THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Appellate Case No. 2020-001159
Case No. 2020-CP-40-02040

Beacham O. Brooker, Jr., Ellen B. Corontzes;
and BBB&C Family, LLC, Respondents,

v.

Julia B. Brooker, Appellant.

INITIAL BRIEF OF APPELLANT

James M. Griffin (S.C. Bar # 9995)
Margaret N. Fox (S.C. Bar # 76228)
GRIFFIN DAVIS LLC
4408 Forest Drive, Suite 300
Columbia, South Carolina 29206
(803) 744-0800

Badge Humphries (S.C. Bar # 72904)
GRIFFIN HUMPHRIES LLC
2113 Middle Street, Suite 305
Sullivan's Island, South Carolina 29482
(843) 883-7424

Attorneys for Appellant

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STATEMENT OF THE CASE

This matter relates to a March 17, 2020 arbitration demand by Appellant against Respondents. (Pet. and Mot. to Stay Ex. A (Arbitration Demand, Mar. 17, 2020) (the "Arbitration Demand").) That Arbitration Demand seeks the dissolution of a family limited liability company called BBB&C Family LLC and an accounting, and it asserts breach of fiduciary duty claims against Respondents under Section 33-44-409(h) of the South Carolina Code of Laws. (Arbitration Demand 11-16.) On July 17, 2020, the circuit court entered an order staying the arbitration proceeding initiated by the Arbitration Demand, potentially delaying that proceeding and the availability of the relief it seeks for years. (Order Granting Pet'rs' Mot. to Stay, July 17, 2020 (the "Order").) The Order and the circuit court's subsequent order refusing to alter or amend it are the

subjects of this appeal. (Id.; (Order Denying Mot. to Alter or Amend Order Granting Pet'rs' Mot. to Stay 1-2, Aug. 24, 2020.)

Appellant Julia B. Brooker ("Appellant" or "Julia") and Respondents Beacham O. Brooker, Jr. ("Beacham") and Ellen B. Corontzes ("Ellen") executed the Operating Agreement of BBB&C Family LLC on January 31, 2014. (Arbitration Demand Ex. 1 (Operating Agreement, LLC of BBB&C Family LLC, Jan. 31, 2014) (the "Operating Agreement").) Section 11.01 of the Operating Agreement provides as follows:

> Section 11.01. **Any dispute or controversy between the parties hereto arising out of, under, or in connection with, or in relation to, this Operating Agreement shall be submitted to binding arbitration** in accordance with South Carolina Code Sections 15-48-10, et seq., as such may be amended from time to time (the ["Act"]). . . . Any dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding. The arbitrators shall be selected as provided in the [Act], and **the arbitrators shall render a decision on any dispute within one hundred twenty (120) Days** after the last of the arbitrators has been selected. If any party to this Operating Agreement fails to select an arbitrator with regard to any dispute submitted to arbitration under this Section 11.01 within thirty (30) Days after receiving notice of the submission to arbitration of such dispute, then the other party shall select an arbitrator for such non-selecting party. **The decision of the arbitrators shall be final and binding on the parties, who specifically renounce any judicial review of the award**, and agree that judgment on the award may be enforceable in any court of competent jurisdiction.

(Operating Agreement 23) (emphasis added).

Counsel for Respondents accepted service of Appellant's Arbitration Demand on Appellants' behalf on April 7, 2020. (Mot. to Dismiss and Compel Arbitration Ex. 3 (Acceptance of Service of Arbitration Demand, Apr. 7, 2020).) Respondents did not follow the procedures set forth in Section 11.01 of the Operating Agreement. Instead, on April 21, 2020, Appellants initiated this proceeding by filing their Petition and Motion to Stay the arbitration proceeding initiated by Respondent's Arbitration Demand. (Pet. & Mot. to Stay, Apr. 21, 2020 (the "Petition").) In their submission, Respondents conceded the existence of an agreement to arbitrate the underlying

dispute between the parties pursuant to the Operating Agreement; however, Respondents argued that Appellant's duly commenced arbitration proceeding should be stayed until the resolution of an entirely separate probate dispute between the parties over the interpretation of a trust agreement. (Petition 1.)

Three days later, Appellant filed her April 24, 2020 Motion to Dismiss Petition and Motion to Stay and a Motion to Compel Arbitration and supporting memorandum of law. (Mot. to Dismiss and Mot. to Compel Arbitration, Apr. 24, 2020.) Respondents then filed their April 29, 2020 Petition and Amended Motion to Stay (hereinafter, "Pet. and Am. Mot. to Stay") and Memorandum of Law in Support of their Petition and Amended Motion to Stay and in Opposition to Respondent's Motion to Dismiss Petition and Motion to Stay, Motion to Compel Arbitration, and Motion for an Award of Attorney's Fees and Expenses. (Pet. and Am. Mot. to Stay; Mem. in Supp., Apr. 29, 2020 (hereinafter, "Petr's' Mem.").) Thereafter, Appellant filed her May 1, 2020 Renewed Motion to Dismiss Petition and Amended Motion to Stay and a Motion to Compel Arbitration and supporting memorandum of law. (Renewed Mot. to Dismiss Pet., Am. Mot. to Stay, and Mot. to Compel Arbitration, May 1, 2020.)

