RECEIVED
Jul 26 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

JUDGE R. KEITH KELLY, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2022-001059

Kenneth Pace, Individually and as Personal Representative of the Estate of Earl E. Pace, Respondent,

v.

Lake Emory Post Acute Care; THI of South Carolina at Camp Care, LLC; THI of South Carolina, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical and Operational Services, LLC; Fundamental Clinical Consulting, LLC; Fundamental Long Term Care Holdings, LLC, and Kerry L. Wheeler, DO, Defendants,

Of which Lake Emory Post Acute Care; THI of South Carolina at Camp Care, LLC; THI of South Carolina, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical and Operational Services, LLC; and Fundamental Long Term Care Holdings, LLC, are Appellants.

FINAL BRIEF OF RESPONDENT

Jennifer Spragins Burnett (S.C. Bar No. 69617)
Anthony L. Harbin (S.C. Bar No. 63999)
Harbin & Burnett, LLP
P.O. Box 35
Anderson, SC 29622
Ph: 864-964-0333
Fax: 864-964-0930
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

SOUTH CAROLINA CASES

SOUTH CAROLINA UNPUBLISHED OPINIONS

ORDERS OF CIRCUIT COURT

OTHER STATE COURT CASES

SOUTH CAROLINA STATUTES

TREATISES

COURT RULES

STATEMENT OF ISSUES ON APPEAL

I. DOES THE SOUTH CAROLINA COURT OF APPEALS LACK JURISDICTION OVER APPELLANTS' APPEAL BECAUSE IT WAS NOT TIMELY FILED?

II. DID THE CIRCUIT COURT ERR IN DENYING APPELLANTS' MOTION TO COMPEL ARBITRATION AND MOTIONS TO STAY AS THE ARBITRATION AGREEMENT WAS EXECUTED WITHOUT AUTHORITY?

III. DID THE CIRCUIT COURT ERR IN DENYING APPELLANTS' MOTION TO COMPEL ARBITRATION BECAUSE THE ADMISSION AND ARBITRATION AGREEMENTS WERE WHOLLY INDEPENDENT AND THERE WAS NOT A MERGER?

IV. DID THE CIRCUIT COURT ERR IN DENYING APPELLANTS' MOTION TO COMPEL ARBITRATION BECAUSE THE DOCTRINE OF EQUITABLE ESTOPPEL DID NOT APPLY?

STATEMENT OF THE CASE

On or about July 10, 2014, Mr. Pace was taken into the protective custody of the South Carolina Department of Social Services, (hereafter "DSS"). *See* Plaintiff's Memorandum in Opposition to the Motion to Dismiss, to Compel Arbitration, and to Stay the State Court Proceeding at Exhibit A, (hereafter referred to as Plaintiff's Memorandum") (R. pp. 259-264). A Guardian *ad Litem*, (hereafter "GAL"), and an attorney were appointed for Mr. Pace by the family court. *See* Plaintiff's Memorandum at Exhibit B (R. pp. 265-267). Thereafter, Mr. Pace was admitted to Lake Emory Post Acute Care, (hereafter "Lake Emory"), for care and supervision. *See* Plaintiff's Memorandum at 2 (R. p. 241, lines 12-13) (R. p. 306, lines 12-13). At the time Mr. Pace was admitted to Lake Emory, he was under the custody of DSS. *See id* (R. p. 241, lines 1-3) (R. p. 306, lines 1-3). A DSS employee executed Mr. Pace's admission paperwork. *See* Admission Agreement – South Carolina executed by Calvin Hill dated January 29, 2015 (R. pp. 271-282). The paperwork executed by the DSS employee, Calvin Hill, (hereafter "Mr. Hill"), included an admission agreement and a separate arbitration agreement. *See* Facility-Resident/Representative

Arbitration Agreement executed by Calvin Hill dated January 29, 2015 (R. pp. 216). It is undisputed that Mr. Hill was the only signer of the admission paperwork and the arbitration agreement.

