THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Spartanburg County
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2018-CP-42-04405
Appellate Case No. 2019-001731

The Estate of Mary Solesbee, by her personal representative, Connie Bayne, Respondent,

v.

Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman; Inpatient Consultants of North Carolina, P.C.; and Angela Brown, ACNP, Defendants,

Of which Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman are the Appellants.

FINAL BRIEF OF APPELLANTS

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INTRODUCTION

This appeal comes to the Court in the context of a wrongful death and survival action that arose out of alleged nursing home negligence. At bottom, it is an appeal of the trial court's denial of the Facility's[1] motion to compel arbitration. The Other Appellants[2] are appellants simply by virtue of their respective motions to stay the lawsuit pending the arbitration the Facility sought to compel. Insofar as the trial court was concerned, the Other Appellants' motions were mooted by its denial of the Facility's motion. Appellants' fates are likewise related in this Court. Unless the Facility's appeal is successful, the Other Appellants' appeals are moot.

In denying the Facility's motion, the trial court found the subject Arbitration Agreement wholly unenforceable against Plaintiff[3]—adding, however, that even if it were enforceable as to Plaintiff's *survival* claims, it could not be enforced as to Plaintiff's *wrongful death* claims. The trial court also denied the Facility's alternative request to be allowed to conduct—without waiving its right to arbitration—limited discovery, targeted at the facts bearing on arbitrability.

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[1] The "Facility" is Defendant/Appellant THI of South Carolina at Magnolia Manor-Inman, LLC, d/b/a Magnolia Manor-Inman, a skilled nursing facility in Spartanburg County.

[2] The "Other Appellants" are Defendants/Appellants Fundamental Clinical and Operational Services, LLC, and Fundamental Administrative Services, LLC. "Appellants" refers to the Facility and the Other Appellants, collectively.

[3] "Plaintiff" is Plaintiff/Respondent, Connie Bayne (also referred to herein as "Ms. Bayne"), as personal representative of the estate of her mother, Mary Solesbee ("Ms. Solesbee").

Respectfully, the trial court erred in not finding the Arbitration Agreement enforceable against Plaintiff based on merger/equitable estoppel (not only as to the survival claims but also the wrongful death claims) or, at least, in not granting the Facility's alternative request for targeted discovery on the issue of arbitrability. And as to the Other Appellants, this lawsuit should have been (and should be) stayed until the arbitrability issue is finally decided and any/all arbitration proceedings are concluded.

STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in denying the Facility's motion to compel arbitration (and, by extension, the Other Appellants' motions for a stay pending arbitration)?

A. Should the trial court have granted the Facility's primary request for relief, i.e., should it have found the Arbitration Agreement enforceable, immediately halted this litigation, and compelled all claims against the Facility (survival and wrongful death) to arbitration?

(1) Should the trial court have found the Arbitration Agreement enforceable based on merger/equitable estoppel?

(2) Should the trial court have found the Arbitration Agreement enforceable not only as to the survival claims but also as to the wrongful death claims?

B. Assuming, *arguendo*, the trial court did not err in denying the Facility's primary request for relief, should it have granted the Facility's secondary request for relief, i.e., should it have allowed the Facility to conduct targeted discovery on the issue of arbitrability?

II. Did the trial court err in denying the Other Appellants' motions to stay this lawsuit pending arbitration of the claims against the Facility?

STATEMENT OF THE CASE

Factual Background

With the help of her son, Allen Dover ("Mr. Dover"), Ms. Solesbee, was admitted to the Facility on June 27, 2016. (*See* R. pp. 104, 138–39 ¶¶ 1–3 & 5, 165–76.) In conjunction with Ms. Solesbee's admission, Mr. Dover signed a number of documents on her behalf, including an Admission Agreement and an Arbitration Agreement. (R. pp. 104, 165–76.)

