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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

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 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, THI of South Carolina at Magnolia Manor-Inman d/b/a Magnolia Manor-Inman are the	.....	Appellants.

FINAL BRIEF OF RESPONDENT

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1. Whether a nursing home can use the South Carolina Adult Health Care Consent Act's limited authority for "health care" decisions to bind a nursing home resident to an independent arbitration contract to which she did not assent.

2. Whether a nursing home resident received the "direct benefit" required to support equitable estoppel from an arbitration contract she never saw and which purported to take her right to a jury trial.

3. Alternatively, whether a nursing home resident's assent to arbitration affects a wrongful death claim that compensates the resident's beneficiaries for their losses.

4. Whether a nursing home can ask a court to "permit" discovery already authorized by the rules or to preemptively rule that conducting discovery will not waive the nursing home's perceived right to pursue arbitration later.

STATEMENT OF THE CASE

Connie Bayne, appointed as personal representative of the Estate of her mother Mary Solesbee, filed a Summons and Complaint in the Spartanburg County Court of Common Pleas on December 27, 2018. (R. p. 12), (Compl. ¶ 1). The Complaint alleged wrongful death and survival claims against THI of South Carolina at Magnolia Manor—Inman, LLC d/b/a Magnolia Manor of Rock Inman ("the Facility") along with related entities the Complaint alleged to have operational or managerial control over the Facility. (R. pp. 12-14; 17-19), (Compl. ¶¶ 2-3; 21-25). The Complaint also named as defendants IPC Healthcare, Inc. and its employee Nurse Angela Brown, who provided services to the Facility's residents. (R. pp. 13-14), (Compl. ¶¶ 3-5). Ms. Bayne amended her Complaint on January 3, 2019 and February 27, 2019. (R. pp. 30-45; R. pp. 46-61), (Am. Compl.; Sec. Am. Compl.). IPC Healthcare, Inc. and Nurse Brown were dismissed as defendants by stipulation on September 28, 2019.

The Facility moved to compel arbitration and to stay court proceedings on February, 22, 2019. (R. pp. 101-103), (Magnolia Manor Mot. to Dismiss & to Compel Arb.). Motions to stay were filed by Defendants Fundamental Administrative Services, LLC and Fundamental Clinical and Operational Services, LLC on August 9, 2019. A hearing on the motions was held before the Honorable Grace Gilchrist Knie on August 16, 2019. On September 11, 2019, the circuit court entered an order denying the Facility's motion to compel arbitration and dismissing as moot the other Appellants' motions to stay. (R. pp. 1-9), (Order, dated Sept. 11, 2019). The Facility, Fundamental Administrative Services, LLC, and Fundamental Clinical and Operational Services, LLC served a notice of appeal on October 11, 2019.

STATEMENT OF THE FACTS

Mary Solesbee was admitted to the Facility on June 27, 2016, with an abscessed wound on

her left thigh. (R. p. 49), (Sec. Am. Compl. ¶ 9). Prior to Ms. Solesbee's admission but on that same date, her son Allen Dover was presented with two adhesion contracts at the Facility. Ms. Solesbee was not present during this process. (R. p. 130), (C. Bayne Aff. ¶ 2). The first contract was an "Admission Agreement" governing the type of care Ms. Solesbee would receive at the Facility and Ms. Solesbee's financial obligation to pay for those services. On the Admission Agreement's final page, labeled as "Page 12 of 12," there was an "Entire Agreement" provision indicating these 12 pages constituted "the entire agreement and understanding between the parties" concerning Mr. Solesbee's admission to the Facility. Mr. Dover signed the Admission Agreement on the "Signature of Representative" line. The Facility's representative did not ask Mr. Dover for proof of authority to act on Ms. Solesbee's behalf. In fact, publically available records showed that, while Ms. Solesbee had previously named Mr. Dover as her agent in a power of attorney, she explicitly revoked that appointment in a power of attorney revocation document recorded with the Cherokee County Register of Deeds on September 12, 2014. In the revocation, Ms. Solesbee stated, "I will no longer allow [Mr. Dover] to act on my behalf" and "I will no longer be responsible for obligations incurred" by Mr. Dover supposedly in my stead. (R. pp. 132-136), (Pla.'s Mem. in Opp. to Defs.' Mot. to Dismiss and Compel Arb., Exhibits B & C).

On the same day, Mr. Dover signed a contract called "Arbitration Agreement." This contract was not part of the 12 pages comprising the Admission Agreement but was its own separate contract (labeled "Page 1 of 1") with its own signature blocks. The Arbitration Agreement, purportedly a contract between the Facility and either Ms. Solesbee or Mr. Dover, provided for alternative dispute resolution for any claim a party may bring against another arising out of Ms. Solesbee's admission in the Facility. Mr. Dover signed the Arbitration Agreement on the line labeled "Resident/Representative Signature." Appellants admit agreeing to the Arbitration

Agreement was not a condition or prerequisite to admission at the Facility. (R. p. 77, lines 10-12; R. p. 150), (Tr. of Record Aug. 16, 2019 at 16:10-12); Defs' Mem. in Supp. of Mot. to Dismiss and Compel Arb. at 11.

When Ms. Solesbee arrived in the Facility later on June 27, 2016, her left thigh wound required constant monitoring and treatment. (R. p. 50-51), (Sec. Am. Compl. ¶ 20). However, Ms. Solesbee's wound was not properly assessed at admission or properly treated at any point during her 19 days at the Facility. The Facility's personnel failed to properly monitor Ms. Solesbee's vital signs, prescribed her a combination of medications that worsened her condition, and failed to act when Ms. Solesbee presented clinical signs of sharp decline. (R. p. 49), (Sec. Am. Compl. ¶¶ 10, 13, 16). At one point, Ms. Solesbee lost 12 pounds in just over a week, but the Facility did nothing to address it. (R. p. 49), (Sec. Am. Compl. ¶ 15). Ms. Solesbee's unaddressed and worsening leg wound led to her admission to Pelham Regional Medical Center on July 14, 2016, where she was diagnosed with an infection in her left leg and sepsis. Ms. Solesbee never recovered, passing away on August 1, 2016. On December 27, 2018, Connie Bayne, Ms. Solesbee daughter, initiated this action as the personal representative for her estate. (R. p. 12), (Compl. ¶ 1). The Complaint alleged wrongful death and survival claims arising from Appellants' negligence and corporate negligence including failure to adequately treat Ms. Solesbee's leg wound causing her wrongful and premature death.

On July 17, 2018, the Facility chose to forego discovery and filed a motion to compel arbitration and petition to stay state court proceedings. Relying on the Arbitration Agreement Ms. Solesbee did not sign, the Facility argued Ms. Bayne must arbitrate rather than litigate her claims. The circuit court denied the motion, finding Mr. Dover lacked authority to enter the Arbitration Agreement on Ms. Solesbee's behalf. (R. pp. 1-9), (Order, dated Sept. 11, 2019). The circuit court

also held that, even if the Arbitration Agreement was generally valid, it could not be enforced for the wrongful death claim brought for the benefit of Ms. Solesbee's statutory beneficiaries. Id. at 4-7. Finally, the circuit court rejected the Facility's request for leave to conduct discovery before the court ruled on its motion. Id. at 7-8. Citing the South Carolina Rules of Civil Procedure, the court found the Facility could have performed discovery before filing its motion and that recent precedent from this Court did not support the Facility's request. Id. at 7 (citing Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 576, 813 S.E.2d 292, 309 (Ct. App. 2018)).

STANDARD OF REVIEW

Appellate courts apply a *de novo* review to a circuit court's finding on whether a nonsignatory is bound to an arbitration contract. Wilson v. Willis, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019) (citing Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007) and Pearson v. Hilton Head Hosp., 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012)). However, under a *de novo* review, the circuit court's factual findings will not be reversed so long as "any evidence reasonably supports those findings." Wilson, 426 S.C. at 335, 827 S.E.2d at 172. To the extent a discovery order is properly before the Court, the Facility must prove an abuse of the circuit court's discretion. Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 576, 813 S.E.2d 292, 309 (Ct. App. 2018) (quoting Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 536 787 S.E.2d 485, 495 (2016)).