The circuit court held a hearing on these competing motions to compel and stay arbitration on June 24, 2020. (Mot. Hr'g Tr., June 24, 2020.) The parties submitted proposed orders on June 30, 2020. (Pet'rs' Proposed Order Granting Mot. to Stay, June 30, 2020; Appellant's [Proposed] Order, June 30, 2020.) On July 17, 2020, the circuit court signed and entered Respondents' proposed order granting Respondents' motion to stay the arbitration proceeding. (Order Granting Pet'rs' Mot. to Stay, July 17, 2020.) On July 27, 2020, Appellant filed her Motion to Alter or Amend the Court's Order Granting Petitioners' Motion to Stay, pursuant to Rules 52(b) and 59(a), SCRCP. (Mot. to Alter or Amend Order Granting Pet'rs' Mot to Stay.) Upon being prompted by

the circuit court, Respondents submitted a proposed order denying Appellant's motion to alter or amend the circuit court's order granting a stay of the arbitration proceeding on August 21, 2020. (Email from A. Sowell to Judge Manning (enclosing proposed order), Aug. 21, 2020.) The circuit court signed and entered that proposed order without alteration on August 24, 2020. (Order Denying Mot. to Alter or Amend Order Granting Pet'rs' Mot. to Stay, Aug. 24, 2020.) On the same day, Appellant filed her notice of appeal. (Notice of Appeal, Aug. 24, 2020.)

STANDARD OF REVIEW

"[T]he question of the arbitrability of a claim is an issue for judicial determination." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "Determinations of arbitrability are subject to de novo review." Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 129, 678 S.E.2d 435, 437 (2009). Accordingly, an "[a]ppeal from the denial of a motion to compel arbitration is subject to de novo review." New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 625, 667 S.E.2d 1, 3 (Ct. App. 2008). However, "a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." Id.

ARGUMENT

"The policy of the United States and South Carolina is to favor arbitration of disputes." Zabinski, 346 S.C. at 596, 553 S.E.2d at 118. Accordingly, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Grant, 383 S.C. at 129, 678 S.E.2d at 437. Here, the arbitration agreement is broad, specifically providing that "[a]ny dispute or controversy between the parties hereto arising out of, under, or in connection with, or in relation to, this Operating Agreement shall be submitted to binding arbitration in accordance with South Carolina Code Sections 15-48-10, et seq." (Operating Agreement 23.)

The circuit court erred by failing to enforce this provision in the Operating Agreement between the parties and by ignoring applicable law as set forth in the South Carolina Uniform Arbitration Act (the "Act"). Rather than apply the Act and enforce this agreement between the parties, the circuit court erroneously concluded that "based on the evidence before the [circuit court] a stay is appropriate consistent with the tenets of Rule 1 of the South Carolina Rules of Civil Procedure." (Order 3.) Though framed in the guise of a factual finding entitled to some deference, the circuit court premised this finding on its wrongful conclusion of law that the provisions of Section 15-48-20(b) of the Act are somehow "inconsistent." (Id.)

In staying Appellant's duly commenced arbitration proceeding, the circuit court committed error in five respects. First, the circuit court wrongfully concluded that provisions of Section 15-48-20(b) of the Act were somehow inconsistent. As discussed in more detail below, there is nothing inconsistent about the provisions of Section 15-48-20(b), and it requires a "substantial and bona fide" dispute over the existence of an agreement to arbitrate before a party can obtain a stay of an arbitration proceeding. Otherwise, the circuit court must compel the parties to arbitrate. Second, the circuit court wrongfully denied Appellant's motion to compel arbitration based on the same error of law. In so doing, the circuit court violated Section 15-48-20(a)'s mandate. Third, the circuit court misconstrued Rule 1, SCRCP, and wrongfully applied it to the arbitration proceeding, which was not pending before it. Fourth, to the extent the circuit court had any discretion, which Appellant disputes, it abused that discretion by ordering a stay of the arbitration proceeding on this record. In this regard, there is no evidence supporting the circuit court's finding that the arbitration proceeding and the probate appeal "would necessarily result in duplicative discovery or result in findings by an arbitration panel that could be undone by a final decision in the probate appeal." (Order 3.) Fifth, the circuit court erred by ordering a stay of the arbitration proceeding instead of

deferring that question to the duly appointed panel of arbitrators. The agreement to arbitrate is exceedingly broad and easily covers the question of the whether to stay the proceeding pending a determination of the probate appeal.

I. The circuit court erred by staying the arbitration proceeding based on its misconstruction of applicable law.

As set forth in the Operating Agreement, the parties agreed to submit to binding arbitration in accordance with the Act "[a]ny dispute or controversy between the parties hereto arising out of, under, or in connection with, or in relation to, this Operating Agreement." (Operating Agreement 23.) Rather than apply the Act and enforce this agreement between the parties, the circuit court noted that both parties relied upon Section 15-48-20(b) of the Act and then concluded that "those provisions are inconsistent." (Order 3.)