In pertinent part, the Arbitration Agreement provides as follows:

> ***PLEASE READ CAREFULLY***
>
> **FACILITY – RESIDENT/REPRESENTATIVE ARBITRATION AGREEMENT**
>
> This Agreement is made between Magnolia Manor Inman ("Facility"), its agents, employees and servants, and Mary Solesbee ("Resident") or Allen Dover ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative"). It is the intention of the parties to this Agreement to bind not only themselves, but also their successessors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.
>
> ***
>
> [A]any controversy or dispute between the parties arising out of or relating to Facility's Admission

> Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration . . . .[4]
>
> ***
>
> The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law.[5]
>
> **I understand and agree that I am giving up and**

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[4] There is no dispute here about whether Plaintiff's claims against the Facility are within the scope of the Arbitration Agreement. They are.

[5] There is no dispute here about whether the Federal Arbitration Act, 9 U.S.C. §§ 1–16 (the "FAA"), applies to the Arbitration Agreement. It does. *See Allied–Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273–77 (1995) (explaining that unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce); *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014) ("Since the Supreme Court decided *Allied–Bruce*, many—if not all—federal and state courts have held that nursing home residency contracts similar to the one at issue here implicate interstate commerce and the FAA. Generally, these holdings center on a common theme: nursing home residency contracts usually entail providing residents with meals and medical supplies that are inevitably shipped across state lines from out-of-state vendors. We likewise find the terms of the residency agreement implicate interstate commerce and, thus, the FAA.") (footnote omitted).

waiving my right to a jury trial.

> This Agreement shall remain in effect for all care rendered at Facility and shall survive any termination or breach of this Agreement or the Admission Agreement. By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative.

(R. p. 104 (bold print and underlines in original) ("Magnolia Manor Inman," "Mary Solesbee," and "Allen Dover" handwritten in original).)

Ms. Solesbee remained a resident of the Facility until July 14, 2016, when she was transported to the hospital, where she passed away on August 1, 2016. (R. p. 33 ¶ 9.) According to Plaintiff, Ms. Solesbee's death was "a direct and proximate result of . . . sepsis resulting from [an] improperly treated leg wound and infection" that was not properly recognized and treated while she was a resident of the Facility. (R. p. 34 ¶ 19.)

Procedural Background

Alleging negligence in Ms. Solesbee's care/treatment at the Facility, Plaintiff filed this wrongful death and survival action in the Spartanburg County Court of Common Pleas on December 27, 2018. (*See* R. pp. 10–29.) The operative complaint is Plaintiff's amended complaint, filed January 3, 2019. (R. pp. 30–45.) The Facility filed its motion to compel arbitration on February 22, 2019, based on the Arbitration Agreement Mr. Dover signed for Ms. Solesbee. (R.

pp. 101–04.)[6]

The parties submitted their respective briefs for[7] and against[8] the motion, and following a hearing on August 16, 2019,[9] the trial court denied the Facility's motion to compel arbitration by order filed September 11, 2019, the Honorable Grace Gilchrist Knie presiding. (*See* R. pp. 1–9.)[10] By notice served October 11, 2019, this appeal timely follows. (*See* R. pp. 177–80.)

STANDARD OF REVIEW

A circuit court's determination of whether a claim is subject to arbitration is reviewed de novo on appeal. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). This includes de novo review of the determination of whether an arbitration agreement is enforceable against a nonsignatory. *Wilson v. Willis*, 426 S.C. 326, 334, 827 S.E.2d 167, 172 (2019). "Under de novo review, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Id.* Issues of law, however, are reviewed without any particular deference to the lower court. *See, e.g., Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 782 S.E.2d 590 (2016). Moreover, even where a ruling

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[6] The Other Appellants filed their motions to stay on August 9, 2019. (*See* R. pp. 105–08.)

[7] (R. pp. 140–64.)

[8] (R. pp. 109–29.)

[9] (*See generally* R. pp. 62–100.) The Other Appellants' motions to stay were also heard at this time. (R. pp. 66:7–69:16.)

is on a matter within the trial court's discretion, if the ruling is based on a misunderstanding of the law, rather than upon the exercise of discretion, the question presented on appeal is one of law. *See Bain v. Self Mem'l Hosp.*, 281 S.C. 138, 152, 314 S.E.2d 603, 611 (Ct. App. 1984).

ARGUMENT

I. The trial court erred in denying the Facility's motion to compel arbitration (and, by extension, the Other Appellants' motions for a stay pending arbitration).