ARGUMENT

The Facility's motion to dismiss sought to deny Respondent the constitutionally-guaranteed right to a jury trial based on an invalid arbitration contract. Arbitration may be favored by federal law but only when the parties voluntary agree to it. Here, Ms. Solesbee was not even at the Facility when its employee presented the Arbitration Agreement for signature, and the Facility

produced nothing to show Ms. Solesbee's son (Allen Dover) had the authority to bind his mother (or her estate) to the Arbitration Agreement. South Carolina appellate courts have repeatedly rejected nearly all of the legal and equitable theories the Facility now proposes to create a binding contract where there is not one. Just two years ago, this Court also rejected the Facility's discovery-related argument. Hodge, 422 S.C. at 576, 813 S.E.2d at 309. In sum, the Facility failed to meet its burden to show a valid arbitration contract and was in no way denied the opportunity to conduct discovery before filing its motion to compel arbitration.[1]

1. The Independently-Invalid Arbitration Agreement does not Merge with the Admission Agreement.

The Facility argues Ms. Solesbee's estate must arbitrate its claims against Appellants, but Ms. Solesbee never agreed to do so. Ms. Solesbee never signed or otherwise assented to the Arbitration Agreement on which the Facility relies to support its motion to dismiss the estate's civil action. Mr. Dover's signature on the Arbitration Agreement is ineffective because he did not have authority to bind Ms. Solesbee to a dispute resolution contract. Moreover, as the circuit court concluded, Ms. Solesbee's presence at the Facility does not estop the estate from contesting arbitration under South Carolina or federal equitable estoppel principles.

This appeal centers on core components of contract formation. Since the Facility points only to the Arbitration Agreement as a basis for dismissing Respondent's claims, it cannot prevail without first establishing the Arbitration Agreement is a properly formed, binding contract. However, while the Facility offered the Arbitration Agreement as an alternative means for settling

[1] For the same reasons, the Court should affirm the circuit court's ruling dismissing the remaining Appellants' motions to stay as moot. As made clear in Appellants' Brief, the motions to stay are wholly dependent on the outcome of Magnolia Manor's motion to compel arbitration. Appellants' Br. at 28. Also, even if the Court were to reverse the circuit court's ruling on the Facility's motion, the motions to stay should be remanded for resolution by the circuit court in the first instance.

disputes, Ms. Solesbee never accepted that offer. Moreover, as established in South Carolina precedent, Mr. Dover's statutory authority to admit Ms. Solesbee to the Facility does not confer authority to enter the Arbitration Agreement, a document the Facility drafted as a separate and distinct contract offered for a completely different purpose.

a. The Facility Cannot Show the Core Requirements to Form a Contract.

A contract is formed only when one party makes an offer, the other manifests acceptance, and the contract's promises are supported by valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). Acceptance requires an "objective manifestation of . . . assent at the time the contract was made." Laser Supply & Services, Inc. v. Orchard Park Assoc., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009). The Arbitration Agreement was not signed by Ms. Solesbee and she was not even in the building when the Arbitration Agreement was offered for signature. (R. p. 130), (C. Bayne Aff. ¶ 2). Since Ms. Solesbee never personally assented to the Arbitration Agreement, the Facility argues the signature of her son (Mr. Dover) assented on her behalf. However, the Facility presents nothing to show Mr. Dover had authority to contract for Ms. Solesbee, and she had explicitly stated in public records that Mr. Dover lacked such authority. (R. pp. 135-136), (Pla.'s Mem. in Opp. to Defs.' Mot. to Dismiss and Compel Arb., Exhibit C). Instead, the Facility now argues Mr. Dover had statutory authority to enter Ms. Solesbee to the Facility and that authority either carries over to the Arbitration Agreement or equitably estops Ms. Solesbee's estate from opposing arbitration. The circuit court correctly refused both of these arguments because they have been rejected by South Carolina appellate courts three times in the last six years.

South Carolina's Adult Health Care Consent Act ("the Act") empowers designated family members of some vulnerable adults to sign a contract admitting the vulnerable adult to a skilled

nursing facility and agreeing to pay the fees imposed by that facility for its services. S.C. Code Ann. § 44-66-60(A); Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450, 453 (2014). But, since the Act is limited to "health care" decisions, it provides no authority for separate contracts like the Arbitration Agreement. Id. at 354, 755 S.E.2d at 454; Thompson v. Pruitt Corp., 416 S.C. 43, 51, 784 S.E.2d 679, 684 (Ct. App. 2016) (citing Coleman and agreeing an "Arbitration Agreement does not deal with healthcare decisions"). Additionally, a family member signing a nursing home admission contract pursuant to authority derived from the Act does not estop a later argument that the same family member lacked authority to sign a separate arbitration contract. Coleman, 407 S.C. at 354-56, 755 S.E.2d at 455; Thompson, 416 S.C. at 60, 784 S.E.2d at 688. The Act was never meant to affect anything other than "health care" decisions and, the Arbitration Agreement was not a health care decision because Ms. Solesbee could get all the health care services covered in the Admission Agreement without agreeing to arbitrate. (R. p. 77, lines 10-12), (Tr. of Record Aug. 16, 2019 at 16:10-12) ("this arbitration agreement . . . was not a condition to admittance into the facility").

Coleman did acknowledge the possibility that equitable estoppel could be invoked if the disputed arbitration language was actually or effectively part of the same admission contract. 407 S.C. at 355, 755 S.E.2d at 455. This narrow path to a successful estoppel argument requires several steps. Preliminarily, the Facility must establish the Act empowered Mr. Dover to enter the Admission Agreement on Ms. Solesbee's behalf. See Hodge, 422 S.C. at 574, 813 S.E.2d at 308 (finding that there can be no estoppel argument where signatory family member lacked authority under Act to enter admission contract). Then, the Facility must meet multiple requirements to apply the common law contract law interpretation principle by which courts interpret multiple writings as a single contract. Coleman, 407 S.C. at 355, 755 S.E.2d at 455. This "merger" principle

cannot apply unless the writings in question were executed "at the same time, by the same parties, for the same purpose, and in the course of the same transaction." Id. (quoting Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)). Even then, merger does not apply if there is "*anything* indicating a contrary intention." Id. (emphasis added). Thus, simultaneously executed writings relating to the same general subject matter will not be viewed as a single or merged agreement if either their language or the circumstances even hint that the parties actually intended the writings to be distinct, separate contracts. Three nursing homes have previously attempted but failed to meet these robust requirements, and South Carolina's appellate courts have never applied merger to nursing home admission and arbitration contracts. See generally Coleman, Thompson, and Hodge.

b. The Facility Makes Inconsistent Arguments on Mr. Dover's Authority under the Adult Health Care Consent Act.

The Facility cannot meet any of the requirements to support its equitable estoppel argument. First, the Facility does not even offer a consistent position on whether the Act empowered Mr. Dover to enter the Admission Agreement on Ms. Solesbee's behalf. The Act only applies if Ms. Solesbee was "unable to consent," a term defined by the Act as limited to a person who cannot (1) appreciate the nature and implications of both her condition and proposed interventions; (2) form a reasoned decision concerning proposed treatment courses; or (3) communicate her decisions in an unambiguous manner. S.C. Code Ann. § 44-66-20(8). The Facility's merger argument could only be relevant to this appeal if Mr. Dover had authority under the Act, but Appellants' counsel made a different argument to the circuit court. There, counsel refused to acknowledge Ms. Solesbee was incapacitated, arguing there was some unspecified evidence in the record to the contrary (R. p. 72, lines 8-13), (Tr. of Record Aug. 16, 2019 at 11:8-13). If Ms. Solesbee had the capacity the Facility suggested to the circuit court, then he may not

qualify as a person "unable to consent," the Act[2] would not apply even to the Admission Agreement, and the merger argument would fail at its initial hurdle. Hodge, 422 S.C. at 574, 813 S.E.2d at 308.

c. The Admission Agreement and Arbitration Agreements Serve Different Purposes.

Second, the Facility cannot show the Admission Agreement and Arbitration Agreement were executed for the same purpose. The Admission Agreement was formed because its "parties wish to admit [Ms. Solesbee] to" the Facility. (R. p. 165), (Admission Agreement at 1). That purpose is borne out in the Admission Agreement's twelve pages. The Facility agreed to "[f]urnish room, routine meals, nursing care, personal care, or custodial care" (R. p. 166), (Admission Agreement at 2, § (A)(3)) to Ms. Solesbee who, in turn, agreed to "[p]ay all fees and charges" for those skilled nursing services. Id. at 3, § (B)(4). The Admission Agreement's provisions referred to Medicaid eligibility, bed hold policies, late fees for unpaid service charges, etc. The Arbitration Agreement covers a completely different issue. It is solely devoted to directing an alternative dispute resolution method and purporting to eliminate its parties' right to seek relief through the courts. (Arbitration Agreement). These two contracts cannot have the same purpose because, as Appellants' counsel admits, the Arbitration Agreement was not a pre-condition for admission. (R. p. 77, lines 10-12; R. p. 150), (Tr. of Record Aug. 16, 2019 at 16:10-12); Defs' Mem. in Supp. of Mot. to Dismiss and Compel Arb. at 11).

d. The Terms and Context Show the Parties Intended the Admission Agreement and Arbitration Agreement to be Separate Contracts.

