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STATE OF WISCONSIN
IN THE COURT OF APPEALS
DISTRICT II

JOHN MAYER AND DIANNE MAYER,

Plaintiffs-Respondents, Appeal No. 2020AP000199

v.

CONROY SOIK AND MARY SOIK,

Defendants,

STEVE ANDERSON,

Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT FOR MANITOWOC COUNTY
THE HONORABLE MARK ROHRER, PRESIDING
CIRCUIT COURT CASE NO. 2017-CV-373

RESPONSE BRIEF OF PLAINTIFFS-RESPONDENTS, JOHN MAYER AND DIANNE MAYER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Wisconsin Statutes

Wisconsin Cases

Other

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiffs-Respondents John Mayer and Dianne Mayer (hereinafter "Mayers") do not believe that oral argument is necessary but would welcome the opportunity if the Court believes it will assist in its decision. Publication is appropriate pursuant to the criteria set forth in Wis. Stat. § 809.23. This case involves application of the well-established rules in Wisconsin regarding who can and, more importantly, who cannot enforce a contract in the context of a non-party attempting to enforce an arbitration agreement.

STATEMENT OF THE ISSUE FOR REVIEW

1. Can Steven Anderson ("Anderson") enforce an arbitration provision in a contract to which he is not a party, is not a signatory, when the clear language in the arbitration provision specifically excluded employees like Anderson?

Circuit Court Answer: No

Correct Answer: No

INTRODUCTION

Anderson is attempting to force the Mayers to arbitrate their claims against him, relying on an arbitration provision in a franchise agreement between the Mayers and Culver's Franchising Systems (hereinafter "CFS"). (R. at 171, A. at p. A001). The language in the agreement is clear that the arbitration provision only applies to the parties and not to CFS's agents, employees, or affiliates like

Anderson. Instead of applying Wisconsin law, which indicates Anderson may not compel arbitration, Anderson asks this Court to apply federal law.

While Anderson overstates the breadth of the federal rule, it is of no consequence because Wisconsin courts have addressed this issue and routinely held that non-parties to arbitration agreements can only enforce those agreements under recognized Wisconsin state law concepts. Therefore, this Court must look to state law concepts to answer the question of whether Anderson, a non-party to the arbitration agreement, can enforce the arbitration agreement. Wisconsin law is clear that Anderson cannot require the dispute pending in a state circuit court to be resolved by arbitration because he is not a third-party beneficiary of the contract that contains the arbitration provision. Further, Anderson cannot meet his burden to show that the Mayers are equitably estopped from pursuing their claims against him outside of arbitration. Because Anderson cannot meet his burden, the trial court's decision must be affirmed.

STATEMENT OF THE CASE

It must first be noted that Anderson's brief is filled with irrelevant information that is not supported by any citations to the record. Some of the more egregious examples are on Page 3 of the brief, where Anderson states that John Mayer is a practicing attorney and has thirty years of experience litigating in Manitowoc, WI, and that the Mayers are represented by John Mayer's partner in this litigation. (Appellant Brief p. 3). Further, in the footnote on Page 5, Anderson,

states that the Mayers also own an interest in six additional Culver's franchise locations in Wisconsin, Michigan, and Arizona. Id. at p. 5. Such statements are problematic for two reasons. First, the Wisconsin rules of appellate procedure are clear that all facts must include citations to the record and Anderson's brief violates this rule. Wis. Stat. § 809.19(1)(e). Second, the only conclusion to be drawn is that Anderson is attempting to prejudice this Court with extraneous and impertinent information in an effort to gain an advantage. Anderson obviously wants this Court's decision to be influenced by these irrelevant representations.

It would be unproductive for the Mayers to respond to each and every one of Anderson's "facts" that have no citation to the record or relevance to the legal issue presented in this appeal. However, the Mayers' lack of response and their respect for the rules of appellate procedure are in no way an endorsement of Anderson's "facts".

Even more troubling is Anderson's inclusion in his appendix of information the circuit court did not consider in Anderson's motion to dismiss the case and compel arbitration. Anderson's Appendix A212 to A213 were documents presented to the circuit court in an unrelated motion and had nothing to do with Anderson's motion to dismiss and compel arbitration. (R. at 155, 154, A. at pp. A212, A213). Therefore, Anderson is asking this Court to consider factual information that Anderson did not ask the circuit court to consider in his motion to dismiss.

Unfortunately, this does not end the procedural problems with Anderson's appeal. A215, the Declaration of Joe Koss, filed with the circuit court on November 12, 2019, should not have been considered by the Court because it was testimony which is inappropriate in a motion to dismiss. (R. at 159, A. at p. A215-A216). The declaration of Joe Koss was meant to convey that all actions taken by Anderson were with the approval of CFS. Id. However, given that Anderson filed a motion to dismiss which stayed discovery, Joe Koss was never deposed to test the truth and veracity of his declarations. The circuit court should have either disregarded the Declaration of Joe Koss or converted Anderson's motion to dismiss to a motion for summary judgment. This is addressed more fully in the argument section of this brief.