There is nothing inconsistent about Section 15-48-20(b) of the Act. Pursuant to Section 15-48-20(a), upon the "application of a party showing an agreement [to arbitrate], and the opposing party's refusal to arbitrate, the court **shall order** the parties to proceed to arbitration." S.C. Code Ann. § 15-48-20(a) (emphasis added); see also Weckesser v. Knight Enterprises S.E., LLC, 228 F. Supp. 3d 561, 564 (D.S.C. 2017), aff'd, 735 F. App'x 816 (4th Cir. 2018) ("If a valid arbitration agreement exists and covers the claims at issue, this Court has 'no choice but to grant a motion to compel arbitration.'" (quoting Adkins v. Labor Ready, Inc., 303 F.3d 496, 500 (4th Cir. 2002))). The only instance where a party is entitled to a stay of an arbitration proceeding is where the party disputes the existence of an agreement to arbitrate pursuant to Section 15-48-20(b). S.C. Code Ann. § 15-48-20(b) . If a party disputes the existence of an agreement to arbitrate, that issue "when in substantial and bona fide dispute, shall be forthwith and summarily tried." Id. "If found for the opposing party, the court **shall order** the parties to proceed to arbitration." Id. (emphasis added). A review of Section 15-48-20(b) within its statutory context makes its meaning even clearer.

A. Section 15-48-20(b) of the Act precludes staying the arbitration proceeding where there is an undisputed agreement between the parties to arbitrate.

By any reading of its terms, Section 15-48-20(b) provides no basis on which the circuit court could order a stay of Appellant's arbitration proceeding. S.C. Code Ann. § 15-48-20(b). By its plain language, Section 15-48-20(b) only provides a basis for staying an arbitration upon "a showing that there is no agreement to arbitrate." Id. Otherwise, a circuit court "shall order the parties to proceed to arbitration." Id. Respondents conceded the existence of an agreement to arbitrate, and the circuit court acknowledged this concession. (Order 3 ("It is undisputed that there is an agreement to arbitrate").) Accordingly, Section 15-48-20(b) clearly provides no possibility for a stay based on this record. If the Court has any doubt as to the meaning of the of Section 15-48-20(b), reading the Act "in toto," as Respondents suggested to the circuit court, makes its import even clearer. (See Pet. and Am. Mot. to Stay 1; Petr's' Mem. 5.)

First, Section 15-48-10 of the Act explains what is required for a valid "agreement to arbitrate," stating as follows:

> A written agreement to submit any existing controversy to arbitration or **a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract**. Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.

S.C. Code Ann. § 15-48-10(a) (emphasis added). As noted, Respondents have not claimed that there are any grounds "at law or in equity for the revocation" of the Operating Agreement. Accordingly, the Operating Agreement's arbitration clause is indisputably valid, enforceable, and irrevocable under Section 15-48-10. Id.

Next, as discussed in more detail below, Section 15-48-20(a) provides that a court shall compel the parties to arbitrate where there is a valid arbitration agreement and a refusal by a party to arbitrate. The full text of Section 15-48-20(a) provides as follows:

> On application of a party showing an agreement described in Section 15-48-10, and the opposing party's refusal to arbitrate, **the court shall order the parties to proceed with arbitration**, **but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue** so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

S.C. Code Ann. § 15-48-20(a) (emphasis added). Again, Respondents have not denied "the existence of the agreement to arbitrate" and have refused to arbitrate, so Section 15-48-20(a) entitles Appellant to an order compelling arbitration of the Arbitration Demand. Id.

Then, the language of Section 15-48-20(b) shows that Respondents' argument is clearly baseless:

> On application, the court may stay an arbitration proceeding commenced or threatened **on a showing that there is no agreement to arbitrate**. **Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried** and the stay ordered if found for the moving party. **If found for the opposing party, the court shall order the parties to proceed to arbitration.**

S.C. Code Ann. § 15-48-20(b) (emphasis added). Because Respondents have conceded the existence of a valid and enforceable agreement to arbitrate, Section 15-48-20(b) provides no basis for a stay of the arbitration proceeding. Rather, its mandate is nondiscretionary: "the court **shall order** the parties to proceed to arbitration. Id. (emphasis added).

B. Section 15-48-20(d) of the Act provides no basis for staying the arbitration.

Respondents also suggested below that Section 15-48-20(d) somehow provided for a stay of the arbitration proceeding. (Petr's' Mem. 5.) Again, Respondents did so without any explanation. (Id.) The circuit court's Order also fails to discuss how this provision rendered the

Act's dictates inconsistent. As a basis for their argument below, Respondents merely quoted the language from this provision, which reads as follows:

> Any action or proceeding involving an issue subject to arbitration shall be stayed **if an order for arbitration or an application therefor has been made under this section** or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

S.C. Code Ann. § 15-48-20(d) (emphasis added); (see Petr's' Mem. 5).