[2] The Facility has also expressly waived any argument relying on the Act based on its counsel's concession at the circuit court hearing. Tr. of Record Aug. 16, 2019 at 8:12-14 ("We can't use the Adult Health Care Act"); see also Thompson, 416 S.C. at 50, 784 S.E.2d at 683 (finding nursing home waived argument regarding the Act through statement at circuit court hearing).

Third, even if the Court were to find the Act applied to Ms. Solesbee and the prerequisites to merger were present, the Facility's argument fails because the language and circumstances of the Admission Agreement and Arbitration Agreement show the parties intended they be construed as separate contracts. Coleman, Thompson, and Hodge are the key precedent here because they illustrate the type of contract language or structure showing parties do not intend multiple agreements to be interpreted as one. For example, an arbitration contract does not merge with an admission contract in which a nursing home and its resident chose to insert an "entire agreement" or integration provision (aka "merger clause") limiting its parameters and excluding other writings. Coleman, 407 S.C. at 355, 755 S.E.2d at 455. Coleman held one such provision proved "on its face" that merger does not apply. Id. Also, admission and arbitration contracts cannot merge if they contain inconsistent terms, especially provisions related to how each contract may be terminated. Id.; Thompson, 416 S.C. at 53, 784 S.E.2d at 685. Moreover, courts look at the way the contracts are structured, finding it is unlikely parties intended two contracts to be treated as one if they chose separate titles, required separate signatures, and numbered each contract's pages differently. Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562, 813 S.E.2d at 302. Finally, Hodge held a nursing home cannot argue for merger when it chose to separate arbitration and admission into two agreements while taking the position that agreeing to the former was not required to obtain the benefits of the latter. 422 S.C. at 562-63, 813 S.E.2d at 302.

The Facility preemptively dismisses all of these factors, arguing none of them suggest the parties intended the Admission Agreement and Arbitration Agreement not merge. Appellants' Br. at 11-12. However, by rejecting or discounting these factors, the Facility is arguing against well-established, recent precedent (Coleman, Thompson, and Hodge) without offering the Court any

reason why it should so dramatically and quickly reverse course. All four of these examples apply to the Admission Agreement and Arbitration Agreement in this case and provide extensive evidence the contracts do not merge.

i. The Admission Agreement's "Entire Agreement" Provision

The Admission Agreement concludes with an "Entire Agreement" provision identifying the limited scope of that contract. (R. p. 176), (Admission Agreement at 12, § XVIII). Specifically, this provision states "this Agreement represents the entire . . . understanding between the parties." "Agreement" is capitalized because it is a defined term, which the Admission Agreement's opening line limits to "THIS ADMISSION AGREEMENT." (R. p. 165), (Admission Agreement at 1) (emphasis in original). Thus, the Admission Agreement's "Entire Agreement" provision is similar to the admission contracts in Coleman, Thompson, and Hodge. In fact, the Admission Agreement's "Entire Agreement" provision is just as probative against merger as those in earlier cases. It specifically limits the contract's interpretation to the "Agreement" and then defines that term narrowly in a way that does not include the Arbitration Agreement or any other writing. In this sense, the "Entire Agreement" provision is consistent with the fundamental purpose an integration provision serves in a contract. See Palmetto State Sav. Bank of S.C. v. Barr, 293 S.C. 252, 253-54, 359 S.E.2d 531, 532 (Ct. App. 1987) (finding purpose of integration provision is to create "strong implication the whole intentions of the parties has been expressed" in the writing containing the clause); Wilson v. Landstrom, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984) (citing Armour Fertilizer Works v. Hyman, 120 S.C. 375, 113 S.E. 330 (1922) (the terms of a completely integrated contract "cannot be varied or contradicted by parol evidence of prior or contemporaneous agreements not included in the writing")).

Plus, there is contract language here that tracks Coleman and progeny almost word for word. In Coleman, the court focused on the fact that the admission contract's "Entire Agreement" provision referenced "[t]his Agreement . . . and the Arbitration Agreement." Referencing the two writings distinctly was "the admission agreement's recognition of the arbitration agreement as a separate document." Thompson, 416 S.C. at 52, 784 S.E.2d at 684 (citing Coleman, 407 S.C. at 355, 755 S.E.2d at 455). Hodge applied the same principle using language from an arbitration contract that referenced an admission contract in distinct terms. 422 S.C. at 562, 813 S.E.2d at 302. If an arbitration contract explains its scope extends to disputes arising from "this Agreement or the . . . Admission Agreement," then the parties "recognized a separateness" between the two contracts. Id. The Arbitration Agreement in this case does exactly what Coleman, Thompson, and Hodge identify as proof that defeats the Facility's merger argument. In describing its term, the Arbitration Agreement states that its effect will continue even after the termination of "this Agreement ***or the Admission Agreement.***" (Arbitration Agreement) (emphasis added).

Finally, the Facility argues the "Entire Agreement" provision supports merger because it incorporates "other Admissions Materials." Appellants' Br. at 11 (R. p. 176), (quoting Admission Agreement at 12 § XVIII). To the extent the Facility implies the Arbitration Agreement was incorporated by reference into the Admission Agreement, the Facility has offered nothing in either contract to support this conclusion. "Admissions Materials" is not a defined term and there is nothing to suggest the Arbitration Agreement was intended to be included within it. Plus, since the Facility admits agreeing to arbitration was not required for admission, it would be counterintuitive to conclude the Arbitration Agreement was an "admissions material." Thompson rejected a similar argument when a nursing home argued its admission contract's "entire agreement" provision incorporated a separate arbitration contract by referring broadly to "exhibits." Since "exhibit" was

undefined and not referenced elsewhere in either contract, the term was ambiguous and was interpreted against the nursing home who drafted it. 416 S.C. at 53-54, 784 S.E.2d at 685 (citing Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455).

ii. Inconsistent Termination Provisions

Two contracts executed at the same time do not merge if they contain inconsistent terms. The parties likely did not intend for the two be read as one if they chose to, for example, apply different substantive law to the two agreements. Hodge, 422 S.C. at 562, 813 S.E.2d at 302. Coleman, Thompson, and Hodge made special note of inconsistent provisions in admission and arbitration contracts regarding when each contract may be cancelled at the resident's urging. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 551, 813 S.E.2d at 296. In each instance, the arbitration contract allowed the resident to disclaim or revoke its provisions within thirty days but the admission contract did not include a similar right. Id. Here, the Arbitration Agreement does not have a disclaimer provision, and the Facility argues this fact as a means of distinguishing Coleman, Thompson, and Hodge. (R. p. 76, lines 12-25), Tr. of Record (Aug. 16, 2019) at 15:12-25.

However, the contracts' termination provisions are just as inconsistent here as in those cases. The Arbitration Agreement states that its effect on disputes between the parties would survive even if both the Admission Agreement and Arbitration Agreement are cancelled. (Arbitration Agreement). As structured by the Facility, there does not seem to be any means by which a resident could unilaterally cancel the Arbitration Agreement. The Admission Agreement is very different in that it allows a resident to unilaterally terminate that contract "at any time." (R. p. 170), (Admission Agreement at 6, § IV, ¶ 1). Thus, while the Facility is correct the Arbitration Agreement is technically different than Coleman and progeny because it lacks a disclaimer

provision, that distinction makes no difference because the Arbitration Agreement and Admission Agreement still have inconsistent termination provisions that rebut any argument the parties intended these two separate contracts merge into one.

iii. Contract Formatting and Structure

Thompson and Hodge prove it is not just specific contract language that shows a nursing home and its resident did not intend for admission and arbitration contracts to merge. Intent can be derived from the way a contract is formatted or structured. Rather than adding an arbitration provision to the admission contract or attaching that language as an exhibit, the nursing home in Thompson chose to place it in an entirely separate document with its own, distinct "Arbitration Agreement" label. 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1. That choice was in itself further proof of "the parties' intent for [the arbitration contract] to stand by itself as an independent contract." Id. The Facility did the same here, and the Arbitration Agreement announces itself as a distinctive contract from its very title. Hodge also noted the importance of formatting choices a nursing home makes when constructing its admission and arbitration contracts. 422 S.C. at 562, 813 S.E.2d at 302. An arbitration contract looks more and more like its own independent document if entering it requires a separate signature than the admission contract and the documents have separate pagination. Id. Here, the Arbitration Agreement required separate signatures. Plus, the Admission Agreement ran from "Page 1 of 12" to "Page 12 of 12," while the Arbitration Agreement was all on its own as "Page 1 of 1."

iv. Admission is not Dependent on Arbitration Agreement

The Facility's merger argument is also rebutted by its counsel's admissions. The purported interaction between two separate contracts can be judged not only by their language but also by how their parties treat each contract. An arbitration contract is far less likely to merge with an

admission contract if the nursing home admits arbitration is not required for admission. Thus, in Hodge, this Court cited as further evidence against merger an arbitration contract provision stating that arbitration was not a precondition to a resident's acceptance into the nursing home. 422 S.C. at 562-63, 813 S.E.2d at 302. Similarly, the Facility does not treat the Admission Agreement and Arbitration Agreement as if they are interdependent or even as related to the same purpose. The Facility's counsel told the circuit court that executing the Arbitration Agreement was not mandatory and not a precondition to admission. (R. p. 84, lines 24-25-p. 85, lines 1-10), (Tr. of Record Aug. 30, 2018 at 23:24-24:10).