A. The trial court should have granted the Facility's primary request for relief, i.e., it should have found the Arbitration Agreement enforceable, immediately halted this litigation, and compelled all claims against the Facility (survival and wrongful death) to arbitration.

(1) The trial court should have found the Arbitration Agreement enforceable based on merger/equitable estoppel.

In opposition to the Facility's motion to compel arbitration, Plaintiff argued that the Arbitration Agreement was unenforceable because Ms. Solesbee herself did not sign it and (despite his representation to the contrary in the Arbitration Agreement itself) Mr. Dover did not have legal authority to sign it for her. (*See* R. pp. 82:18–83:19, 112–17.) While acknowledging that it was presently (on the limited record available) unable to establish a true agency (either actual or

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[10] This order effectively disposed of the Other Appellants' motions to stay, too, though not on the merits.

apparent) on the part of Mr. Dover,[11] the Facility argued that the Arbitration Agreement was enforceable nonetheless because it should properly be viewed as merged with the Admission Agreement, and Ms. Solesbee having received benefits under the Admission Agreement, Plaintiff should be equitably estopped from denying the enforceability of the Arbitration Agreement with which the Admission Agreement was merged. (R. pp. 74:25–78:11, 153–59.)

Citing *Wilson*, 426 S.C. 326, 827 S.E.2d 167, the trial court rejected the Facility's argument, finding that Ms. Solesbee was not a *direct* beneficiary, but merely an *indirect* beneficiary, and thus the Facility could not enforce the Arbitration Agreement against Plaintiff based on equitable estoppel. (*See* R. p. 4.) The finding that Ms. Solesbee was only an indirect beneficiary effectively mooted the question of merger in the trial court, because, under *Wilson*, "when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled;"[12] in other words, "when the benefits to a nonsignatory are merely indirect," the question of merger is immaterial—either way, "arbitration cannot be compelled." Respectfully, the trial court is mistaken, and it should have found that the Admission Agreement and the Arbitration Agreement merged and, given Ms. Solesbee's receipt of *direct* benefits under the Admission Agreement, Plaintiff should be equitably estopped from denying the enforceability of the Arbitration

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[11] (*See* R. p. 69:3–20, p. 74:3–24.)

Agreement.

"South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) *estoppel*." *Wilson*, 426 S.C. at 338, 827 S.E.2d at 174; *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (confirming the validity of the general proposition of law on which the appellants therein based their merger/equitable estoppel argument: "Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. . . . [T]he documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. *Unless there is a contrary intention, appellants are correct that there was a merger.*") (emphasis added).

As the *Coleman* Court stated, "The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract." 407 S.C.

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[12] *Id.* at 343, 827 S.E.2d at 176.

at 355, 755 S.E.2d at 455 (quoting *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)).

The merger question thus examines whether, "where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,"[13] as the Admission Agreement and the Arbitration Agreement were here, there is evidence to upset the presumption of merger. This is a question of the parties' intention. *Id.* at 355, 755 S.E.2d at 455 ("in the absence of anything indicating a contrary *intention* . . .") (emphasis added). "[I]n attempting to ascertain th[e] [parties'] intention," the Court "endeavor[s] to determine the situation of the parties, as well as their purposes, at the time the contract was entered into." *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

It must be remembered that, where, as here, the instruments in question were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, *merger is presumed*. For this presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the circumstances giving rise to the merger presumption (same time, parties, purpose, and transaction)—can support a reasonable, non-speculative inference that the parties' intention was contrary to merger. *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d

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13 *Id.* at 355, 755 S.E.2d at 455.

125, 130 (Ct. App. 2005) ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation."). No such inference can be drawn here.

The "Entire Agreement" clause in the Admission Agreement expressly states that other admissions materials are deemed a part of it. (R. p. 176.) While the Arbitration Agreement was not *required* for Ms. Solesbee's admission to the Facility, all this means is that it did not have to be agreed to for her to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was in fact agreed to. In other words, even though the Arbitration Agreement was not a *condition* of admission, it certainly was agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Ms. Solesbee's relationship with the Facility: the Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission.