This provision merely addresses what happens in a pending civil action or court proceeding when a motion to compel arbitration is filed. See S.C. Code Ann. § 15-48-20(d). Such case is stayed pending the resolution of the motion to compel arbitration under Section 14-48-20(d). Id. It is clearly inapplicable in this case because Respondents were not making an application for an order for arbitration. See id. Instead, they were making a motion to stay a properly initiated arbitration. Accordingly, Section 14-48-20(d) clearly has no applicability, particularly when properly construed within the Act's statutory context.

C. Section 15-48-170 of the Act provides no basis for staying the arbitration.

Finally, Respondents quoted the language of Section 15-48-170 in stating that they were "relying" on this provision to stay the arbitration as well. (Petr's' Mem. 5.) Like before, Respondents simply said so without explanation. (Id.) This section of the Act also provides no basis to support the circuit court's conclusion that the Act's provisions are inconsistent. It does not even contain the word "stay," much less provide a basis to change the clear meaning of the provisions—in Section 15-48-20—actually dealing with a motion to compel or stay arbitration. Instead, it reads as follows:

> Except as otherwise provided, an application to the court under this chapter shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action.

S.C. Code Ann. § 15-48-170. By any reading of this provision, it provides that a motion suffices for an "application" under the Act (dispensing with the need for a petition or complaint) and should be heard as a motion (rather than by trial) but that the same should be served like a summons, instead of like a motion. That is all Section 15-14-170 says, and it does not support Respondents' Petition and Amended Motion for Stay.

Accordingly, the circuit court erred in premising its Order on a fundamental misconstruction of the Act. There is nothing inconsistent about the provisions of Section 15-48-20(b) or the Act read "in toto" as advocated by Respondents. (Petr's' Mem. 5.) Section 15-48-20(b) requires a dispute as to the existence of an agreement to arbitrate in order to entitle a party to a stay of an arbitration proceeding. S.C. Code Ann. § 15-48-20(b). Because no such dispute existed here and because there is nothing inconsistent about the requirements for a stay under Section 15-48-20(b), the circuit court erred in ordering a stay of the arbitration proceeding.

II. The circuit court had no discretion to deny Appellant's motion to compel arbitration because Respondents conceded the existence of the agreement to arbitrate but simply refused to arbitrate.

By denying Appellant's motion to compel arbitration, the circuit court erred in violating the plain dictates of Section 15-48-20(a) of the Act, which afforded no discretion to the circuit court in considering Appellant's motion. Nowhere in Respondents' submissions is there any basis to dispute the facts relevant to granting Appellant's motion to compel arbitration: (1) the existence of an arbitration agreement between the parties and (2) a refusal to by Appellants to arbitrate. Pursuant to Section 15-48-20(a), this is all that's required for an order compelling arbitration: "[o]n application of a party showing an agreement described in § 15-48-10, and the opposing party's refusal to arbitrate, **the court shall order the parties to proceed with arbitration**." S.C. Code Ann. § 15-48-20(a) (emphasis added). By its plain terms, this provision affords no discretion to the circuit court. See id.; see also Weckesser, 228 F. Supp. 3d at 564 ("If a valid arbitration

agreement exists and covers the claims at issue, this Court has 'no choice but to grant a motion to compel arbitration.'" (quoting Adkins, 303 F.3d at 500)).

The Operating Agreement indisputably fits the description of an arbitration agreement as defined by Section 15-48-10. See S.C. Code Ann. § 15-48-10(a). On its first page, the Operating Agreement contains the notice required by Section 15-48-10(a) in underlined capital letters. (Operating Agreement 1.) Then, Section 11.01 of the Operating Agreement requires the parties to submit any dispute or controversy to binding arbitration, providing that "[a]ny dispute or controversy between the parties hereto arising out of, under, or in connection with, or in relation to, this Operating Agreement shall be submitted to binding arbitration in accordance with South Carolina Code Sections 15-48-10, et seq." (Operating Agreement 23.) It further requires that "[a]ny dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding." (Id.)

Counsel for Respondents accepted service of Appellant's Arbitration Demand on April 7, 2020. (See Acceptance of Service.) Their filing of the Petition and Motion to Stay evidences Respondents' refusal to arbitrate. (See Petition.) By failing to challenge the existence of an agreement to arbitrate and even submitting a copy of the same with their Petition and Motion to Stay, Respondents conceded that there is no dispute as to the existence of an agreement to arbitrate between the parties. Therefore, because Respondents do not dispute the existence of an agreement to arbitrate and have refused to arbitrate, Appellant is entitled to an order compelling the parties to proceed to arbitration. See S.C. Code Ann. § 15-48-20(a). The circuit court erred by refusing to grant Appellant's motion.

III. The circuit court erred by misconstruing Rule 1, SCRCP, and attempting to apply it to an arbitration proceeding that was not pending before it.

Having found the mandatory provisions in the Act somehow inconsistent, the circuit court concluded that "a stay is appropriate consistent with the tenets of Rule 1 of the South Carolina Rules of Civil Procedure." (Order 3.) The portion of Rule 1, SCRCP, on which the circuit court relied is not even a rule. Rather, it merely states that "[the rules] shall be construed to secure the just, speedy, and inexpensive determination of every action." Rule 1, SCRCP. However, the South Carolina Rules of Civil Procedure contain no rule addressing motions to compel or stay arbitration. The applicable law is the Act, and the Act speaks in mandatory terms.