In sum, the Arbitration Agreement and Admission Agreement have the same four indicators South Carolina courts have cited in the past to find the parties did not intend for simultaneously-executed contracts to merge into one. Moreover, contrary to the Facility's arguments, any uncertainty about these four indicators as applied to this case must be resolved in Respondent's favor, not to her detriment. The Facility argues merger is the default position and must be applied absent an affirmative showing of contrary intent. Appellants' Br. at 11. But, that argument overlooks two key holdings from Coleman. First, to the extent merger is a presumption, it is an easily rebuttable one because "***anything*** indicating a contrary intention" means a court will not apply merger. 407 S.C. at 355, 755 S.E.2d at 455 (quoting Klutts, 268 S.C. at 88, 232 S.E.2d at 24) (emphasis added). Thus, the Facility's task on appeal is not to successfully oppose one of the four indicators discussed above but to prove all four are absent here. Second, since the Facility drafted these form contracts of adhesion, any ambiguities must be construed against the Facility. Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455. Coleman applied this rule to a nursing home's quibbles over the effect of an "entire agreement" clause, and Thompson used it to reject a nursing

home's argument that an arbitration contract was incorporated into an admission contract. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53-54; 784 S.E.2d at 685.

Accordingly, the Facility's merger argument is flawed not only in the specific ways described above but also in its very conception of when and how the merger doctrine operates. The circuit court properly applied extensive South Carolina law in this field and rejected the Facility's contention that the Arbitration Agreement and Admission Agreement merged.

2. Respondent is not Equitably Estopped from Opposing Arbitration.

Ms. Solesbee did not sign the Arbitration Agreement or authorize anyone to sign for her and was not even in the building when it was presented for signature. Yet, the Facility argues South Carolina Supreme Court precedent suggests Ms. Solesbee's estate is equitably estopped from opposing arbitration. Appellants' Br. at 13-15 (citing Wilson v. Willis, 426 S.C. 326, 827 S.E.2d 167 (2019)). However, the Facility does not even cite or attempt to apply the elements of equitable estoppel imposed by South Carolina law.[3] Plus, Wilson actually refused to compel arbitration against a non-signatory, holding there is a presumption *against* forcing someone to arbitrate based

[3] As Wilson recognized, whether a non-signatory may be bound to an arbitration contract is a state law issue. 426 S.C. at 348, 827 S.E.2d at 174 (citing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630-31 n. 5 (2009)). Under South Carolina law, equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conducted be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on conduct of the party to be estopped. Id. Wilson did not dismiss or eliminate this test for equitable estoppel but only found its application was an issue that had not been preserved for appellate review. The Facility argues Wilson concluded this test only applies to "non-arbitration cases." Appellants' Br. at 14 (citing Wilson, 426 S.C. at 340 n. 9, 827 S.E.2d at 175 n. 9). However, that could not have been Wilson's meaning because applying different rules to arbitration and non-arbitration contracts would violate the U.S. Supreme Court's equal-treatment principle. See Prima Paint Corp. v. Flood Conklin Mfg. Co., 388 U.S. 395, 404 n. 12 (1967) (finding intent of Federal Arbitration Act was "to make arbitration agreements as enforceable as other contracts, but not more so").

on a contract she did not sign. 426 S.C. at 338, 827 S.E.2d at 173. Wilson even went on record to say equitable estoppel is rarely appropriate to force arbitration. Id. at 345, 827 S.E.2d at 177 (finding equitable estoppel "should be used sparingly"). Finally, the Facility cannot meet the "direct benefits" test considered in Wilson because Respondent's claims in no sense rely on the Arbitration Agreement's terms, and the Facility's argument to the contrary expressly links its estoppel claim to its fatally flawed merger argument.

The "direct benefits estoppel" discussed in Wilson could only apply if Respondent has "consistently maintained that other provisions of the same contract should be enforced to benefit" her. 426 S.C. at 340, 827 S.E.2d at 175 (quoting Pearson, 400 S.C. at 290, 733 S.E.2d at 601). In other words, the Facility's burden is to show Respondent has "knowingly exploit[ed]" the Arbitration Agreement to her benefit. Wilson, 426 S.C. at 340, 827 S.E.2d at 175. The Facility makes no attempt to meet this burden and cannot do so. Respondent's claims do not cite or rely on the Arbitration Agreement. Instead, the Facility argues Respondent was the direct benefit of the Admission Agreement and, therefore, should be estopped from denying the Arbitration Agreement. Appellants' Br. at 14-15.

But, this argument has two key flaws. First, Respondent has not obtained a "direct benefit" from the Admission Agreement as that term is used for estoppel purposes. Respondent does not allege a breach of contract claim based on the Admission Agreement or otherwise rely on that contract to seek liability against the Facility. The mere fact that Ms. Solesbee's relationship with the Facility underlying Respondent's claims was memorialized in the Admission Agreement is not sufficient for the Facility to invoke estoppel. Wilson, 426 S.C. at 343, 827 S.E.2d at 176 ("direct benefits estoppel is not implicated simply because a claim relates to or would not have arisen 'but for' a contract's existence"). Second, this argument shows the Facility's estoppel claim is wholly

dependent on a merger argument it cannot prove. Appellants' Br. at 15 (arguing estoppel applies because Admission Agreement and Arbitration Agreement merged). As discussed in Argument 1 above, there is no merger here because (1) the Facility disputes Ms. Solesbee's competence and, as a result, her son's statutory authority to enter the Admission Agreement; (2) the contracts were created for different purposes; and (3) there are many indications from the contracts' language they were not intended to be construed as one.

Finally, this Court has previously rejected a nursing home's attempt to use direct benefits estoppel to compel a non-signatory nursing home resident to arbitrate. Thompson, 416 S.C. at 58-59, 784 S.E.2d at 687-88; see also Hodge, 422 S.C. at 556-57, 813 S.E.2d at 299-300 (applying Thompson). After surveying Pearson and Fourth Circuit cases, Thompson refused to apply this form of estoppel because it generally requires proof of some benefit to the party opposing estoppel in "*the contract that includes the arbitration provision.*" 416 S.C. at 59, 784 S.E.2d at 688 (emphasis added). The Facility, therefore, cannot build an estoppel argument by citing supposed benefits Ms. Solesbee gained in the Admission Agreement. Thompson also rejected any effort to argue Ms. Solesbee gained a "direct benefit" from the Arbitration Agreement. Id. at 60, 784 S.E.2d at 688 ("any possible benefit emanating from the [Arbitration Agreement alone is offset by the [Arbitration Agreement's] requirement that Mother waive her right of access to the courts . . .").

In sum, the circuit court correctly rejected the Facility's equitable estoppel argument because the Facility has not cited or applied the proper elements, cannot show Respondent obtained any "direct benefit," and bases its estoppel claim on its flawed merger argument. As it did in Thompson and Hodge, this Court should reject the Facility's equitable estoppel argument.

3. Alternatively, Ms. Solesbee's Purported Consent to Arbitration Does Not Extend to the Wrongful Death Claim Covering Her Family Members' Losses.

As an alternative finding[4], the circuit court correctly concluded the Arbitration Agreement did not cover Respondent's wrongful death claim. Appellants insist Ms. Solesbee had the power to waive the right to a jury trial on a claim that did not exist when the Arbitration Agreement was presented, would never belong to her, and covered injuries suffered exclusively by other people. No South Carolina authority supports these propositions. In fact, even if Ms. Solesbee could agree to arbitrate her own claims, the history and structure of South Carolina's wrongful death and survival statutes show wrongful death is a distinct, independent claim she could not force to arbitration because it solely benefits family members who never agreed to forego a jury trial.

a. South Carolina Law does not Allow a Nursing Home Arbitration Contract to be Enforced Against Unconsenting Non-Parties.