FACTUAL BACKGROUND

John and Dianne Mayer and Conroy and Mary Soik are partners in Soikmayer, LLC, CMJD, Inc., Blue Oval, LLC, Neon Blue, Inc., 11820 Velp Avenue, LLC, and Custard, Inc. ("CMJD", "Blue Oval", "Neon Blue", "1182 Velp Avenue", and "Custard", respectively, collectively, "Partnership Entities"). (R. at 117, 118, 119, A. at pp. A052-A211). CMJD, Neon Blue, and Custard operate three co-owned Culvers restaurants on sites that are owned and managed by Soikmayer, Blue Oval, and 11820 Velp Avenue. (R. at 111, A. at pp. A029-A030).

This case arises from a partnership dispute between the Mayers and the Soiks relating to the Soiks' mismanagement of the Partnership Entities including, but not

limited to, Mary Soik's conversion of the Partnership Entities' funds while she was serving as the bookkeeper of the Partnership Entities, the Soiks' steadfast refusal to permit the Mayers to inspect the books and records, and the Soiks' concerted efforts to dissolve the partnership in order to cover up their unlawful conduct. (R. at 111, A. at pp. A028-A049).

In their Second Amended Complaint, the Mayers brought the following causes of action against the Soiks: (1) breach of fiduciary duty (Count I), (2) breach of contract (Count II), (3) tortious interference with a contract (Count III), (4) civil theft pursuant to Wis. Stat. §895.446 (Count IV), (5) conversion against Mary Soik (Count V), (6) civil conspiracy against Mary and Conroy Soik (Count VI), and (7) a claim for punitive damages (Count XI). Id.

As a result of Defendant Anderson's constant meddling and interference in the partnership dispute to the detriment of the Mayers, the Mayers were forced to join him as a defendant in this action and have asserted the following causes of action against him: (1) aiding and abetting breach of fiduciary duty (Count VII), (2) injury to business in violation of Wis. Stat. § 134.01 (Count VIII), (3) tortious interference with contractual relationship (Count IX), (4) civil conspiracy (Count X), and (5) a claim for punitive damages (Count XI). Id. The allegations against Anderson are summarized below:

> 28. To that end, Mary Soik found an ally in Steve Anderson, Culver's General Counsel and Vice President of Legal Affairs. Mr. Anderson sought to help the Soiks avoid the accountability that the Mayers sought to obtain from them as partners in the co-owned stores.

29. To that end, Steve Anderson approached the Mayers demanding to mediate their partnership dispute with the Soiks. The Mayers politely declined to have Mr. Anderson mediate the dispute because they did not want to inject Culver's into the partnership dispute with the Soiks.

30. Moreover, the Mayers informed the Soiks through their attorney, Nicholas Linz, that it was improper for the Soiks to inject Culver's in the partnership dispute.

31. Unbeknownst to the Mayers at that time, Steve Anderson had been in contact with the Soiks and had counseled them throughout the partnership dispute. Mr. Anderson concealed this material fact from the Mayers when he requested to mediate the partnership dispute.

32. Steve Anderson viewed the Mayers' refusal to have him mediate the partnership dispute as a personal insult and retaliated by suspending the Mayers' expansion rights which Culver's had previously granted them in Colorado, Michigan, and Wisconsin. This occurred after the Mayers relocated their son, Mathew Mayer, to Colorado and spent a substantial sum of money in identifying suitable locations and planning to expand their Culver's business in Colorado. The Mayers also spent substantial sums of money in identifying suitable locations in Wisconsin and Arizona.

33. Steve Anderson subsequently requested to have a meeting with the Mayers in Culver's headquarters to review the performance of their stores. Notably, Mr. Anderson had never been involved in these operational meetings before the Mayers' partnership dispute with the Soiks arose nor had a business review ever been conducted at Culver's headquarters. The Mayers' attorney instructed Mr. Anderson not to discuss the partnership dispute with the Soiks at that meeting.

34. During the meeting, it became explicitly clear that Steve Anderson arranged the meeting under the pretense of reviewing the Mayers' stores so that he could discuss their partnership dispute with the Soiks.

35. The Mayers understandably did not invite their attorney to the meeting with Culver's because Steve Anderson had represented that the meeting was scheduled to review the stores and Steve Anderson was instructed not to discuss the partnership dispute. When the Mayers got up to leave the meeting after the store review was completed, Steve Anderson demanded that they stay so that he could discuss the partnership dispute with them. John Mayer told Steve Anderson that it was unethical for the parties to the partnership dispute and Steve Anderson to discuss the partnership dispute without counsel present. The Mayers refused to discuss the partnership dispute with Mr. Anderson because it was a pending legal matter that did not involve either Culver's or Mr. Anderson.

36. Notably, Steve Anderson, as an experienced attorney, very well knows that he is not permitted to speak with the Mayers or Soiks regarding the partnership dispute when their attorney was not present in the meeting. Mr. Anderson is also well aware that his insistence on discussing the partnership

dispute with the Mayers outside of their attorney's presence is a clear violation of the Wisconsin Rules of Ethics.