Moreover, the arbitration proceeding is a separate proceeding from this one. The arbitration proceeding has never been a civil action pending before the circuit court to which the rules of civil procedure would apply. Therefore, the circuit court had no authority to apply Rule 1, SCRCP to stay that proceeding. Rather, the sum and substance of the circuit court's authority over the arbitration proceeding was by virtue of the Act via this separate proceeding. See Hilton Head Resort Four Seasons Ctr. Horizontal Prop. Regime Council of Co-Owners, Inc. v. Resort Inv. Corp., 311 S.C. 394, 399, 429 S.E.2d 459, 463 (Ct. App. 1993) (explaining that the circuit court had jurisdiction by virtue of Section 15-48-20(b).).

Accordingly, staying the arbitration proceeding on the basis of Rule 1, SCRCP, was inappropriate. The only matters before the circuit court were the parties competing motions to compel and stay arbitration, both of which were authorized by the Act and should be governed by its express terms. As discussed above, those express terms required the circuit court to order the parties to proceed to arbitration.

IV. To the extent that the circuit court had any discretion to grant a stay of the arbitration proceeding, the circuit court abused that discretion because there is nothing in the record supporting its findings.

Appellant maintains that Rule 1, SCRCP, afforded the circuit court no discretion to issue a stay of the arbitration proceeding. Nonetheless, even if the circuit court somehow did have some discretion, the circuit court abused its discretion because there is no evidence supporting the circuit court's findings.

A. The circuit court's Order granting a stay of the arbitration proceeding is unsupportable in light of the record in this case.

At Respondents' urging, the circuit court erroneously based its decision on fallacies devoid of any proof. By signing the proposed order submitted by Respondents, the circuit court concluded as follows:

> Given the allegations made by the arbitration demand, it appears clear that elements of the probate case are implicated. The Court cannot judge to what extent they are but suffice it to say discovery of those issues will necessarily need to be had. To allow arbitration to proceed would necessarily result in duplicative discovery or result in findings by an arbitration panel that could be undone by a final decision in the probate appeal.

(Order 2-3) (emphasis added). By so stating, the Order illustrates its faulty underpinnings.

First, by candidly stating that the circuit court "cannot judge to what extent" the appeal of the probate matter and the arbitration proceeding overlap, the circuit court's Order shows that there is no evidence reasonably supporting the circuit court's findings. It also shows that the Respondents have not met any burden of proving their entitlement to a stay of the proceeding, even if the South Carolina Rules of Civil Procedure somehow governed an arbitration proceeding that was not pending before the circuit court. In analogous situations where a party seeks a stay of discovery, a movant carries the heavy burden of proving that a stay is warranted.[1] Given state and

[1] For example, for a motion to stay discovery pending a ruling on a motion to dismiss, "[t]he moving party bears the burden of showing good cause and that a stay of discovery is reasonable."

federal policy favoring the enforcement of agreements to arbitrate, at least the same burden is warranted here.

Such a heavy burden is especially justified in this case, where Respondents are asking the circuit court to potentially stay the arbitration for years while appeals of the probate matter run their course. Despite that fact, the circuit court impermissibly concluded that it need not make any analysis or subject Respondents to any burden of proof before staying the arbitration proceeding for years on end. Instead, the circuit court based its conclusion on the number of paragraphs Respondents could count in the arbitration demand that reference estate planning or the probate dispute. (Order 2.) That is not evidence, and in granting a stay on this basis, the circuit court plainly allowed Respondents to avoid any burden of proving entitlement to a stay. To the extent the circuit court's finding in this regard is entitled to any deference, it was an abuse of discretion. There is simply no evidence in the record reasonably supporting the circuit court's findings.

Second, the circuit court's Order is wrongly premised on the notion that there could be duplicative discovery between the arbitration proceeding and the appeal of the probate matter. There can be no discovery in the appeal of the probate matter, so there is no possibility of

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Brown-Thomas v. Hynie, No. 1:18-CV-02191-JMC, 2019 WL 1043724, at *4 (D.S.C. Mar. 5, 2019) (citing Kron Med. Corp. v. Groth, 119 F.R.D. 636, 637 (M.D.N.C. 1988)); see Gardner v. Newsome Chevrolet-Buick, Inc., 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) ("Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure." (citing H. Lightsey & J. Flanagan, *South Carolina Civil Procedure*, (2d ed. 1985))).). In evaluating such motion to stay, "the Court must take a 'preliminary peek' at the merits of a dispositive motion to see if it 'appears to be clearly meritorious and truly case dispositive.'" McCabe v. Foley, 233 F.R.D. 683, 685 (M.D. Fla. 2006) (quoting Feldman v. Flood, 176 F.R.D. 651, 652-53 (M.D. Fla.1997)); see also Brown-Thomas, C.A. No. 1:18-cv-02191-JMC, 2019 WL 1043724, at *7 ("[U]pon taking a careful 'peek' at the pending Motions to Dismiss . . . there is no indication that they are 'clearly meritorious and truly case dispositive' . . . ." (quoting McCabe, 233 F.R.D. at 685)); Baker v. Swift Pork Co., C/A No. 3:15–CV–663–JHM, 2015 WL 6964702, at *1 (W.D. Ky. Nov. 10, 2015) (denying a motion to stay discovery when it was "not patently apparent" whether a dispositive motion would be granted or denied).

duplicative discovery. See S.C. Code Ann. § 62-1-308(i) (explaining that "[t]he hearing must be strictly on appeal and no new evidence may be presented"). Accordingly, this underlying premise of the circuit court's Order is likewise unfounded.