The group of Ms. Solesbee's wrongful death beneficiaries were not parties to the Arbitration Agreement and Appellants may not rely on this contract to dismiss the wrongful death claim without overcoming the presumption that a contract may be enforced only by its parties. Touchberry v. City of Florence, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988). A South Carolina contract may be enforced against a non-party only with proof of (1) incorporation by reference; (2) assumption; (3) agency; (4) veil piercing/alter ego; or (5) estoppel. Wilson, 426 S.C. at 338, 827 S.E.2d at 174 (citing Malloy v. Thompson, 409 S.C. 57, 561-62, 762 S.E.2d 690, 692 (2014)). Since Appellants do not attempt to apply any of these theories, the Arbitration Agreement does not apply to the wrongful death claim.

b. South Carolina Courts Define Wrongful Death as a Distinct, Independent Claim that is Not Derivative of Claims Held by a Decedent at her Death.

[4] The Court need not reach this portion of the Facility's appeal if it affirms the circuit court's order on merger and equitable estoppel. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

Unable to claim Ms. Solesbee's family members are parties, Appellants are left to argue the wrongful death claim actually belongs to Ms. Solesbee's estate rather than the statutorily designated beneficiaries. However, this argument incorrectly lumps together the wrongful death claim and the survival of tort claims Ms. Solesbee had against Appellants at the time of her death. The history and development of South Carolina's wrongful death and survival statutes show wrongful death is something entirely different than tort claims surviving a person's death. South Carolina courts have long recognized these are two very different theories of liability with distinct origins, purposes, and results. Even in more modern cases, their distinct nature is evidenced in how the claims are litigated and how juries resolve them.

The differences begin with the statutes themselves. The wrongful death statute, originally known as Lord Campbell's Act, is now codified beginning at S.C. Code Ann. § 15-51-10 and it creates a cause of action for tortious conduct causing death. A wrongful death claim covers losses and awards damages exclusively to statutorily-defined beneficiaries consisting of the decedent's children, parents, or heirs. S.C. Code Ann. § 15-51-20. Damages are paid to these beneficiaries because a wrongful death claim is directed at their losses suffered as a result of the decedent's absence. Scott v. Porter, 340 S.C. 158, 168, 530 S.E.2d 389, 394 (Ct. App. 2000) (citing F. P. Hubbard & R. L. Felix, The South Carolina Law of Torts 610 (2d ed 1997) (holding wrongful death damages consist of (1) pecuniary loss; (2) mental shock and suffering; (3) wounded feelings; (4) grief and sorrow; (5) loss of companionship; and (6) deprivation of the use and comfort of the decedent's society, experience, knowledge, and judgment).

In contrast, the legislature positioned the survival statute in a completely different code chapter. Both wrongful death and survival relate to "civil remedies and procedures" (Title 15) but, while wrongful death is a distinct claim warranting its own designation (Chapter 51), the survival

statute is classified within an existing chapter (Chapter 5) identifying the proper "parties" for pursuing legal claims. A plaintiff may cite the survival statute to support a suit for any number of legal claims. When that claim is based on the decedent's personal injury, the available damages include "medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased." Scott, 340 S.C. at 170, 530 S.E.2d at 395. Thus, while courts and parties often refer to a "survival claim," this term is a misnomer because the survival statute does not create a claim, it only corrects a misguided common-law rule that assumed a person's existing legal claims died with her. Bemis v. Waters, 170 S.C. 432, 170 S.E. 475, 476 (1933) (holding that survival statute exists as a "correct[ion]" to common-law rule). The statutory scheme alone shows wrongful death and survival are distinct claims accruing at different times and governed by different statutes of limitation. S.C. Code Ann. § 15-3-560(6) (measuring three-year limitations period for wrongful death claims from date of death).

The statutes' history also shows their independence. In Grainger v. Greenville, S. & A. Railway Co., the South Carolina Supreme Court traced the divergent tracks wrongful death and survival claims have taken over their development. 101 S.C. 399, 85 S.E. 968 (1915). In that case, the trial court had dismissed a survival action because the decedent's administrator (equivalent to the modern "personal representative") had previously recovered on a wrongful death claim. Id. at 968. The wrongful death statute in place then was nearly identical to current section 15-51-10 and it provided a claim "in favor of the beneficiaries" but nothing for "the deceased or his estate." Id. at 969. When the legislature recognized this abnormality, it responded by creating the predecessor to the modern survival statute. Id. (citing 1912 Code section 3693). Grainger held this legislative history conclusively established wrongful death and survival claims are distinct and independent.

Id. The claims are distinct because "[t]he beneficiaries, the cause of action, the measure of damages, are all different." Grainger, 85 S.E. at 969.

Building on Grainger and other similar cases, Bass further highlighted the claims' distinctiveness by holding judgment in a wrongful death claim does not have claim preclusive effect on survival claims. 229 S.C. at 611-12, 93 S.E.2d at 914; see also Gleaton v. Southern Ry. Co., 212 S.C. 186, 192, 46 S.E.2d 879 (1948) ("verdict and judgment for defendant in an action under the survival statute will not estop the personal representative of the deceased in an action under Lord Campbell's Act"). Bass also addressed a reason why wrongful death claims are often erroneously perceived as derivative of survival claims. In both, the decedent's personal representative is the named plaintiff. 229 S.C. at 612, 93 S.E.2d at 914. But this fact alone is not determinative because, when asserting wrongful death and survival claims, a personal representative "function[s] under two separate and distinct trusteeships." Id. In other words, while it is the personal representative's name in the caption for a wrongful death claim, "it is clear . . . the real parties to the action were the beneficiaries." Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539, 541 (1928).

In light of the history and structure of wrongful death and survival claims, a number of other reported opinions have rejected the notion that the former is derivative of the latter. As early as 1907, the South Carolina Supreme Court recognized a wrongful death action is not the survival of an action which the deceased had in his lifetime, but is a "new cause of action." Osteen v. Sothern Ry., Carolina Division, 76 S.C. 368, 57 S.E. 196, 200 (1907). Claussen held a wrongful death claim is "not a continuation" of any claim the decedent had before her death. 145 S.E. at 540. A wrongful death claim is "independent" of claims the decedent had during her life and "wholly different" than any other claim available at her death. Wellman v. Bethea, 243 F. 222

(E.D.S.C. 1917); In re Mayo's Estate, 60 S.C. 401, 38 S.E. 634, 638 (1901). Wrongful death and survival claims are "separable and distinct." Keel v. Seaboard Air Line Ry., 122 S.C. 17, 114 S.E. 761, 762 (1922). In sum, Appellants err in asking the Court to find wrongful death is derivative of survival claims because "[t]he object, scope, and measure of damages" is different for the two claims. In re Mayo's Estate, 38 S.E. at 638.

These distinctions remain valid even in more modern cases. This Court continues to recognize the wrongful death statute created a new cause of action that did not exist at common law, accrues only at the decedent's death, and which is subject to its own statute of limitation. Weaver v. Lentz, 348 S.C. 672, 678, 561 S.E.2d 360, 363 (Ct. App. 2002). Accordingly, wrongful death actions and survival claims consider the losses related to a person's death from completely different perspectives. Boyle v. U.S., 948 F. Supp. 2d 577, 580 (D.S.C. 2012). Their distinctiveness is even plainer in practice. Since they compensate different groups for different losses, wrongful death and survival claims can result in dramatically different verdicts. For example, in Scott, the jury awarded $ 600,000 in actual damages on a medical malpractice claim alleged under the survival statute and $ 1.5 million in punitive damages for the same claim. 340 S.C. at 162, 530 S.E.2d at 391. On a wrongful death claim in the same action, the jury awarded $ 1.5 million in actual damages and $ 2 million in punitive damages. Id. Since these two claims addressed such different losses by different people, the disparate awards were not inconsistent, and this Court affirmed the verdict in its entirety. Id. at 169-71, 530 S.E.2d at 394-96; see also Welch v. Epstein, 342 S.C. 279, 303-05, 536 S.E.2d 408, 420-21 (Ct. App. 2000) (affirming verdict of less than $29,000 for survival claim and $ 3 million for wrongful death claim).

In sum, extensive South Carolina precedent rejects Appellants' contention that wrongful death claims are derivative of claims a person holds at the time of her death. South Carolina's

appellate courts have held wrongful death claims are "distinct," "independent," "separate," "wholly different," and "not a continuation" of claims a decedent could have filed during her lifetime. These cases show Ms. Solesbee did not bind her wrongful death beneficiaries to arbitration. Those beneficiaries are the "real parties" to the wrongful death claim, and they did not sign the Arbitration Agreement or otherwise consent to waive their right to a jury trial.

c. None of the South Carolina Authority Appellants Cite Supports Arbitration in this Case.

