreements apply to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained." *Id.* at 149, 644 S.E.2d at 708 (internal quotation marks omitted) (finding no significant relationship existed between a loan agreement and claims based on defendant's employees' use of plaintiff's personal information to embezzle money).

In this case, there is no significant relationship between Weaver's claims and the residency agreement. Weaver's claims arise out of Appellants' failure to warn her of the presence of an alligator pond on the property after summoning her to look for Mrs. Walker. (R. pp. 8-9). This includes allegations of "failing to maintain property subject to their control in a reasonably safe condition" and "failing to warn Plaintiff of dangerous conditions." (R. p. 10, ¶¶ 36, 38). These claims do not fall within the arbitration agreement because they arise out of Appellants' voluntary conduct. *See Hatcher v. Edward D. Jones & Co., L.P.*, 379 S.C. 549, 554, 666 S.E.2d 294, 297 (Ct. App. 2008) (affirming the denial of a motion to compel arbitration as to a negligence claim based on the impermissible withdrawal of money from plaintiff's retirement account because "although these claims are factually related to the performance of the contract, each action is

legally distinct from the contractual relationship between the parties, and therefore, was not within the contemplation of the parties' agreement to arbitrate). Weaver's claims are distinct from the residency agreement between Mrs. Walker and Appellants, and were not within the contemplation of the parties who signed the arbitration agreement.

Appellants' argument to the contrary relies on one allegation of the Complaint (Br. of App. p. 26 (citing R. p. 8, ¶ 22)) and ignores that this case is not about Mrs. Walker's death but about Weaver's discovery of her dead, dismembered body. Weaver's claims do not arise out of or relate to Mrs. Walker's stay. Under Appellants' logic, once a person's family member resided at an assisted living facility, any claim that person had against the facility would be subject to the arbitration agreement. This cannot be correct. *See Aiken*, 373 S.C. at 150, 644 S.E.2d at 708 ("Applying what amounts to a 'but-for' causation standard essentially includes every dispute imaginable between the parties, which greatly oversimplifies the parties' agreement to arbitrate claims between them. Such a result is illogical and unconscionable."). For example, if someone visiting a resident suffered a slip-and-fall on the premises or food poisoning from eating a meal there, those claims would not "relate to" the resident's stay as they arise from Appellants' conduct unrelated to its duties to a resident. In the same way, in this case, when Appellants summoned Weaver and her family to help them look for her grandmother, they owed her a duty to warn her of dangerous conditions that existed in the search area. These factual allegations are unrelated to the residency agreement.

Appellants' argument is neither supported nor saved by reference in the arbitration agreement to third parties. (Br. of App. p. 27). The arbitration agreement states it "binds third parties not signatories to this Arbitration Provision, including any spouse, children, heir, representatives, agents, executors, administrators, successors, family members, or other persons

claiming through the Resident, or persons ***claiming through the Resident's estate***, whether such third parties make a claim in the representative capacity or in a personal capacity." (R. p. 32, ¶ 14) (emphasis added). Weaver does not make a claim through Mrs. Walker. Mrs. Walker would have no claim regarding someone finding her dead body. As established above, Weaver also did not and cannot make a claim through Mrs. Walker's estate because she was not a wrongful death beneficiary. Therefore, the reference to third party claims does not apply to the facts of Weaver's claims.

The terms of the arbitration agreement do not apply to Weaver's claims, and the Court should affirm the lower court's denial of Appellants' motion on this basis.

C. Weaver's Claims are Not Subject to Arbitration because she did Not Sign the Residency Agreement, Does Not Seek to Enforce It, and Received No Benefit From It

Weaver, as a non-signatory to the residency agreement, cannot be bound to its arbitration provision when she does not seek to enforce any term or obligation of the residency agreement and received no benefit from it.