37. Steve Anderson's unwavering persistence on asserting himself in the Mayers' partnership dispute with the Soiks was befuddling to the Mayers and prompted them to investigate Mr. Anderson's unethical behavior. The Mayers learned that Mr. Anderson had testified before a congressional subcommittee that was considering changes to U.S. patent laws that Culver's had used its franchisee's marketing contributions into the National Marketing fund to defend a patent infringement lawsuit. The Mayers were never informed their marketing contributions were being used for legal expenses that should have been paid by Culver's or its insurers. Upon information and belief, Mr. Anderson had directed Culver's to use advertising funds for other non-advertising uses. Mr. Anderson also directed Culver's to file and maintain a meritless lawsuit against Steak 'N Shake. Finally, upon information and belief, Mr. Anderson directed Culver's not to include litigation in Culver's Uniform Franchise Offering Circular. All of this unethical behavior was brought to Mr. Anderson's attention by the Mayers.

38. The Mayers also learned that Steve Anderson was receiving information regarding this lawsuit from the Soiks and their attorney which he used to further exert pressure on the Mayers.

39. The Mayers brought their concerns about Steve Anderson's testimony regarding the improper use of the funds in the National Marketing Fund, his concerted efforts to assert himself into the partnership dispute that had nothing to do with Culver's, his decision to suspend the Mayers' expansion rights, and his concerted efforts to meddle into the partnership dispute. In retaliation, Mr. Anderson informed the Mayers that Dianne Mayer would no longer be considered an approved operator by Culver's, that the Mayers could not acquire the Soiks' interest in the three co-owned restaurants because they are not approved operators by Culver's, and that the Mayers must inform any prospective purchaser of the Soiks' interest in the co-owned restaurants that the Mayers are not approved operators by Culver's.

40. Steve Anderson knew that Dianne Mayer has established herself as a very successful operator of Culver's restaurants in the franchise system through her operations of the co-owned restaurants have consistently ranked among the highest performing restaurants in the Culver's system based on every metric. The Mayers own and operate nine Culver's locations across three states. They have spent two decades developing the resources and talent necessary for this.

41. By withdrawing Culver's approval of Dianne Mayer as an operator, Steve Anderson wanted to destroy the Mayers' interest in the co-owned restaurants or at a bare minimum, force them to sell their interest in those restaurants which the Mayers had no interest in doing.

42. The Mayers also learned that Steve Anderson had conveyed to Culver's Board of Directors that the Mayers were harming the Culver's brand by pursuing their claims against the Soiks in this lawsuit, that the Mayers

unreasonably refused to resolve the matter, and that the Mayers were bullying and threatening him and the Soiks with further legal action.

43. In reality, it was Steve Anderson who was bullying the Mayers. He unjustifiably asserted himself in the Mayers' partnership dispute with the Soiks. He retaliated against the Mayers for refusing to allow him to mediate the dispute by suspending their expansion rights. He told the Mayers that Culver's does not need their money and is not bothered by litigation. Mr. Anderson even went so far as to attempt to intimidate and pick a fight with the Mayers' counsel while discussing resolution of the partnership dispute. He then upped the ante by withdrawing Culver's approval of Dianne Mayer as the operator of the co-owned restaurants even though he has no legal or factual basis to do so.

44. Steve Anderson advised the Mayers that they were not allowed to discuss the partnership dispute with other Culver's employees. When other employees of Culver's voiced their objection to Mr. Anderson's conduct toward the Mayers, Mr. Anderson had them relocated within the company so that they no longer had contact with the Mayers. Mr. Anderson engaged in a campaign to silence any Culver's employees who objected to or raised concern of his treatment of the Mayers.

45. In a good faith effort to resolve the partnership dispute with the Soiks and to avoid a potential dispute with Culver's, the Mayers offered to purchase the Soiks' interest in the co-owned restaurants on the same terms and conditions that the Soiks had received and accepted from another Culver's franchisee. In addition, the Mayers advised Culver's and the Soiks that they were willing to resolve this lawsuit if the Soiks accepted their offer and Culver's approved the transfer of the Soiks' interest to the Mayers.

46. In response to the Mayers' offer, Steve Anderson had Culver's send the Mayers notices of default for the co-owned restaurants contending that the stores were in default because Dianne Mayer was no longer an approved operator by Culver's. This despite the fact that Mrs. Mayer is an approved operator by Culver's in other restaurants, was and still is the de facto operator of the co-owned restaurants and is the president of the co-owned restaurants.

47. Upon information and belief, Mr. Anderson has not directed Culver's to send Mary Soik notices of default for her solely owned stores for lack of an approved operator even though those stores are similarly situated to the co-owned stores.

48. Mr. Anderson has made it explicitly clear that he will stop at nothing until he destroys the business that the Mayers have worked tirelessly for decades to build with substantial investment of time and money. He has abused his authority and position with Culver's in an effort to force the Mayers to sell their interest in the co-owned stores.