Appellants do not address any of this extensive South Carolina case law showing wrongful death is a distinct, independent claim. Instead, Appellants cite an indiscriminate collection of case law, federal district court orders, and secondary sources to suggest South Carolina courts have already ruled wrongful death is a derivative claim. None of the authorities Appellants cite support that conclusion and none squarely address the question now before the Court. Instead, it is the precedent cited in Argument 3(b) that is most helpful for showing the true nature of a wrongful death claim under South Carolina law.

Appellants claim the South Carolina Supreme Court addressed the arbitrability of wrongful death claims in Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014). However, Dean addressed a very different issue related to forum selection clauses. Id. at 382, 759 S.E.2d at 733 (finding "outcome of this appeal turns" on effect of arbitral forum provision). Plus, Dean did not even compel arbitration in the case before it. The Supreme Court rejected a few reasons cited for invalidating a nursing home arbitration contract but remanded the matter to the circuit court to address two others. Id. at 387, 759 S.E.2d at 736. Appellants rely on a sentence in one of Dean's footnote but read far too much into that sentence. Id. at 378 n. 3, 759 S.E.2d at 731 n. 3 ("We note that courts may not refuse to compel arbitration simply because a wrongful death claim is involved").

This footnote addressed an overly broad pronouncement in the appealed order suggesting wrongful death claims are categorically excluded from arbitration. Id. (citing circuit court order statement stating that "wrongful death actions are not something that's arbitrated"). That type of rule would violate the FAA's equal-treatment principle. Id. (citing Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 532-33 (2012)); see also Kindred Nursing Ctrs., Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1426 (2017). However, that is not the argument Respondent makes here. A wrongful death claim may be arbitrable in instances where the statutory beneficiaries agree to do so. Respondent simply argues an individual's consent to arbitrate may not be grafted into a wrongful death claim that pays different people for different losses. Dean does not reject that argument or even consider it.

Moreover, Appellants err in arguing the circuit court's order violates the equal-treatment principle. Appellants' Br. at 7-8, 14. Several other courts have held that rejecting arbitration for wrongful death claims in similar cases does not violate Marmet or any other Supreme Court precedent on the equal-treatment principle.[5] Refusing to compel arbitration here does not mean wrongful death claims can never be arbitrated. Instead, as other courts have recognized, it simply means the nursing home violated a generally-applicable contract law rule by failing to get consent for arbitration from the proper people. Finally, reading Dean's footnote to have any bearing on the parties' dispute does not adequately account for either side's arguments on the key issue. As discussed in Argument 3(d) below, the interaction of wrongful death and survival claims for

[5] See Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 360 (Ill. 2012) (unlike Marmet, Illinois was not applying a categorical anti-arbitration rule but was rather applying "common law principles governing all contracts"); Vickers v. Canal Pointe Nursing Home & Rehab Ctr., 2016 Ohio 3244, 2016 WL 3080329 (Ohio App. June 1, 2016) (finding that Ohio Supreme Court precedent preventing arbitration of wrongful death claims did not create categorical ban Marmet bars because it applied generally applicable contract law rule against enforcing contract against person who had not assented).

arbitrability purposes requires a careful analysis of statutory language and history as well as case law interpreting the two claims. Dean had no reason to undertake this analysis and has nothing to offer the Court in resolving this appeal.

Appellants also rely on one unreported federal district court order. Appellants' Br. at 16 (citing THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert, Civil Action No. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. Mar. 19, 2015)). The soundness of Gilbert's reasoning and the continued viability of its conclusions are questionable. The district court ordered arbitration but did not feel the need to squarely address the issue raised here because the court concluded the plaintiff "ha[d] not brought a wrongful death action . . . for the benefit of individual heirs." Id. at * 3. The court's meaning is unclear, but the court was mistaken if it was implying the proceeds of a wrongful death claim do not flow to individuals identified as statutory beneficiaries. S.C. Code Ann. § 15-51-40; see also Claussen, 145 S.E. at 541 (finding beneficiaries are the "real parties" to a wrongful death claim). Additionally, Gilbert was never more than persuasive authority and is now bad law. Gilbert applied equitable estoppel and third-party beneficiary theories to compel arbitration, but this court has since rejected those theories twice in nursing home cases. 2015 WL 1268185, at * 2; see also Hodge, 422 S.C. at 556-58, 574-75, 813 S.E.2d at 299-300, 308; Thompson, 416 S.C. at 57-62, 784 S.E.2d at 687-89.

Appellants also ask the Court to declare wrongful death a "derivative" claim based on one sentence in *South Carolina Jurisprudence*. Appellants' Br. at 19. However, Appellants fail to direct the Court to the most pertinent entry. In a chapter devoted to wrongful death claims, this secondary source includes a section entitled "[s]eparate, independent cause of action" which notes the existence of two claims at the tortious death of a person and, crucially, "***the wrongful death action and the survival action involve different, independent claims.***" 28 S.C. Jur. Wrongful

Death § 5 (emphasis added). Finally, Appellants contend that, since section 15-51-10 permits wrongful death claims only when the decedent would have had a claim if she survived, South Carolina law intends to give an individual control over a wrongful death claim which includes the right to determine the method by which it will be resolved. Appellants' Br. at 19-20 (citing Quattlebaum v. Carey Canada, Inc., 685 F. Supp. 939 (D.S.C. 1988)); see also Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 699 S.E.2d 143 (2010) (citing Quattlebaum). But, Quattlebaum (and Stokes) did not address arbitration at all. Instead, they simply held that if an individual allows the statute of limitations on a personal injury claim to lapse during her life, then a wrongful death claim may not be used after her death to "revive" the stale claim. Stokes, 389 S.C. at 349, 699 S.E.2d at 146.

The statute of limitations is not at issue here and Quattlebaum/Stokes have never been cited as justification for binding non-parties to an arbitration contract. Plus, the legal provisions holding that an individual may prevent a wrongful death claim by ignoring or settling a personal injury suit during her life do not mean the individual may control the manner in which the wrongful death claim will be resolved *should she choose to leave it intact.* Several courts have made this distinction explicitly. Oklahoma, like South Carolina, bars a wrongful death suit if the decedent ended a personal injury claim during her lifetime based on the same wrongdoing. Boler v. Sec. Health Care, LLC, 336 P.3d 468, 477 (Okla. 2014) (citing Haws v. Luethje, 503 P.2d 871 (Okla. 1972)). Even so, Boler refused to apply a nursing home resident's arbitration contract to a wrongful death claim because doing so would violate contract principles on mutual assent. Id. at 471 and n. 5.

Pennsylvania also bars wrongful death claims if the decedent allowed her personal injury claim to lapse. Pisano v. Extendicare Homes, Inc., 77 A.3d 651, 657 (Pa. Super. 2013) (citing

Moyer v. Rubright, 651 A.2d 1139 (Pa. Super. 1994)). Yet, just like Oklahoma, Pennsylvania does not extrapolate from that rule the notion that an individual can bind her wrongful death beneficiaries to arbitration. Pisano, 77 A.3d at 657, 662 (refusing to find wrongful death beneficiaries lost jury trial right "where they did not waive it of their own accord"). Thus, Quattlebaum/Stokes and their interpretation of section 15-51-10 do not require arbitration in this case. Had Ms. Solesbee settled her claims against Appellants before her death, Respondent could not bring a wrongful death claim on behalf of the statutory beneficiaries. But it does not follow that Ms. Solesbee had the ability to direct the wrongful death claim to arbitration. Since Ms. Solesbee had a viable dispute with Appellants when she died, a proposed arbitration of the wrongful death claim must consider whether the beneficiaries agreed to waive a jury trial.

In short, none of the South Carolina authority Appellants cite support arbitration in this case. The cases in Argument 3(b) are more apt precedent showing South Carolina recognizes wrongful death is a distinct, independent, and non-derivative legal claim.

d. Many Other Jurisdictions Have Refused to Compel Arbitration of Wrongful Death Claims Based on a Decedent's Arbitration Contract.

In light of the historical and structural differences between South Carolina's wrongful death and survival statutes, as well as substantial case law defining and treating the resulting claims distinctly, the Court should reject Appellants' attempt to use Ms. Solesbee's purported assent to the Arbitration Agreement to force arbitration on a wrongful death claim. At least a dozen other jurisdictions have rejected Appellants' argument.[6] Four different state supreme courts have done

[6] FutureCare NorthPoint, LLC v. Peeler, 143 A.3d 191, 209-10, 213 (Md. App. 2016); Taylor v. Extendicare Health Facilities, Inc., 147 A.3d 490, 494 and n. 1 (Pa. 2016) (citing Pisano v. Extendicare Homes, Inc., 77 A.3d 651, 660 (Pa. Super. 2013)); Boler v. Sec. Health Care, LLC, 336 P.3d 468, 477 (Okla. 2014); Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc., 316 P.3d 607, 614 (Ariz. Ct. App. 2014); Daniels v. Sunrise Sr. Living, Inc., 212 Cal. App. 4th 674, 151 Cal. Rptr. 3d 273 (2013); Carter v. SSC Odin Operating Co, LLC, 976 N.E.2d 344,

so over just the last ten years. While some jurisdictions have taken a contrary view[7], South Carolina's statutory language and case law discussed above are more in line with the states that refuse to compel arbitration under similar circumstances. In the aggregate, to the extent the Court looks beyond South Carolina law, persuasive authority supports the circuit court's order.