Indeed, the fact that the Arbitration Agreement was not required for admission underscores its connectedness to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement). The Arbitration Agreement only

makes sense together with the Admission Agreement, which is its (the Arbitrations Agreement's) sole reason for being.

The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. To point to such things is to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place *unless multiple instruments are involved.* Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger.

Moreover, to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. Again, where, as here, the instruments in question are signed at the same time, by the same parties, for the same purpose, in the course of the same transaction, merger is presumed. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence "indicating [(i.e., affirmatively showing)] a contrary intention." 407 S.C. at 355, 755 S.E.2d at 455. To allow the merger presumption to be upset based on evidence that is at best ambiguous—i.e.,

that does not even go so far as to clearly indicate a contrary intention—is to allow the exception to devour the rule.

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, the trial court should have found Plaintiff equitably estopped from denying the validity of the Arbitration Agreement under the "direct benefits" test our Supreme Court endorsed in *Wilson*, 426 S.C. 326, 827 S.E.2d 167. The *Wilson* Court favorably discussed the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals' earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which the Facility contends Plaintiff is estopped from refusing to comply with the Arbitration Agreement here. *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner's alternative argument based on the application of the state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., "[t]he traditional test referenced by [the] [p]etitioners," "has been analyzed most-often in *non*-arbitration cases") (emphasis added). "Under direct benefits estoppel, '[a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause.'" *Pearson*, 400 S.C.

at 290, 733 S.E.2d at 601 (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)).

Without question, Ms. Solesbee received direct benefits from the Admission Agreement in the form of her admission to the Facility, including, without limitation, the room, board, care, and treatment she received therein. To deny Ms. Solesbee's receipt of any direct benefit would require acceptance of the absurd premise that every single aspect of her residency—every instance of care/treatment, every meal, all day every day—was deficient. Ms. Bayne herself does not even suggest as much. (*See* R. pp. 33–37 ¶¶ 9–23 (premising Plaintiff's claims on alleged negligence pertaining specifically to care/treatment Ms. Solesbee received in respect of a left thigh wound); *see also* R. p. 110 ("Unfortunately, instead of providing attention to the leg wound, [Ms. Solesbee] did not receive proper care and treatment, the leg wound worsened while she was [at the Facility]. . . . Unfortunately, because the inappropriate care and delay of getting treatment, [Ms. Solesbee] passed on August 1, 2016, from sepsis.") Ms. Solesbee having undeniably received direct benefits from the Admission Agreement, Plaintiff cannot now deny the validity of the Arbitration Agreement with which the Admission Agreement merged, as the trial court should have found.

(2) The trial court should have found the Arbitration Agreement enforceable not only as to the survival claims but also as to the wrongful death claims.

Despite finding the Arbitration Agreement to be completely unenforceable against Plaintiff, the trial court went on to find as a matter of law that, even if it were enforceable as to Plaintiff's survival claims, it could not be enforced as to Plaintiff's wrongful death claims. (*See* R. pp. 4–7.) Respectfully, the trial court is mistaken.

As noted above, the FAA applies to the subject Arbitration Agreement. "[T]he basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate"[14] and "ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement." *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012); *see also* 9 U.S.C. § 2 (providing that an arbitration agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."). "By its terms, the [FAA] leaves no place for the exercise of discretion by a . . . court, but instead *mandates* that . . . courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis added); *see also* 9 U.S.C. § 4 ("The court shall

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[14] *Allied–Bruce*, 513 U.S. at 270.

hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement*.") (emphasis added).

As our Supreme Court expressly noted in *Dean*, "courts may not refuse to compel arbitration simply because a wrongful death claim is involved." 408 S.C. at 378, 759 S.E.2d at 731 n.3 (citing *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012) (per curiam) (invalidating West Virginia's policy refusing to refer wrongful death claims against a nursing home to arbitration)); *see also THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, 2015 WL 1268185 at *3 (D.S.C. Mar. 19, 2015) ("[T]he South Carolina Supreme Court made clear in *Dean* that, under South Carolina law, an arbitral agreement is still indeed binding on a decedent's estate for a claim in wrongful death.")). Here, however, the trial court has done just that, endorsing a rule that amounts to an outright prohibition on the arbitration of wrongful death claims, a clear violation of the FAA. *See Marmet Health Care*, 565 U.S. at 533 ("As this Court reaffirmed last Term, '[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.'") (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011)).