49. Mr. Anderson's vindictive and retaliatory conduct is the payback to the Mayers for standing up to him.

(R. at 110, A. at pp. A035-A040).

All of the franchise agreements between CFS and the Mayers contain an identical narrow arbitration provision that only applies to the parties and does not apply to CFS's employees, agents, or directors. The arbitration provision states in pertinent part that:

> A. Arbitration Process. Except to the extent Franchisor elects to enforce the provisions of this Agreement by judicial process and/or injunction as provided in this Agreement, all disputes, claims and controversies between the parties arising under or in connection with this Agreement or the making, performance or interpretation of this Agreement (including claims of fraud in the inducement and other claims of fraud and the arbitrability of any matter) which have not been settled through negotiation or mediation will be submitted to binding arbitration pursuant to the Federal Arbitration Act. All arbitration proceedings must take place in Sauk County, Wisconsin. The arbitrator must follow the law and not disregard the terms of this Agreement. The arbitrator must have a minimum of seven (7) years experience in franchise or product distribution law and will have the right to award specific performance of this Agreement. The proceedings must be conducted in accordance with the Federal Rules of Evidence and the Commercial Arbitration Rules of the American Arbitration Association, to the extent that the AAA Commercial Arbitration Rules are not inconsistent with provisions of this arbitration provision. The decision of the arbitrator will be final and binding on all parties. This Section will survive termination or non-renewal of this Agreement under any circumstances. Judgment upon the award of the arbitrator may be entered in any court having jurisdiction thereof. During the pendency of any arbitration proceeding, Franchisee and Franchisor will fully perform their respective obligations under this Agreement. (Emphasis added). (R. at 117, 118, 119, A. at pp. A074-A075, A122-A123, A165-166).

Although the arbitration provision in the franchise agreement does not include CFS's officers or directors, another portion of the franchise agreement specifically gives CFS's officers and directors, like Anderson, the ability to join in any arbitration involving CFS:

> D. No Collateral Estoppel or Class Actions. No arbitration findings or awards made by the arbitrator(s) may be used to collaterally estop either party from raising any like or similar issues, claims or defenses in any other or subsequent arbitration, litigation, court hearing or other proceeding involving third parties or other franchisees. No party except Franchisor, Franchisee, and their officers, directors, owners or partners, and the Personal Guarantors will have the

> right to join in any arbitration proceeding arising under this Agreement. Therefore, the arbitrator(s) may not permit or approve class actions or permit any person or entity that is not a party to this Agreement to be involved in or to participate in any arbitration hearings conducted under this Agreement. (R. at 117, 118, 119, A. at A075, A123, A166).

Unfortunately for Anderson, CFS is not a party to this matter as this case arose out of the Soiks' tortious conduct and breeches of contract with the Mayers and Anderson's subsequent efforts to aid and abet the Soiks. Thus, there is no arbitration proceeding being brought by CFS for Anderson to join.

DISPOSITION IN THE CIRCUIT COURT

Almost immediately after being sued by the Mayers, Anderson filed a motion to dismiss the Mayers' claims against him and to compel arbitration. (R. at 171, A. at p. A001). Anderson also filed a motion to stay discovery pending resolution of Anderson's motion to dismiss and to compel arbitration. Id.

Pursuant to Wis. Stat. § 802.06(1)(b), upon a filing of a motion to dismiss, "all discovery and other proceedings shall be stayed for a period of 180 days after the filing of the motion or until the ruling of the court on the motion, whichever is sooner, unless the court finds good cause upon the motion of any party that particularized discovery is necessary." Wis. Stat. § 802.06(1)(b).

Because Anderson filed a motion to dismiss, he was limited to relying only on the matters in the pleadings. The only exception to this rule is that "a court may consider a document attached to a motion to dismiss or for judgment on the pleadings without converting the motion into one for summary judgment, if the document was referred to in the plaintiff's complaint, is central to his or her claim,

and its authenticity has not been disputed." Soderlund v. Zibolski, 2016 WI App 6, ¶ 37, 366 Wis. 2d 579, 599, 874 N.W.2d 561, 570 citing Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687, 690 (7th Cir.2012); Santana v. Cook Cty. Bd. of Review, 679 F.3d 614, 619 (7th Cir.2012). Anderson violated this rule by submitting the declaration by CFS's president Joe Koss in a reply brief in support of his motion to dismiss and compel arbitration. (R. at 159, A. at p. 215). The Declaration of Joe Koss is not referenced in the Mayers' complaint, was not central to their claim, and its authenticity is disputed as the Mayers have not been able to depose Joe Koss to test the truth or veracity of his declaration. Therefore, the circuit court and this Court must disregard the declaration of Joe Koss. In the alternative, this Court should remand the decision on Anderson's motion to dismiss and compel arbitration to allow the Mayers to take the deposition of Joe Koss and others at CFS to test the truth and veracity of Joe Koss's declarations.