Our courts have "recognized that five theories 'aris[ing] out of common law principles of contract and agency law could provide a basis for binding nonsignatories to arbitration agreements: 1) incorporation by references; 2) assumption; 3) agency; 4) veil piercing/alter ego; and 5) estoppel.'" *Malloy v. Thompson*, 409 S.C. 557, 561-62, 762 S.E.2d 690, 692 (2014) (quoting *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 601 (Ct. App. 2012)) (alteration in original). Appellants argue only the fifth theory—equitable estoppel—applies in this case. (Br. of App. pp. 28-32). "[T]he equitable estoppel doctrine in an arbitration setting allows a party to 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." *Hodge v. UniHealth Post-*

Acute Care of Bamberg, LLC, Op. No. 5541 (Shearouse Adv. Sh. No. 10 at 65, (Ct. App. filed March 7, 2018), 2018 WL 1177630, *14-15 (internal quotation marks omitted). "Restated, when a signatory seeks to enforce an arbitration agreement against a nonsignatory, the doctrine prevents the nonsignatory from averring he or she is not bound to the arbitration agreement when he or she receives a direct benefit from a contract that contains an arbitration clause." *Id.*

The equitable estoppel theory does not apply to this case because Weaver does not seek to enforce the residency agreement and neither received nor receives a benefit from it. The allegations of Weaver's Complaint and the factual and legal foundations for her claims have nothing to do with the residency agreement. Appellants' argument on this point again incorrectly focuses on their conduct toward Mrs. Walker and her death. Weaver's claims do not arise out of Appellants' duties "to supervise Mrs. Walker" or "to provide services to Mrs. Walker." (Br. of App. pp. 30-31). Her claims are based on duties that arose when Appellants called the family, enlisted Weaver's help in searching for her grandmother, and then failed to warn her of the dangerous condition of the alligator pond on its premises that Appellants knew Weaver was searching its property for her grandmother. These claims do not rely on or arise out of any provision of the residency agreement and do not assert the breach of any term of the residency agreement. *See, e.g.*, *Malloy*, 409 S.C. at 562, 762 S.E.2d at 692-93 (holding defendants' "argument that a derivative 'duty' from the CRAs binds Malloy, a non-signatory to the CRAs, conflates the duties created by the CRA contracts and general tort duties. Malloy does not claim that Merrill Lynch breached a duty created by the CRAs, but rather that it breached the duty owed by all persons not to intentionally interfere with another's expected inheritance"); *Hodge*, 2018 WL 1177630, *24-25 ("[B]ecause Respondents are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement."). Weaver asserts breach of

common law duties owed to her by virtue of Appellants' conduct, not duties dependent upon the terms or obligations imposed by the residency agreement.

Weaver may bring claims against Appellants in the absence of the residency agreement. Appellants rely on *Wilson v. Willis*, 416 S.C. 395, 786 S.E.2d 571 (Ct. App. 2016) for their argument to the contrary.[9] (Br. of App. pp. 28-32). Their reliance is misplaced. In *Wilson*, this Court expressly found the allegations of the plaintiffs "complaints necessarily depend upon the terms, authority, and duties created and imposed by" the agreement containing the arbitration provision. 416 S.C. at 417, 786 S.E.2d at 582. In this case, the allegations of the Complaint arise from Appellants' conduct, not from any term, authority, or duty created or imposed by the residency agreement. Therefore, Weaver may "reach" Appellants in the absence of the residency agreement. *Id.* at 417-18, 786 S.E.2d at 583; Br. of App. p. 31.

Significantly, the "benefit" Appellants assert Weaver receives from the residency agreement is that, she "would receive a benefit from the Agreement if she prevails on her claims" because she allegedly cannot hold Appellants liable but for the residency agreement. (Br. of App. p. 31). This argument turns the equitable estoppel-benefit theory on its head. Weaver must have received a benefit from the residency agreement that justifies enforcing its terms as to her. *See Pearson*, 400 S.C. at 296, 733 S.E.2d at 605 (finding the plaintiff "received a benefit due to the contract, in that he was able to work at the Hospital and receive payment for his work"). The benefit cannot be something that ***may*** be received as a result of the very litigation as to which the defendant is seeking to compel arbitration. Appellants essentially argue that Weaver may benefit from the very thing it is working to prevent her from receiving—a recovery in this lawsuit. That

[9] On March 28, 2018, the Supreme Court granted a petition for writ of certiorari in *Wilson* that includes the arbitration issue. (App. Case No. 2016-001512).

is no benefit at all and would make every claim of a non-signatory subject to arbitration. Weaver also does not seek to benefit from any services Appellants were obligated to or did provide to Mrs. Walker. (Br. of App. p. 31). She alleges Appellants breached a duty owed ***to her***, not a duty to owed to Mrs. Walker or related to the actual cause of her death.