The FAA requires that courts place arbitration agreements "on *equal footing with other contracts* . . . ." *Concepcion*, 563 U.S. at 339 (emphasis added). While a court may invalidate an arbitration agreement based on "generally applicable contract defenses," it may not do so based on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (citing *Concepcion*, 563 U.S. at 339). Thus, even assuming, *arguendo*, the rule endorsed by the trial court is technically less than an outright prohibition on the arbitration of wrongful death claims, i.e., even if the rule would technically allow for arbitration of wrongful death claims where the statutory beneficiaries were themselves signatories to the arbitration agreement (either in their own hand or in that of some duly authorized/empowered representative), it would nonetheless violate the FAA because of the unique (and in the vast majority of cases insurmountable) obstacle it would present to the arbitration of wrongful death cases.

Besides violating the FAA, the rule endorsed by the trial court is founded on a misunderstanding of South Carolina law. Fundamental to the court's analysis is its view that wrongful death claims are independent claims that belong to the statutory beneficiaries, i.e., that the statutory beneficiaries *themselves* possess causes of action *they* can assert for wrongful death. (*See, e.g.*, R. p. 4 ("The second

issue presented to the Court was whether the Wrongful Death claims *brought by the Decedent's Beneficiaries* are excluded under a valid Arbitration Agreement.") (emphasis added) (original bold print omitted); *id.* at p. 6 ("If the defendant has a defense that would completely bar the decedent's claim had the decedent survived, then *the wrongful death beneficiaries may not bring a claim* under the statute.") (emphasis added).) But this is not the law.

Under S.C. Code Ann. § 15-51-10, a personal representative is bound to an Arbitration Agreement to the same extent as his or her decedent:

> Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such *as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof*, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured . . . .

(emphasis added). Additionally, S.C. Code Ann. § 62-3-703 provides: "a personal representative of a decedent domiciled in this State at his death *has the same standing to sue and be sued in the courts of this State and the courts of any other jurisdiction as his decedent had immediately prior to his death.*" (emphasis added).[15]

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[15] To be clear, for its part, the Arbitration Agreement expressly states the parties' intent to bind third parties in terms that certainly include statutory beneficiaries. (R. p. 104 ("*It is the intention of the parties to this Agreement to bind not only themselves, but also, their, successors, assigns, heir, personal*

Under South Carolina law, a claim for wrongful death is *derivative* of the decedent's rights. 26 S.C. Jur. Limitation of Actions § 32 ("A wrongful death action is derivative in nature . . . ."). The *decedent* must have possessed the claim at the time of his/her death, such that he/she could have maintained an action had they survived. *Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 348–49, 699 S.E.2d 143, 146 (2010) ("In *Quattlebaum v. Carey Canada, Inc.*, the honorable and learned judge, Joe F. Anderson, Jr., correctly applied South Carolina law and dismissed a wrongful death claim because the decedent possessed no claim at his death. 685 F. Supp. 939 (D.S.C. 1988). . . . *Quattlebaum* was correctly decided and adheres to the principle that a decedent's estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived."). The *claim* for wrongful death *belongs* to the *decedent's estate*. *Id.* at 349, 699 S.E.2d at 146 ("We reaffirm today that a claim under the Wrongful Death Act lies in the *decedent's estate* only when the decedent possessed the right of recovery at his death.") (emphasis added)). The claim *must* be brought by the decedent's *personal representative*; it does not belong to the statutory beneficiaries, their interest is only in the *recovery*. *See* S.C. Code Ann. § 15-51-20 ("Every [wrongful death] action shall be for the benefit of the [statutory beneficiaries] . . . [and] shall be brought by or in the name of the executor or

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representatives, guardians or any persons deriving their claims through or on

administrator of [the decedent]."); S.C. Code Ann. § 15-51-40 ("In every [wrongful death] action the . . . damages . . . recovered shall be divided among the [the statutory beneficiaries] in those shares as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate.").