The circuit court did not get distracted by Anderson's inappropriate attempt to introduce matters outside of the pleadings in his motion to dismiss. The circuit court did a very thorough and careful analysis of Wisconsin contract law and compared the allegations in the complaint against Anderson to the language in the arbitration provision of the franchise agreement. (A. at pp. A005-A014). Applying the State of Wisconsin contract law principals, the circuit court concluded simply and succinctly:

> Mr. Anderson is not a party to the franchise agreement, the Court respectfully denies his motion to dismiss and compel arbitration. Id. at p. A014.

Anderson does not dispute that he is not a party to the franchise agreement. Instead, he bemoans the fact that the circuit court did not apply the "uniform rule" that when "a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreement." Appellant Brief pp. 16-17 citing Grand Wireless, Inc. v. Verizon Wireless, Inc., 748 F.3d 1, 11 (1st Cir. 2014). However, this rule is part of the Federal Court's common law, which is inapplicable here as the controlling law is the law of Wisconsin as it pertains to contract interpretation, third party beneficiary status, and equitable estoppel.

STANDARD OF REVIEW

The first question in resolving a motion to compel arbitration is to determine whether the parties have an agreement to arbitrate their dispute. Zurich Am. Ins. Co. v. Watts Indus., Inc., 466 F.3d 577, 587 (7th Cir. 2006). Although questions of the scope of an arbitration clause are resolved in favor of arbitration as a matter of federal law, the presumption in favor of arbitration does not apply when deciding whether there is an agreement to arbitrate in the first instance. Rizzo v. Kohn Law Firm, S.C., 2018 WL 851386, *1 (WD. Wis. 2018). Questions of whether there is an agreement to arbitrate and the scope of that agreement are answered by applying state principals of contract law. Id. A non-party to an arbitration agreement may enforce the agreement only if the relevant state contract law allows him to do so.

Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 632, 129 S. Ct. 1896, 1902, 173 L. Ed. 2d 832 (2009).

The question in this case is whether Anderson, a non-party to the franchise agreement between CFS and the Mayers, can use the arbitration provision against the Mayers to preclude them from availing themselves of remedies available to any citizen of this State in a circuit court. The question of who can enforce an arbitration provision is answered by applying the law of the State of Wisconsin which makes no presumption in Anderson's favor. Further, Anderson cannot rely on the "uniform rule" that he is advocating.

ARGUMENT

I. Wisconsin Law Applies When Deciding Whether Steve Anderson, A Non-Party To An Arbitration Provision, Can Enforce That Arbitration Provision

Anderson asks this Court to disregard Wisconsin law and adopt the federal common law that "when a principal is bound under the terms of a valid arbitration clause, its agents and employees, and representatives are also covered under the terms of such agreements." Grand Wireless, Inc. v. Verizon Wireless, Inc., 748 F.3d 1, 11 (1st Cir. 2014). However, Anderson glossed over the primary issue in this appeal, which is whether federal law or state law applies to decide the question of whether a non-party can enforce an arbitration provision. This is not a new or novel issue and Wisconsin has provided explicit guidelines for litigants such as the Mayers and Anderson. Wisconsin substantive law applies to the legal question presented in this appeal. The federal courts in the State of Wisconsin have

universally held that even in federal courts, Wisconsin substantive law applies to the question of whether a non-signatory and non-party can use an arbitration provision offensively to force another out of circuit court and into arbitration.

In Marriott v. Opes Grp., No. 04-C-945, 2005 WL 8163233 (E.D. Wis. Dec. 15, 2005), the court, relying on the 7th Circuit Court of Appeals decision in Cont'l Cas. Co. v. Am. Nat. Ins. Co., 417 F.3d 727 (7th Cir. 2005), held that in an action for state claims it removed based upon diversity, the court should apply the substantive law of the state in which it sits. Marriott v. Opes Grp., No. 04-C-945, 2005 WL 8163233, *3 (E.D. Wis. Dec. 15, 2005). Based upon that, the court in Marriott applied Wisconsin substantive law to the question of whether a non-signatory and non-party to an agreement can enforce an arbitration provision. Id.

In 2018, the Western District of Wisconsin in Rizzo v. Kohn Law Firm, S.C., 2018 WL 851387 (W.D. Wis. 2018) applied Wisconsin state law to answer the question of whether there was an agreement to arbitrate in the first instance. The Rizzo court relied on the U.S. Supreme Court decision in Arthur Andersen, LLP v. Carlisle that held "a litigant who is not a party to the relevant arbitration agreement may enforce the agreement if the relevant state law contract allows him to do so." 556 US 624, 632 (2009).

The position that Anderson advocates has no application in Wisconsin Federal or State Courts. Instead, Wisconsin substantive law applies to the question of whether a non-signatory or a non-party can enforce an arbitration provision.