The en banc Missouri Supreme Court addressed a similar case in Lawrence v. Beverly Manor. Similar to the Arbitration Agreement, the contract in Lawrence purported to bind both a nursing home resident and "all persons whose claim is derived through or on behalf" of the resident including family members, legal representatives, and heirs. Id. Shortly after admission, the nursing home's staff members allegedly dropped the mother and caused fatal injuries. Id. Just like this case, the family filed wrongful death and other legal claims, the nursing home cited the contract in an effort to compel arbitration, and the trial court denied the motion. Id. at 526-27.

The Missouri Supreme Court affirmed, finding wrongful death is not derived from any claim the resident may have had at or before her death. Id. at 529. All of the key components cited in Lawrence to show a wrongful death is not derivative are also present under South Carolina law. Lawrence started by reviewing the wrongful death statute's language. Id. at 527 (quoting Mo. Rev. Stat. § 537.080). Missouri's statute is substantially similar to its South Carolina counterpart, and Lawrence interpreted that language to create a new cause of action that is distinct from survival claims and not a transmitted right from a decedent to her family members. Lawrence, 273 S.W.3d

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355-58 (Ill. 2012); Ping v. Beverly Enters., Inc., 376 S.W.3d 581 (Ky. 2012); Woodall v. Avalon Care Center-Federal Way, LLC, 231 P.3d 1252 (Wash. App. 2010); Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009); Bybee v. Abdulla, 189 P.3d 40 (Utah 2008); Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1262 (Ohio 2007); Chapman v. Cardiac Pacemakers, Inc., 673 P.2d 385 (Idaho 1983); see also Strickholm v. Evangelical Lutheran Good Samaritan Soc'y, Case No. 4:11-CV-00059-BLW, 2011 WL 2532395 (D. Idaho June 24, 2011).

[7] E.g. Laizure v. Avante at Leesburg, Inc., 109 So.3d 752 (Fla. 2013); In re Labatt Food Serv., L.P., 279 S.W.3d 640 (Tex. 2009); Briarcliff Nursing Home, Inc. v. Turcotte, 894 So.2d 661 (Ala. 2004); Ballard v. Southwest Detroit Hosp., 327 N.W.2d 370 (Mich. App. 1982).

at 527. South Carolina precedent makes these same points. Weaver, 348 S.C. at 678, 561 S.E.2d at 363 ("[t]he wrongful death statute . . . created a new cause of action"); Keel, 114 S.E. at 762 (wrongful death and survival claims are "separable and distinct"). Considering both the statutory language and precedent, Lawrence concluded a wrongful death claim is "separate and distinct." 273 S.W.3d at 528. Its holding was buttressed by the fact that Missouri wrongful death claims compensate different people for different losses. Id. at 528-29. South Carolina cites the same factors to highlight a wrongful death claim's independence. Scott, 340 S.C. at 168-70, 530 S.E.2d at 394-95 (listing available damages in wrongful death and survival claims); In re Mayo's Estate, 38 S.E. at 638 (finding "object, scope, and measure of damages" in wrongful death claims is "wholly different").

Lawrence followed and was soon joined by a number of other states in rejecting the notion that a nursing home resident could contract away a jury trial on a wrongful death claim compensating her family members or heirs for their unique damages. These cases often point to a common set of factors to show a wrongful death claim is not derivative of the decedent's claims. First, a wrongful death claim is likely not derivative when wrongful death and survival are expressly distinguished in the statutes. Pisano, 77 A.3d at 656 (reading statutes to mean "two separate and distinct causes of action arise from a single injury" resulting in death); see also Woodall v. Avalon Care Center-Federal Way, LLC, 231 P.3d 1252 (Wash. App. 2010) (describing wrongful death and survival as "conceptually different"). Second, the two claims should be viewed as separate when they are brought by different people to compensate different individuals for different losses. In Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc., an Arizona appellate cited the different claimants, different beneficiaries, and different damages as definitive proof a wrongful death statute "confers an original and distinct claim" and is neither

"derived from nor is it a continuation of claims which formerly existed in a decedent." 316 P.3d 607, 613 (Ariz. Ct. App. 2014); see also FutureCare NorthPoint, LLC v. Peeler, 143 A.3d 191, 203 (Md. App. 2016) (holding that survival and wrongful death claims are distinct because they are "by different persons, the damages go into different channels, and are recovered upon different grounds"); Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 599 (Ky. 2012) (concluding wrongful death is independent claim in part because it belongs to the beneficiaries and is "meant to compensate them for their own pecuniary loss").

Third, many of these opinions find wrongful death to be a non-derivative claim because it accrues at a different time than a survival claim. In Carter v. SSC Odin Operating Co, LLC, the Illinois Supreme Court concluded wrongful death is independent because it "does not accrue until death" while the state's survival statute "simply allows a representative . . . to maintain those . . . actions that had already accrued." 976 N.E.2d 344, 354 (Ill. 2012); see also Boler, 336 P.3d at 477; Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1262 (Ohio 2007) (finding decedent's wrongful death claim "accrued independently to his beneficiaries for the injuries they personally suffered"). In other words, a wrongful death claim does not accrue or, as one court put it, "vest" in the statutory beneficiaries until the decedent's death. Strickholm v. Evangelical Lutheran Good Samaritan Soc'y, Case No. 4:11-CV-00059-BLW, 2011 WL 2532395 (D. Idaho June 24, 2011).

Finally, these cases show the error in Appellants' interpretation of a "derivative" claim. The Arbitration Agreement purports to extend to people deriving their claim through Ms. Solesbee. Appellants seem to argue wrongful death is sufficiently derivative because S.C. Code Ann. § 15-51-10 permits a wrongful death claim only if the decedent could have brought a claim for the same harm before she died. Many cases from other states cited above found wrongful death was not a derivative claim despite statutes like section 15-51-10. Boler, 336 P.3d at 472-77; Carter, 976

N.E.2d at 358-59; Woodall, 231 P.3d at 1259 ("characterizing the wrongful death claims as 'derivative' does not support the proposition that the heirs must arbitrate their claims for wrongful death"). By arguing that a statute like section 15-51-10 was enough to force a wrongful death claim to arbitration, Carter found parties like Appellants "overstate[] the significance of the derivative nature of a wrongful-death action" especially where, here as in Carter, there is extensive case law and structural differences demonstrating wrongful death is an independent claim. Similarly, Boler held that while a statute like 15-51-10 might make wrongful death "partially derivative" in a limited sense, it would still be improper to compel arbitration since wrongful death accrues separately and compensates statutory beneficiaries directly for their personal losses. 336 P. 3d at 472, 477 (finding a resident's signature could not compel arbitration on wrongful death claim unless that claim was "wholly derivative"); see also Pisano, 77 A.3d at 659-60 (providing detailed discussion of definition for "derivative" and rejecting arbitration because while wrongful death claims are inherently "derivative of the decedent's injuries," they "are not derivative of decedent's rights").

In sum, persuasive authority does not support Appellants' argument that South Carolina's wrongful death claim is "derivative" such that a nursing home resident's agreement to arbitrate applies to a wrongful death claim. A dozen states have considered statutes similar to section 15-51-10 and found wrongful death is a distinct, independent claim.

4. The Facility was not Denied the Opportunity to Conduct Discovery and May Not ask the Courts to Preemptively Rule on Waiver.

The Facility suggests the circuit court unreasonably tied its hands in discovery and prevented it from accessing essential information to support arbitration.[8] That argument could

[8] Regardless of the justiciability issues and substantive flaws discussed below, the Court should dismiss this argument for lack of appellate jurisdiction. Discovery orders are interlocutory and not

wield a measure of intuitive heft except that the Facility's right to conduct discovery was never threatened and is not really what it seeks here. Instead, what the Facility's counsel sought from the circuit court was a prophylactic assurance that choosing to engage in discovery would not later lead the circuit court to find the Facility waived its right to pursue arbitration. This was a request the Facility was not permitted to make.