Also, the court's reliance on the Kentucky Supreme Court's dicta in *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), is misplaced.[16] As the *Ping* Court expressly explained, its view that the arbitration agreement would not have bound the wrongful death beneficiaries hinged on the fact that, *under Kentucky law*, a claim for wrongful death is not *derivative* of the decedents' claim but rather is *independent* of the decedent's claim. *See Id.* at 598 ("Courts in states where the

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behalf of Resident.").)

[16] To be clear, the portion of the *Ping* decision where the Court determined that the wrongful death beneficiaries were not bound by the arbitration agreement was not essential to its holding, which was, in fact, that the lower court had correctly denied the defendant's motion to compel arbitration because the person who signed the arbitration agreement did not have authority to do so. *See Id.* at 597 ("In sum, the trial court correctly held that Mrs. Duncan's power of attorney did not authorize her daughter to waive unnecessarily her right to seek redress for injury in court. Since the trial court's denial of Beverly's motion to compel arbitration is to be upheld on *this* ground, we decline, with one *exception* [(whether the arbitration agreement, had it been valid, would have bound the wrongful death beneficiaries)], to address the alternative grounds urged by the Estate for denying the motion to compel arbitration.") (emphasis added); *id.* at 600 ("Finally, the wrongful death claimants *would* not be bound by their decedent's arbitration agreement, *even if one existed*, because their statutorily distinct claim does not derive from any claim on behalf of the decedent, and they therefore do not succeed to the decedent's dispute resolution agreements.") (emphasis added).

wrongful death action is *derivative* have held that an arbitration agreement applicable to a personal injury claim *applies as well to the wrongful death claim.* Where the claims are deemed *independent*, however, courts have held that a person's agreement to arbitrate his or her personal injury claim *does not bind the wrongful death claimants to arbitration*, because they were not parties to the agreement and do not *derive* their claim from a party.") (emphasis added) (citations omitted); *id.* at 599 ("*Because under [Kentucky] law* the wrongful death claim is *not derived* through or on behalf of the resident, *but accrues separately to the wrongful death beneficiaries* and is meant to compensate them for their own pecuniary loss, we agree with the Courts cited above which have held that a decedent cannot bind his or her beneficiaries to arbitrate their wrongful death claim.") (emphasis added). As explained above, however, unlike under Kentucky law, under South Carolina law, a claim for wrongful death *is derivative* of the decedent's rights. *Ping* thus provides no support whatsoever for the trial court's conclusion in this case. If anything, *Ping* cuts against the trial court because, by the *Ping* Court's own logic, in a state, like South Carolina, where the wrongful death claim is derivative of the decedent's rights, an arbitration agreement that is binding on the decedent should be binding on the statutory beneficiaries, too.

Because Ms. Solesbee was bound by the Arbitration Agreement at the time of her death, her wrongful death beneficiaries are bound as well. To conclude

otherwise, as the trial court did, is contrary to the substantive law of South Carolina regarding the claim of wrongful death and the FAA's mandate that arbitration agreements must be placed on equal footing with other contracts. *Concepcion*, 563 U.S. at 339.

Lastly, in any event, any wrongful death claim that Mr. Dover should have as a statutory beneficiary should be subject to arbitration under the Arbitration Agreement, which he did, in fact, sign. (R. p. 104; *see also* R. pp. 138–39 ¶¶ 2–3.)

B. Assuming, *arguendo*, the trial court did not err in denying the Facility's primary request for relief, it should have granted the Facility's secondary request for relief, i.e., it should have allowed the Facility to conduct targeted discovery on the issue of arbitrability.

It must be remembered that the Arbitration Agreement is valid on its face. In other words, there is nothing within the four corners of the document itself that appears out of order. It sets forth the material terms of an agreement to arbitrate. It expressly attests to Mr. Dover's authority to sign on behalf of his mother, Ms. Solesbee. It is duly signed by Mr. Dover and the Facility's agent. (*See generally* R. p. 104.)