Anderson directs this Court to the case of Grand Wireless, Inc. v. Verizon Wireless, Inc. and indicates it was cited by the Wisconsin Court of Appeals in Thomas Zimmer Builders, LLC v. Roots, 2018 WI App. 71, ¶ 14, 384 Wis. 2d 633, 922 N.W.2d 318 (October 18, 2018). However, the Thomas Zimmer Builders case was a per curium opinion and is not citable pursuant to the Wisconsin Rules of Civil Procedure. Wis. Sat. § 809.23(3). Citing to a per curium opinion can result in sanctions for the party or attorney. See State v. Cooper, 2003 WI App 227, ¶ 24, 267 Wis. 2d 886, 672 N.W.2d 118 (wherein an attorney was sanctioned for assertions that citations to unpublished Wisconsin Court of Appeals decisions were merely for informational and illustrative purposes while his arguments revealed an intent to persuade the court with his improper citations). While Anderson's counsel is from Minnesota, he is licensed in the State of Wisconsin and must be mindful of the rule prohibiting citations to per curium opinions.

Anderson has not pointed to any citable case in which a Wisconsin state court or Wisconsin federal court adopted or even discussed the federal rule he advocates for. This is because the federal courts in this state have routinely held that even in their courts, Wisconsin substantive law applies to the question of whether a non-party can enforce an arbitration provision. Anderson has argued that he is both a third-party beneficiary of the arbitration provision between CFS and the Mayers and that the Mayers are estopped from refusing to arbitrate their claims against him. Applying Wisconsin substantive law to these arguments leads to the inescapable

conclusion that the circuit court was correct in denying Anderson's motion to compel arbitration.

II. Anderson Is Not A Third-Party Beneficiary Of The Arbitration Provision Between CFS And The Mayers

Anderson is forced to argue that he is a third-party beneficiary of the arbitration provision between CFS and the Mayers because the plain language of the arbitration agreement does not include CFS's employees, agents, officers, or directors. (Appellant Brief at p. 26). Anderson argues that the arbitration provision is broad, but his argument that he is a third-party beneficiary concedes that the arbitration provision is limited to CFS as an entity and does not apply to employees, agents, officers, or directors. Id. at p. 27. Anderson argues that he is a third-party beneficiary because a corporation must act through its agents so agents must be third-party beneficiaries of any contracts entered into by a corporation. Id. This has never been the law in Wisconsin. If it were, Anderson would have cited to such a case. Wisconsin third party beneficiary law is narrower than Anderson would have this court believe.

Typically, a party cannot seek to enforce a contract to which he is not a party. Abramowski v. Wm. Kilps Sons Realty, Inc., 259 N.W.2d 306, 308, 80 Wis.2d 468, 472 (1977). There is a narrow exception to this rule when the contract was executed for the benefit of a third party, i.e. the agreement was intentionally entered into directly and primarily for the benefit of that person. An indirect benefit incidental

to the primary purpose of the contract is insufficient to confer third party beneficiary status. Marriott v. OPES Group, 2005 WL 8163233, *3 (E.D. WI 2005).

Anderson did not (and could not credibly) argue that the franchise agreement between the Mayers and CFS was intentionally entered into directly and primarily for his benefit. The franchise agreement was entered into for the benefit of the parties only. Therefore, Anderson concedes he is not a third-party beneficiary of the franchise agreement.

The Western District of Wisconsin in Rizzo specifically rejected an agent's argument that he was a third-party beneficiary of a contract simply by being an agent. See Rizzo v. Kohn Law Firm, S.C., 2018 WL 851386 (W.D. Wis. 2018). In Rizzo, Sasha Rizzo applied for and received a credit card from Discover Bank. When Rizzo failed to pay the balance on her credit card accounts, both Discover and their agent the Kohn Law Firm attempted to collect Rizzo's debt to Discover. Id. at *1. Ultimately, Rizzo sued the Kohn Law Firm for violations of the Fair Debt Collections Practices Act arising out of their collection of Discover's debt. Id. When the Kohn Law Firm was sued, they filed a motion to compel arbitration. Id. The cardmember agreement between Discover and Rizzo contained an arbitration agreement which, unlike the agreement relied on by Anderson, actually indicated that non-signatories/parties to the agreement were included in the arbitration provision of the agreement:

> In addition to the cardholder and Discover, the rights and duties described in this arbitration agreement apply to: our Affiliates and our and their officers, directors and employees; any third party co-

> defendant of a claim subject to this arbitration provision; and all joint Accountholders and Authorized users of your Account(s). Id. at *2.

Kohn argued that it was a third-party beneficiary of the arbitration agreement between Discover and Rizzo. Id. The court disagreed and ruled that Kohn's status was like that of an incidental beneficiary that does not have an independent right to enforce the contract. The court said:

> If Discover had wanted to create a broader class of beneficiaries that included anyone acting as Discover's agent or anyone being sued on matters related to the account, it could have used that language. Id. at *3.