Finally, Appellants cannot prove the elements of an estoppel claim. "Essential elements of estoppel as related to the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position." *Regions Bank v. Schmauch*, 354 S.C. 648, 675, 582 S.E.2d 432, 446 (Ct. App. 2003). Appellants had means of knowledge as to the true condition of the alligator pond and Mrs. Walker's dead, dismembered body. Appellants do not argue they relied upon any conduct of Weaver or made a prejudicial change in position. Therefore, even if an equitable estoppel theory applied, which it does not, Appellants could not prove it. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

VI. The Court Should Refuse to Compel Arbitration because Appellants' Conduct Constitutes Outrageous Acts that No Reasonable Person would have Foreseen when entering into an Arbitration Agreement

Weaver argued to the lower court the outrageous and unforeseeable torts exception as a basis on which it could refuse to compel arbitration in this case.[10] (R. pp. 58-59, 100-01). This is

[10] *See Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 13, 791 S.E.2d 128, 134 (2016) (Hearn, J., concurring in part and dissenting in part in opinion in which Beatty, J., concurred) (finding by a majority of the Supreme Court that "the outrageous and unforeseeable torts exception remains a viable principle of law . . . because it embodies a generally applicable contract principle: effectuating the intent of the parties"); *id.* at 23, 791 S.E.2d at 140 (Toal, A.J., dissenting) ("I believe the outrageous and unforeseeable tort exception to arbitration is merely a label for a general contract principle: effectuating the contractual expectations of the parties. Therefore, I would adhere to the Court's previous holdings that the exception may invalidate an arbitration agreement if certain criteria are met.").

an alternative and independent basis upon which the Court may refuse to compel arbitration. Rule 220(c), SCACR.

South Carolina courts consistently refuse to enforce arbitration agreements where the facts consist of "illegal or outrageous acts that no reasonable person would have foreseen at the time the parties executed the agreement to arbitrate." *Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007) (refusing to enforce an arbitration agreement where defendants' employees "systematically harass[ed]" plaintiff about not paying a bill by repeatedly calling her at work, disclosing private information to her family, friends, and coworkers, and making false and defamatory statements about plaintiff). Neither Mrs. Walker nor her son who signed the arbitration agreement on her behalf could have foreseen that Appellants would lose Mrs. Walker, call her family to help find her, and then fail to warn the family of the presence of an alligator pond on Appellants' property. "Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." *Aiken v. World Fin. Corp.*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007) (finding "theft of Aiken's personal information by World Finance employees to be outrageous conduct that Aiken could not possibly have foreseen when he agreed to do business with World Finance. Consequently, in signing the agreement to arbitrate, Aiken could not possibly have been agreeing to provide an alternative forum for settling claims arising from this wholly unexpected tortious conduct.").

Calling family members to search for a missing ninety-year-old woman and then failing to tell them that, in the search, they would encounter an alligator pond with the dismembered remains of their grandmother is outrageous conduct that neither Mrs. Walker nor her son could possibly

have foreseen when executing the residency agreement that contains the arbitration provision. Any argument to the contrary is disingenuous. The signatories to the residency agreement did not agree to an alternative forum for settling claims arising from wholly unexpected tortious conduct, and the Court may affirm the lower court's decision to deny Appellants' motion to compel arbitration on this basis.

CONCLUSION

For the reasons stated herein, the Court should affirm the lower court's decision to deny Appellants' Rule 12(b)(6) motion to dismiss and alternative motion to compel arbitration, and remand the case to proceed as pled in the Court of Common Pleas.

Respectfully submitted,

Kenneth L. Connor, SC Bar No. 100298
C. Caleb Connor, SC Bar No. 100517
CONNOR & CONNOR, LLC
224 Park Avenue SE
Aiken, SC 29801
Phone: (803) 226-0543

Eliza H. Cantwell, SC Bar No. 101689
Joshua P. Cantwell, SC Bar No. 76368
Cantwell Law Firm, LLC
P.O. Box 600
Charleston, SC 29402
Phone: (843) 801-4104
Attorneys for Respondent