The facially valid Arbitration Agreement was not called into question until Plaintiff opposed the Facility's motion to compel arbitration, and Plaintiff's opposition to the motion was founded, most notably, on Mr. Dover's as yet *unchecked* affidavit disavowing his prior express representation of authority to sign

the Arbitration Agreement on this mother's behalf, as well as on Ms. Bayne's as yet *unchecked* affidavit. (*See generally* R. pp. 109–39.) Without these affidavits (especially Mr. Dover's) Plaintiff would have *no evidence* to upset the facial validity of the Arbitration Agreement. In other words, the testimony presented via these affidavits constitutes the only evidentiary basis for the trial court's denial of the Facility's motion to compel arbitration, and the Facility has thus far been forced to take them at face value, without any opportunity to examine the affiants.

Assuming, *arguendo*, the trial court did not err in denying the Facility's primary request for relief (as argued above), the interests of justice required that it allow the Facility to conduct targeted discovery on the issue of arbitrability. Otherwise, the Facility is left in the impossible Catch-22 of, on the one hand, being vulnerable to Plaintiff's argument that it has not presented sufficient evidence to prove the Arbitration Agreement is enforceable (whether by true agency,[17]

[17] A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)). "An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties." *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145–46, 425 S.E.2d 764, 773 (Ct. App. 1992). The doctrine of apparent authority provides that a principal may be bound

estoppel,[18] or ratification[19]), while, on the other hand, being vulnerable to Plaintiff's argument that it waived its arbitration rights by making use of the tools of litigation (i.e., discovery) to prove them. The trial court wrongfully ignores this patently unjust predicament when it asserts, "[the Facility] had the opportunity to use the South Carolina Rules of Civil Procedure to conduct discovery related to arbitration." (R. p. 7.)

The trial court's decision also relies on faulty logic. According to the court, "It is the actions of [Ms. Solesbee] that would be relevant . . . ," and "discovery

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by the acts of it agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

[18] "When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances." *R & G Const.*, 343 S.C. at 433, 540 S.E.2d at 118 (Ct. App. 2000).

[19] Authority can be supplied to an agent retroactively by express or implied ratification. *See Brazell Bros. Contractors v. Hill*, 245 S. C. 69, 74, 138 S.E.2d 835, 837 (1964) ("Ratification, as the term implies, is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been bound but for his subsequent assent."). "Ratification, as it relates to the law of agency, may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into on his behalf by another who at the time assumed to act as his agent." *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S. C. 75, 89, 124 S.E.2d 602, 608 (1962). It is not necessary for a principal to be present at the time of the commission of his agent's act in order for him to ratify that act. *See State v. Waldrop*, 73 S. C. 60, 52 S.E. 793, 795 (1905) ("The presiding judge ruled that he

would likely not change the outcome of [its] decision as issues related to [Mr. Dover] and [Ms. Bayne's] actions are not relevant to implied or apparent authority." (R. p. 7.) The Facility agrees that Ms. Solesbee's actions are relevant; but far from providing good cause to deny the Facility's request for discovery, this fact perfectly illustrates why it should have been granted: it is what Mr. Dover and Ms. Bayne's affidavits *say (or undeniably imply) about Ms. Solesbee's actions* that is so critical here. By denying (albeit retroactively) authority to sign for Ms. Solesbee, Mr. Dover necessarily implies that Ms. Solesbee never acted to give him authority, expressly or implicitly. (*See* R. p. 138 ¶ 2.) By denying that the Arbitration Agreement was ratified, Ms. Bayne necessarily implies that Ms. Solesbee never acted to ratify the Arbitration Agreement, expressly or implicitly. (*See* R. p. 130 ¶ 2.) And, of course, when both Mr. Dover[20] and Ms. Bayne[21] state that, based on their observations of Ms. Solesbee at the time of her admission to the Facility, she was not competent to understand her affairs, they are directly relating their views of Ms. Solesbee's actions.

The trial court is also incorrect to view Mr. Dover and Ms. Bayne's actions as wholly irrelevant. Even though agency may not be established *solely* by the

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could ratify the act of the agent, whether he was present or not, and in this we see no error.").

[20] (*See* R. p. 139 ¶ 5.)