Here, Anderson does not even qualify as an incidental beneficiary to the contract, yet alone a third-party beneficiary. Unlike Discover and Kohn, there was no intent expressed by the parties to benefit Anderson or any other agent or employee of CFS. The intent of the franchise agreement was to set out the obligations and duties of the parties, not provide a benefit to Anderson, especially when he departs from the scope of his employer's best interests. Just like the arbitration agreement in Rizzo, if CFS had wanted to create a broader class of beneficiaries that included Anderson or other officers, agents and employees of CFS, it could have used that language in the arbitration agreement. It did not and instead limited the arbitration agreement to just the parties. However, even if it had, Rizzo tells us that this likely would still not be enough. Accordingly, if Kohn, who was arguably an interested third-party beneficiary, cannot invoke arbitration, where does that leave Anderson? Anderson has far less to argue then Kohn. If this stronger

position of Kohn was inadequate, Anderson's position is even weaker than inadequate.

The Wisconsin Court of Appeals in Milwaukee Area Technical College v. Frontier Adjusters of Milwaukee, 312 Wis. 2d 360, 752 N.W.2d 396 (Ct. App. 2008), rejected the argument that an agent-principal relationship creates third-party beneficiary status. In Milwaukee Area Technical College, the college was the victim of theft by Frontier Adjusters of Milwaukee, a franchisee of Frontier Adjusters, Inc. Milwaukee Area Technical College v. Frontier Adjusters of Milwaukee, 752 N.W.2d 396, 399, 312 Wis.2d 360, 366, 2008 WI App 76, ¶ 4 (Wis.App. 2008). When the college discovered the theft, they sued the franchisor, Frontier Adjusters, Inc., arguing it was a third-party beneficiary of the franchise agreement between Frontier Adjusters, Inc. and Frontier Adjusters of Milwaukee. Id. at 404, 376, ¶ 20. The college argued that the franchisor's right to audit the records of the franchise provided a benefit to the college. Id. at 404, 376, ¶ 19. The court rejected the argument, holding:

> There is nothing either in the franchise agreements between Frontier Adjusters, Inc., and Frontier Adjusters of Milwaukee, or in the summary-judgment Record that even hints that the College was an intended third-party beneficiary of the franchise agreements' audit and inspect clauses, and, indeed, the College does not contend that it was. Id. at 377-78, 404, ¶ 20.

The franchisor's only connection with the college was through its franchisee, but the court rejected the third-party beneficiary argument advanced by the college because the contract did not mention the college either specifically or generally. Id.

at 378, 404, ¶ 21. Just as the franchise agreement in Frontier Adjusters the franchise agreement here offers nothing regarding third-party beneficiaries, including agents and employees of CFS, other than a clear intent to specifically exclude agents and employees of CFS from the arbitration provision. Obviously, the position that Anderson advocates is destroyed by the Frontier Adjusters case. As if that were not enough, Rizzo absolutely eliminates any ambiguity or question that Anderson could somehow, someway, seek to invoke an arbitration provision as a non-party/non-signatory. Rizzo tells us that even when an attempt is made to confer a benefit on a non-party/non-signatory, such an intent must be explicitly stated in the most certain terms.

Compare that to the arbitration provision in the construction contract in Badger State, Inc. v. Keller Const. Co., 2012 WI App. 97, 2012 WL 3029894 (Wis. App. 2012) (unpublished decision) (R.-App. at 001-007). The contract at issue in Badger State was a construction contract between the general contractor and owner that provided:

> The Contractor shall promptly pay each Subcontractor, upon receipt of payment from the Owner, out of the amount paid to the Contractor on account of such Subcontractor's portion of the Work. Id. at ¶ 21, *4 (Wis.App. 2012).

The court in Badger State held that the above language made the subcontractors third-party beneficiaries of the contract between owner and general contractor. Id. at ¶ 33, *6. In Badger State, the contract specifically referenced the subcontractors and imposed a duty on the general contractor to pay those

subcontractors. Based on this, the court held the subcontractors were third-party beneficiaries able to enforce the contract. Id. The arbitration provision at issue here makes no mention of CFS's agents and employees, explicitly or implicitly, and does not impose any obligation on the Mayers to arbitrate disputes with those agents or employees. Further, the contract does not give Anderson (or any agent or employee of CFS) the right to avail themselves of an arbitration provision in an agreement to which they are not a signatory or party.

III. The Mayers Are Not Estopped From Bringing Claims Against Anderson In Wisconsin State Court

In a cursory fashion, Anderson argues that the Mayers are estopped from litigating their claims against Anderson in state court and must submit those claims to arbitration. (Appellant Brief at p. 24). Anderson's argument is that because the Mayers enjoyed the benefits of the franchise agreement, they are not allowed to litigate claims in state court against Anderson, even though Anderson is neither explicitly nor implicitly covered by the arbitration provision. Id. at p. 25. Anderson's argument is non-sensical and not in line with Wisconsin law on equitable estoppel.

Just like Anderson's argument on third-party beneficiary status, his equitable estoppel argument is governed by state law, not federal law. Under Wisconsin state law, the elements of equitable estoppel are (1) action or nonaction, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or nonaction, and (4) which is to his or her

detriment. Affordable Erecting, Inc. v. Neosho Trompler, Inc., 2006 WI 67, ¶ 33, 291 Wis. 2d 259, 275, 715 N.W.2d 620, 628 citing Vill. of Hobart v. Brown Cty., 2005 WI 78, ¶ 36, 281 Wis. 2d 628, 647, 698 N.W.2d 83, 92.