Third, the circuit court's Order is also premised on the false notion that the appeal could somehow undo the decision of the arbitration panel. This idea is incorrect as a matter of fact and law, and the circuit court's Order is devoid of any reasoning as to how it could possibly be the case. The primary question at issue in the arbitration proceeding—whether to dissolve BBB&C Family LLC—is not at issue in the appeal of the probate matter, which deals exclusively with the interpretation of a trust agreement. Likewise, Appellant's entitlement to an accounting and a resolution of her breach of fiduciary duty claims has nothing at all to do with the probate dispute. Accordingly, no findings by the arbitration panel could possibly be altered by a final decision in the probate appeal. The circuit court's surmising otherwise is wholly unsupported by the record.

The claims asserted in the Arbitration Demand are completely distinct from those at issue in the appeal of the probate matter. The resolution of that appeal will have no bearing on the Arbitration Demand and will certainly not "streamline the present arbitration," as Respondents suggested to the circuit court, again without any explanation. (Pet'rs' Mem. 4.) The appeal of the probate matter deals exclusively with the interpretation of a trust, not the Operating Agreement. As the second sentence of the June 20, 2019 Order Calculating Equalization Distribution of Lifetime Gifts explains, the probate matter concerns Appellant's petition "to determine the intent of Janet B. Brooker . . . in the equalization clause of the Janet B. Brooker Trust and Decedent's meaning of the words lifetime gifts, as it is used within the Decedent's Trust document." (Pet'rs' Mem. Ex. B, at 1 (Order Calculating Equalization Distribution of Lifetime Gifts, June 20, 2019).)

The appeal of that probate matter has absolutely nothing to do with BBB&C Family LLC or the Operating Agreement.

By contrast, the Arbitration Demand seeks a judicial decree dissolving BBB&C Family LLC on multiple grounds under Section 33-44-801(4) of the South Carolina Uniform Limited Liability Company Act of 1996:

> (a) the economic purpose of the company is likely to be unreasonably frustrated;
>
> (b) another member has engaged in conduct relating to the company's business that makes it not reasonably practicable to carry on the company's business with that member;
>
> (c) it is not otherwise reasonably practicable to carry on the company's business in conformity with the articles of organization and the operating agreement;
>
> * * *
>
> (e) the managers or members in control of the company have acted, are acting, or will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to the Appellant . . . .

(Arbitration Demand, ¶ 53; see id., ¶¶ 53-62); see also S.C. Code Ann. § 33-44-801(4). None of these statutory grounds for dissolution are at issue in the appeal, and that appeal's ultimate determination will have no bearing on them.

The reason the probate matter is discussed at all in Appellant's Arbitration Demand is because it shows, along with other things, the last of these four grounds for dissolving BBB&C Family LLC—how Respondents "have acted, are acting, or will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial" to Appellant. (See Arbitration Demand, ¶¶ 53-62.) For this particular basis for dissolution, the conduct of Respondents Beacham and Ellen in connection with the probate matter is just one of six supporting reasons:

> a. For nearly as long as the Company has existed, the relationship between Julia and her siblings has been marked by severe distrust and animosity;

> b. **Beacham and Ellen have a history of attempting to short Julia what she is entitled from Mother's estate, as shown by the results of the litigation over Mother's Trust, which result Beacham and Ellen are now appealing**;
>
> c. There has been an ongoing lack of transparency shown by Beacham and Ellen to Julia as demonstrated by their destruction of documents pertaining to Mother's finances, which could have shed light on inconsistencies in the numbers of shares of Martin Marietta and Lockheed Martin common stock owned by Father and Mother;
>
> d. Contrary to the terms of the Operating Agreement, Beacham and Ellen have diverted distributions owed to Julia to an account maintained by Beacham and Ellen without Julia's consent; . . .
>
> e. Beacham and Ellen have ignored Julia's request for additional information about these deposits of funds and the Company in general; [and]
>
> f. Beacham has failed to observe corporate formalities with regard to the real estate limited liability companies, namely 636 Harden LLC and 640 Harden LLC, and as a result is potentially exposing the assets of BBB&C in the event that a judgment is obtained against one or both real estate limited liability companies.

(Arbitration Demand, ¶ 60 (emphasis added).)