[21] (*See* R. p. 131 ¶ 4.)

actions of the agent,[22] "such declarations and conduct [by the agent] are admissible as circumstances in connection with other evidence tending to establish the agency." *Fuller*, 240 S.C. at 83, 124 S.E.2d at 606.

The discovery the Facility sought to conduct is undeniably material. Whether an agency relationship exists (or whether the facts to support estoppel or ratification exist) is a fact-intensive inquiry guided by the legal principles set forth above, as is the issue of Ms. Solesbee's competency. At the least, there is an ambiguity as to whether Ms. Solesbee manifested consent for Mr. Dover to act as her agent, given the inconsistency between Mr. Dover's representation of authority in the Arbitration Agreement and his disavowal of such authority in his affidavit. It could also be investigated whether Mr. Dover and/or Ms. Bayne had at other times acted on their mother's behalf, whether in fact having her authorization/consent (express or implied), or only purporting to have it. Inquiry could also be made into whether Ms. Solesbee and her children had any post-admission discussions or other interactions relating to the documents Mr. Dover signed on her behalf during the admissions process, such that Ms. Solesbee could have repudiated them if they were signed without proper authority—or conversely ratified them by not doing so.

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[22] *Cowburn v. Leventis*, 366 S.C. 20, 39–40, 619 S.E.2d 437, 448 (Ct. App. 2005).

At a minimum, the trial court erred in denying the Facility's alternative request for limited discovery to address gaps in the evidentiary record—gaps which undeniably exist and cannot possibly be filled without the requested discovery—bearing on the Arbitration Agreement's enforceability (and, by extension, on the Other Appellants' motions for a stay).

II. The trial court erred in denying the Other Appellants' motions to stay this lawsuit pending arbitration of the claims against the Facility.

The Other Appellants motions sought a stay of this action until the arbitrability issue is finally decided and any/all arbitration proceedings are completed. (*See* R. pp. 105–08.) Obviously, the relationship between the Facility's motion to compel arbitration and the Other Appellants' motions to stay is such that, insofar as the trial court was concerned, its denial of the former mooted the latter. Thus, while the trial court did not grant the relief the Other Appellants sought, it did not rule against them on the merits either. The mootness of the Other Appellants' motions to stay depends on the extent to which the Facility's appeal is successful. To the extent that the Facility's appeal is successful, the Other Appellants' motions to stay are not moot and they should have been (and should be) granted. *See* 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable

to arbitration under such an agreement, *shall* on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.") (emphasis added); *Episcopal Housing Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) ("The fact that Federal is not a party to an arbitration agreement does not prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement.").

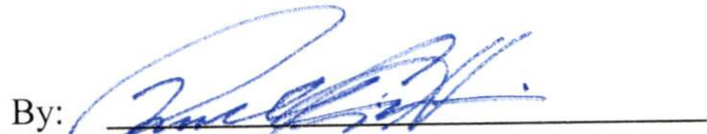
CONCLUSION

For the foregoing reasons, the Facility asks this Honorable Court to reverse the trial court and stay this lawsuit in favor of arbitration (or remand the case to the trial court with instructions for it to do so) or, alternatively, remand the case to the trial court for it to engage in or allow any such other proceedings (including, without limitation, discovery) as may be necessary to properly determine and/or enforce the Facility's rights under the Arbitration Agreement, and the Other Appellants ask the Court to stay this action pending arbitration of Plaintiff's claims against the Facility (or remand the case to the trial court with instructions that it do so) or, alternatively, remand the case to the trial court for any further proceedings necessary to decide their motions to stay on the merits.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 

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Dated: 8/7/20

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Court of Common Pleas

RECEIVED
AUG 13 2020
SC Court of Appeals

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2018-CP-42-04405
Appellate Case No. 2019-001731

The Estate of Mary Solesbee, by her personal representative, Connie Bayne, Respondent,

v.

Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman; Inpatient Consultants of North Carolina, P.C.; and Angela Brown, ACNP, Defendants,

Of which Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman are the Appellants.

APPELLANTS' CERTIFICATION FOR FINAL BRIEF

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I, Russell G. Hines, do hereby certify that the Final Brief of Appellants complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

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