Anderson's brief fails to apply the above elements to the facts of the case. The 7th Circuit has applied equitable estoppel to prevent parties from refusing to arbitrate when they knowingly seek the benefits of a contract containing an arbitration clause. They hold that a plaintiff cannot rely on the contract when it works to its advantage and repudiate it when it works to its disadvantage. Hughes Masonry Co. v. Greater Clark Cty. Sch. Bldg. Corp., 659 F.2d 836, 839 (7th Cir. 1981).

Here, the Mayers' claims against Anderson arise under state law concepts involving tortious interference with the private contracts between the Mayers and Soiks and injury to business. The Mayers are not alleging that Anderson breached the franchise agreement, nor do their claims depend on the existence of the franchise agreement. On the contrary, the Mayers' claims are based on the premise that Anderson aided/abetted the Soiks by helping them violate obligational duties of the Soiks and the Mayers by virtue of private agreements between them as well as principles of common law. Therefore, the Mayers are not relying on the franchise agreement when it works to their advantage and then repudiating it when it works to their disadvantage.

Anderson, without much analysis, relies on decisions from federal courts outside the State of Wisconsin that have applied the "inextricably intertwined" standards to determine whether the doctrine of equitable estoppel is available to a non-party attempting to compel arbitration. The courts that have adopted this standard have cautioned that it is often fact specific and differs with the circumstances of each case. Smith/Enron Congregation Ltd Partnership, Inc. v. Smith Congregation International, Inc., 198 F. 3d 88, 97 (2nd Cir. 1999).

The Western District of Wisconsin addressed the "inextricably intertwined" standard in Scheurer v. Fromm Family Foods, LLC, 202 F. Supp. 3d 1040 (W.D. Wis 2016) stating:

> Despite different phrasing, the "inextricably intertwined" approach that Fromm proposes differs little, if at all, from the Seventh Circuit's rule in Hughes Masonry Co.: the critical issue is whether a plaintiff's claims are connected to an underlying contract that contains an arbitration clause. Scheurer v. Fromm Family Foods, LLC, 202 F. Supp. 3d 1040, 1045 (W.D. Wis. 2016), aff'd, 863 F.3d 748 (7th Cir. 2017).

The Mayers' claims against Anderson are not connected to the franchise agreement. Instead, the Mayers' claims rely on Anderson's breach of Wisconsin substantive law regarding tortious interference with contract and unfair business practices.

The Mayers' claims do not focus on whether Anderson breached or did not breach the franchise agreement. Indeed, the franchise agreement does not resolve any issues between the Mayers and Anderson. Ultimately, Anderson's liability in this case will turn on whether he violated Wisconsin substantive law regarding

tortious interference in private agreements and relationships between the Soiks and Mayers in an attempt to aid the Soiks in their effort to cover up their wrongdoing. Therefore, the franchise agreement is not "inextricably intertwined" with the Mayers' claims in this case nor are the Mayers trying to take advantage of some parts of an agreement while disavowing others. Thus, the Mayers are not equitably estopped from refusing to arbitrate their claims against Anderson.

This case is much like the Western District case of Scheurer v. Fromm Family Foods, LLC, where the plaintiff filed a Title VII action against her former employer that fired her in retaliation for reporting that her former supervisor sexually harassed her. Scheurer v. Fromm Family Foods, LLC, 202 F. Supp. 3d 1040, 1042 (W.D. Wis. 2016), aff'd, 863 F.3d 748 (7th Cir. 2017). The company moved to compel arbitration, however, the court rejected the company's arguments that the company was a third-party beneficiary to an arbitration agreement between the staffing agency and the employee or that the employee was equitably estopped from refusing to arbitrate her claims against the company. Id. at 1045. Just like the plaintiff in Scheurer, the Mayers are not attempting to seek benefits from the franchise agreement in their litigation with Anderson while disavowing other portions of the franchise agreement. The Mayers' claims against Anderson stand alone, separate from the franchise agreement, and are based upon Wisconsin substantive law. Simply stated, the Mayers' claims do not require the existence of a franchise agreement to pursue their claims against Anderson.

CONCLUSION

The trial court correctly applied Wisconsin substantive law to the issue of whether Anderson, a non-party, could enforce an arbitration provision. The rule Anderson advocates for has no place in Wisconsin state courts and so this Court should affirm the circuit court.

Dated this 18th day of June, 2020.

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CERTIFICATION

I hereby certify that this brief and appendix conform to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 7,094 words and 25 pages.

I also certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this 18th day of June, 2020.

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CERTIFICATION OF COMPLIANCE
WITH WIS. STAT. § 809.19(12)

I certify that I have submitted an electronic copy of this brief on June 18, 2020. I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 18th day of June, 2020.

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