The ultimate result of the appeal is immaterial because its only relevance to the Arbitration Demand is in showing a pattern and practice by Beacham and Ellen of attempting to cheat Julia at every turn. Accordingly, Respondents' suggestion that "once the probate court litigation ends, it will streamline the present arbitration and preserve the resources not only of the parties, but of the judicial system" is pure fiction. (Pet'rs' Mem. 4.) The arbitration proceeding will not be streamlined by the resolution of the appeal, much less resolved through it. In truth, Respondents have wasted judicial resources via their dilatory tactics, as they have caused Appellant to expend her resources fighting Respondents' successive efforts to undermine the parties' agreement to arbitrate. Respondents' claim to the circuit court that a stay will save anyone's resources rings hollow.

Moreover, the outcome of the appeal cannot change the fact that Respondents Beacham and Ellen paid Appellant $735,954 after she was forced to retain counsel and file suit in probate

court. (See Mot. to Alter or Amend Ex. A (Letter from B. Sowell to J. Griffin, Dec. 12, 2019).) Prior to the commencement of the probate litigation, Respondents previously took the position that Julia was entitled to approximately $420,000. (Mot. to Alter or Amend Ex. B. (B. Brooker Dep., 28:15-30:15, 44:7-25, Jan. 24, 2018); Mot. to Alter or Amend Ex. C. (B. Brooker Dep., Ex. 17, Brooker Estate Calculations).) In this respect, Respondents even disagreed with prior counsel for the Estate who concluded that Julia was owed approximately $584,000 under Respondents' interpretation of the Trust provision. See id. (setting forth the calculation prepared by counsel for the Trust based upon incomplete records provided by Respondents that purports to show what Julia was owed under Respondents' interpretation of the Trust provision).[2] Nothing that happens in the appeal of the probate court's decision can change the fact that Respondents attempted to cheat Julia out of at least $300,000, because Respondents Beacham and Ellen asserted that Julia was only entitled to approximately $420,000 under their mother's trust, but subsequently conceded she was owed $735,954 after Julia was forced to retain the undersigned counsel and sue Respondents in probate court.

With its Order, the circuit court wrongly relieved Respondents of any burden of proof, based its decision on a false belief that discovery could somehow be duplicative as between the arbitration proceeding and the appeal of probate matter, and apparently misunderstood the issues involved in the two cases. There is no evidence supporting the circuit court's findings. Therefore, to the extent the circuit court had any discretion to stay the arbitration proceeding, it abused that discretion.

[2] Judge McCulloch rejected Respondents Beacham and Ellen's interpretation.

B. The stay could last for years, which is anathema to applicable law and the parties' agreement.

The appeal of the probate matter could last for years because any ruling on the initial appeal will likely result in a subsequent appeal. Currently, briefing in the initial probate appeal in circuit court is complete, but the case is still awaiting the scheduling of oral argument. Accordingly, the circuit court's Order could stay the arbitration proceeding for years. During that time, the relief Appellant sought through arbitration will be completely unavailable to her by any means, forcing her to remain part of a limited liability against her wishes and allowing Respondents' alleged misconduct to continue to harm Appellant and the company without any possibility of an accounting.

This stay clearly "frustrate[s] the statutory policy of rapid and unobstructed enforcement of arbitration agreements." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 23 (1983). The circuit court's Order completely undermines the parties' agreement to arbitrate, which contemplates a prompt and final resolution of their dispute. The Operating Agreement of BBB&C Family LLC provides that the arbitration panel is selected promptly and that it completes its work within four months, and it affords no opportunity for appeal:

> The arbitrators shall be selected as provided in the SCUAA, and **the arbitrators shall render a decision on any dispute within one hundred twenty (120) Days** after the last of the arbitrators has been selected. If any party to this Operating Agreement fails to select an arbitrator with regard to any dispute submitted to arbitration under this Section 11.01 within thirty (30) Days after receiving notice of the submission to arbitration of such dispute, then the other party shall select an arbitrator for such non-selecting party. **The decision of the arbitrators shall be final and binding on the parties, who specifically renounce any judicial review of the award**, and agree that judgment on the award may be enforceable in any court of competent jurisdiction.

(Operating Agreement 23. (emphasis added).)

Eight months have now elapsed since Appellant initiated the arbitration proceeding on March 17, 2020. That is nearly twice the time allotted by the Operating Agreement for the

arbitration panel to be selected and to render a decision. (Id.) Now, with its Order, the circuit court has extended that period potentially for years. As evidenced by the plain language of the Operating Agreement, the parties clearly sought to obtain a prompt and efficient resolution of any dispute, and avoid litigating in circuit court. Accordingly, the circuit court's Order completely undermines the primary objective of the parties' agreement to promptly and definitely arbitrate the underlying dispute.

Therefore, to the extent that the circuit court had any discretion to issue a stay of the arbitration proceeding, the circuit court abused its discretion as shown by the record in this case. The record is clear—the arbitration proceeding to dissolve the BBB&C Family LLC, seek an accounting, and assert claims for breach of fiduciary duty against Respondents Beacham and Ellen has nothing to do with the probate appeal dealing with the interpretation of a trust agreement. Nothing that occurs with the latter will in any way impact the former. Rather, by granting the stay of the arbitration proceeding, the circuit court has undermined the parties' agreement to arbitrate by interjecting potential years of delay into a process that was contemplated to be complete in a manner of months.