Neither the procedural rules nor its opponent's conduct prevented the Facility from conducting discovery. The Facility had the right to serve written discovery requests and to notice depositions from the moment Respondent filed her Complaint with the Spartanburg County Clerk of Court. Rule 30(a)(1), SCRCP (permitting depositions "[a]fter commencement of an action"); Rule 33(a), SCRCP (same for serving interrogatories); Rule 34(b), SCRCP (same for serving requests for production); see also Rule 3(a), SCRCP (stating that a civil action is "commenced" when the complaint is filed if later served within the statute of limitations). The rules specifically provide that a party need not seek a court's permission before serving discovery requests. Rule 33(a), SCRCP; Rule 34(b), SCRCP. Plus, it is not as if the Facility tried and failed or was somehow thwarted in seeking information from Respondent. The record contains no discovery requests Respondent ignored and no subpoenas to which she objected. The Facility lacks the information it claims now to need only because the Facility never asked for it.[9]

The Facility does not contest that it was fully within its power to obtain information from Respondent or others before moving to compel arbitration. (R. p. 72, lines 18-19), Tr. of Record 11:18-19. Instead, the Facility's concern relates to the possible consequences of pursuing

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otherwise immediately appealable because they do not involve the merits of an action or affect a substantive right. Grosshuesch v. Cramer, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008); Rule 201(a), SCACR (limiting appeals to a final judgments and appealable orders).

[9] The Facility also refused to comply with all of Respondent's discovery requests, each time refusing to respond based on the pending motion to compel arbitration. Tr. of Record at 30:16-22.

discovery. South Carolina law holds that a party may waive any right it may have to pursue arbitration if it first chooses to litigate in a way that would render a shift to arbitration prejudicial to its opponent. Johnson v. Heritage Healthcare of Estill, LLC, 416 S.C. 508, 513, 788 S.E.2d 216, 218 (2016); Dean, 408 S.C. at 388, 759 S.E.2d at 736. The point at which a party delves too deeply into litigation to assert a right to arbitrate varies because the analysis is heavily fact driven. Johnson, 416 S.C. at 513, 788 S.E.2d at 219 (citing Liberty Builders, Inc. v. Horton, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999)). In any given case, a party seeking arbitration faces uncertainty in knowing when it is vulnerable to a waiver argument, and the opposing party is uncertain when it may become necessary to assert one.

What the Facility now calls its request for discovery was actually its improper effort to eliminate its uncertainty at Respondent's expense. The Facility sought assurances from the circuit court that choosing to conduct discovery would not expose it to a waiver argument. (R. p. 94, lines 4-5), Tr. of Record 33:4-5. This request did not present an issue any court could resolve in the Facility's favor. No South Carolina court can address the merits of a party's argument unless it presents a justiciable claim. Lennon v. S.C. Coastal Council, 330 S.C. 414, 417-18, 498 S.E.2d 906, 908 (Ct. App. 1998). South Carolina courts cite the "case or controversy" requirement in the U.S. Constitution's Article III and apply federal standards for identifying a justiciable controversy. Id.; Waters v. S.C. Land Resources Conservation Comm'n, 321 S.C. 219, 227-28, 467 S.E.2d 913, 917-18 (1996). A claim is justiciable only if it presents a "real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." Sloan v. Greenville Cnty., 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003). Justiciability specifically considers a party's standing as well as the suitability of the dispute

for resolution. Courts may not address claims that are unripe, moot, or seek an advisory opinion. Jowers v. S.C. Dep't of Health & Envtl. Control, 423 S.C. 343, 815 S.E.2d 446 (2018).

Here, the Facility lacked standing to assert a discovery argument that was both unripe and sought an advisory opinion. The Facility argues it was denied its "request" for discovery (Appellants' Br. at 22) but it lacks standing to assert this claim. Under South Carolina law, standing may be acquired by satisfying the requirements of "constitutional standing" derived from federal constitutional principles. ATC South, Inc. v. Charleston Cnty., 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). The Facility cannot meet those requirements for its discovery-based argument. Constitutional standing demands a concrete and particularized "injury-in-fact," a causal connection between the injury and the conduct complained of, and a finding that the injury will likely be redressed by a ruling in the injured party's favor. Id. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). The Facility has not suffered any concrete and particularized injury. The rules authorized the precise action—serving discovery requests—the Facility claims it was denied. Rules 30(a)(1), 33(a), and 34(b), SCRCP. The Facility cannot claim to be injured by its own decision to forego a right the law unconditionally provided.

The Facility also cannot meet the remaining constitutional standing requirements. There is no causal connection between the proposed injury (i.e. a lack of discovery) and either Respondent's conduct or the circuit court's order. Neither denied the Facility the right to conduct discovery before filing its motion to compel arbitration. Nor can the Facility meet the redressability requirement. Given the rules' repeated statements that discovery requests may be made "without leave of court,"[10] it is not at all clear it would ever be appropriate for a party in the Facility's position to ask a circuit court to grant leave to conduct discovery.

[10] Rule 33(a), SCRCP; Rule 34(b), SCRCP.

When the true nature of the Facility's request is revealed, other justiciability issues arise. In one telling exchange with the circuit court, the Facility's counsel admitted it was his fear of the potential consequences, not any conduct by Respondent or any ruling by the circuit court, that kept the Facility from exercising its discovery rights. Nothing in the Facility's request was about getting discovery it was allegedly denied; it was all about making the Facility more comfortable in opposing any argument of waiver. The Facility's attorney specifically asked the circuit court to find any discovery the Facility chose to perform would, as a matter of law, not subject it to waiver argument. (R. p. 94, lines 3-5), Tr. of Record 33:3-5 (asking circuit court to rule that "if you [conduct discovery], it will not be a waiver").

This was a proposed ruling the circuit court could not issue. While waiver could become an issue later in this litigation, it was not ripe for adjudication before the Facility sent its first discovery request. A claim is not ripe if it is "contingent, hypothetical, or abstract." Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty., 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006)). Before a potential waiver dispute could ripen, the Facility would have to conduct whatever discovery it planned, file a later motion to compel arbitration, and then Respondent could raise a waiver argument citing prejudice the Facility's discovery course caused her. Without those progressions in the litigation, the circuit court could have no basis to rule on the future viability of Respondent's potential waiver argument. Alternatively, the Facility's discovery argument may have been an attempt to get some guidance from the circuit court on just how far it could go in discovery before seriously risking waiver. But, a party seeking an advisory opinion asks a court to go beyond its jurisdiction. Booth v. Grissom, 265 S.C. 190, 217 S.E.2d 223 (1975); see also Sangamo v. Weston, Inc. v. Nat'l Surety Corp., 307 S.C. 143, 414 S.E.2d 127, 130 (1992); Dodge v. Dodge, 332 S.C. 401, 420, 505 S.E.2d 344, 354 (Ct. App. 1998). In other words, the waiver

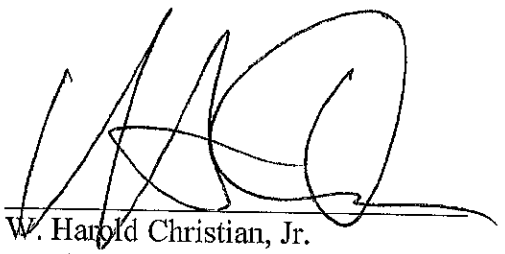
issue was not only unripe, the Facility erred in asking the circuit court to rule on it because parties may not "fish in judicial ponds for legal advice." City of Columbia v. Sanders, 231 S.C. 61, 68, 97 S.E.2d 210, 213 (1957).

Beyond the justiciability flaws, the Facility's discovery argument is incorrect on the merits. Hodge addressed a similar argument, affirming a circuit court's refusal to compel a deposition that would add nothing probative to a potential agency analysis. 422 S.C. at 578, 813 S.E.2d at 310. Moreover, the Facility must show a clear abuse of discretion to reverse the circuit court's discovery ruling. Id. at 576, 813 S.E.2d at 309 (quoting Stokes-Craven Holding Corp., 416 S.C. at 536 787 S.E.2d at 495). The circuit court correctly noted the Facility was requesting discovery that it could have performed without court approval and correctly relied on Hodge as pertinent precedent denying a similar request. Order at 8. Thus, the circuit court's findings were all supported by the facts and the law, the circuit court acted within its discretion in denying the Facility's request.

CONCLUSION

Based on the arguments stated above, Respondent respectfully requests the Court affirm the circuit court's order denying the Facility's motion to compel arbitration. Ms. Solesbee never agreed to the Arbitration Agreement and Mr. Dover lacked legal authority to bind her to arbitration. Even if Ms. Solesbee had agreed to arbitrate her claims, the wrongful death claim is distinct, independent, and belongs to statutory beneficiaries who did not agree to arbitration. Additionally, the Facility's request for discovery was flawed on its merits and presented a non-justiciable request the circuit court correctly denied. Finally, the remaining Appellants' motions to stay were correctly denied as moot because they are wholly dependent on the Facility's motion to compel arbitration.

Respectfully submitted,



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