V. The duly appointed arbitrators should have been allowed to decide whether to stay the arbitration proceeding.

The circuit court also erred by granting Respondents' motion to stay the arbitration proceeding rather than allowing the arbitration panel to make that determination. As argued above, Section 15-48-20(b) obviously afforded no basis for issuing a stay of the arbitration proceeding, and accordingly, any other basis for issuing a stay should have been left to the discretion of the panel of arbitrators.

Here, the agreement to arbitrate was exceedingly broad, covering "[a]ny dispute or controversy between the parties hereto arising out of, under, or in connection with, or in relation

to, th[e] Operating Agreement," as well as "[a]ny dispute as to whether a controversy or claim is subject to arbitration." (Operating Agreement 23.) This broad language clearly covers this dispute over whether to stay the arbitration proceeding pending the resolution of the probate appeal.

As repeatedly stated by the South Carolina Supreme Court, "[b]oth state and federal policy favor arbitration of disputes." Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007). Accordingly, "unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered." Id. Here, the circuit court concluded that "[i]t is undisputed that there is an agreement to arbitrate." (Order 3.) With that conclusion, the decision to issue a stay should have been left for the arbitration panel to determine because "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Zabinski, 346 S.C. at 597, 553 S.E.2d at 118. Indeed, "[a] motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute." Id., 346 S.C. at 597, 553 S.E.2d at 118-19.

Accordingly, because Respondents could submit the same arguments for a stay to the duly selected arbitrators, Appellant's motion to compel arbitration should have been granted, and Respondents' motion denied.

CONCLUSION

For the reasons stated, Appellant respectfully requests that this Court reverse the Order of the circuit court and compel the parties to proceed to arbitration.

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Respectfully submitted,

November 16, 2020

s/Badge Humphries

James M. Griffin (S.C. Bar # 9995)
Margaret N. Fox (S.C. Bar # 76228)
GRIFFIN DAVIS LLC
4408 Forest Drive, Suite 300
Columbia, South Carolina 29206
(803) 744-0800

Badge Humphries (S.C. Bar # 72904)
GRIFFIN HUMPHRIES LLC
2113 Middle Street, Suite 305
Sullivan's Island, South Carolina 29482
(843) 883-7424

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Appellate Case No. 2020-001159
Case No. 2020-CP-40-02040

Beacham O. Brooker, Jr., Ellen B. Corontzes; and BBB&C Family, LLC, Respondents,

v.

Julia B. Brooker, Appellant.

PROOF OF SERVICE

I hereby certify that I have served the Initial Brief of Appellant, Appellant's Designation of Matter to be Included on the Record on Appeal, and Motion for Expedited Appeal upon the following counsel for Respondents via electronic mail at the email addresses below on this November 16, 2020 (copy of email attached):

Thornwell F. Sowell, III (SC Bar # 5197)
Bess J. DuRant (SC Bar # 77920)
Sowell & DuRant
bsowell@sowelldurant.com
bdurant@sowelldurant.com

Attorneys for Respondents Beacham O. Brooker, Jr. and Ellen B. Corontzes

Gray T. Culbreath (SC Bar # 11907)
Gallivan White & Boyd, P.A.
gculbreath@gwblawfirm.com

Attorneys for Respondent BBB&C Family, LLC

s/ Badge Humphries

James M. Griffin (SC Bar # 9995)
Margaret N. Fox (SC Bar # 76228)
GRIFFIN DAVIS LLC
4408 Forest Drive, Suite 300
Columbia, South Carolina 29206
(803) 744-0800

Badge Humphries (SC Bar # 72904)
GRIFFIN HUMPHRIES LLC
2113 Middle Street, Suite 305
Sullivan's Island, South Carolina 29482
(843) 883-7424

Attorneys for Appellant

From: Badge Humphries
Sent: Monday, November 16, 2020 4:29 PM
To: Biff Sowell; Bess DuRant; gculbreath@gwblawfirm.com
Cc: Jim Griffin; Maggie Fox; Badge Humphries; Daphne L. Greve; Jaime Harmon
Subject: Brooker v. Brooker, Appellate Case No. 2020-001159
Attachments: 2020-11-16_Appellant Initial Brief_FINAL.pdf; 2020-11-16_Appellant Desig of Matter_FINAL.pdf; 2020-11-16_Motion for Expedited Appeal_FINAL.pdf

Counsel:

As permitted by part (g)(3) of Supreme Court Order 2020-05-29-02, I am hereby serving via email the Initial Brief of Appellant, Designation of Matter to be Included on the Record on Appeal, and Motion for Expedited Appeal in the above-referenced action. Shortly, I will be filing these documents with the Court of Appeals electronically as permitted by part c(6) of the Order and will attach this email to the proof of service of same.

Sincerely,

Badge

BADGE HUMPHRIES
ATTORNEY

Griffin Humphries LLC
2113 Middle Street, Ste. 305
Sullivan's Island, SC 29482
o. 843.883.7424 f. 843.883.7462 c. 843.991.7080
BHumphries@griffinhumphries.com
www.griffinhumphries.com