DSS subsequently petitioned the court to be relieved of custody and recommended that Lake Emory designate the Respondent as Mr. Pace's representative. DSS, with the consent of the Guardian *ad litem*, the attorney for the Guardian *ad litem*, and the court appointed attorney for Mr. Pace, submitted a consent order seeking to relieve DSS of custody of Mr. Pace, as well as relieving from their appointments the attorneys and Guardian *ad litem.* *See* Plaintiff's Memorandum at Exhibit C (R. pp. 268-270).

The Laurens County Family Court entered an Order on April 24, 2015 relieving DSS, the Guardian *ad litem*, the attorney for the Guardian *ad litem*, and the attorney appointed for Mr. Pace of custody of Mr. Pace. *See id* (R. pp. 268-270).

On or about October 21, 2019, Respondent filed his Summonses and Complaints alleging a Survival Action, (2019-CP-42-03708), and a Wrongful Death Action, (2019-CP-42-03709).

Appellants filed motions to dismiss and compel arbitration on April 13, 2020. Appellants alleged that they were entitled to compel this matter to arbitration pursuant to the aforementioned arbitration agreement and sought a stay of these proceedings. Appellants asserted Mr. Hill was acting pursuant to "court ordered powers" and alleged that South Carolina Code Ann. § 43-35-10 provides authority for DSS to execute an arbitration agreement on behalf of an individual in their custody. *See generally* Defendants' Motion to Dismiss Plaintiff's Complaint, Compel Arbitration and Motions to Stay Court Proceedings filed April 13, 2020 (R. pp. 213-239).

On or about April 8, 2021, the Circuit Court filed an Order Denying Defendants' Motion to Compel Arbitration, and to Stay the Court Proceedings, disagreeing and finding the arbitration

agreement unenforceable as a matter of law. *See* Orders dated April 8, 2021 in case numbers 2019CP4203708 and 2019CP4203709 respectively (R. pp. 1-14). Subsequently, Defendants filed a Motion to Alter, Amend and/or Reconsider on or about April 19, 2021. *See* Defendants' Motion to Alter, Amend and/or Reconsider Order Denying Defendants' Respective Motions to Compel Arbitration and to Stay in case numbers 2019CP4203708 and 2019CP4203709 respectively (R. pp. 444-477).

Judge Kelly entered the Order Denying the Motion to Alter, Amend and/or Reconsider by the Defendants on June 23, 2022 in case number 2019CP4203708. A subsequent Order Denying the Motion to Alter, Amend and/or Reconsider was filed on June 27, 2022 in case number 2019CP4203709.

Appellants then filed a Notice of Appeal that was marked "received" by the Court of Appeals on July 27, 2022 – thirty-four days after the entry of the Circuit Court Order denying their Motion.

STANDARD OF REVIEW

The question of the arbitrability of a claim is an issue for judicial determination. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Determinations of arbitrability are subject to *de novo* review, but if any evidence reasonably supports the trial court's factual findings, this court will not overrule those findings. Stokes v. Metro. Life Ins. Co., 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct. App. 2002). The appellate court will not disturb the trial court's underlying factual findings reasonably supported by the record. *See* Wilson v. Willis, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019), *cited in* Weaver v. Brookdale Senior Living, Inc., 431 S.C. 223, 228, 847 S.E.2d 268, 271 (Ct. App. 2020).

ARGUMENT

I. THE SOUTH CAROLINA COURT OF APPEALS LACKS JURISDICTION OVER APPELLANTS' APPEAL BECAUSE IT WAS NOT TIMELY FILED.

This appeal should be dismissed for lack of jurisdiction because Appellants did not timely serve the notice of appeal. *See* Rule 203(b)(1), SCACR ("A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. *See also* Camp v. Camp, 386 S.C. 571, 574-75, 689 S.E.2d 634, 636, (2010) ("Service of the notice of appeal is a 'jurisdictional requirement, and this [c]ourt has no authority to extend or expand the time in which the notice of intent to appeal must be served.'" (quoting Mears v. Mears, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985))).

Appellants did not file their appeal until four days after the thirty-day deadline. The Circuit Court provided notice of the entry of its order denying the Defendants' Motion to Reconsider by email service of the Notice of Electronic Filing dated June 23, 2022 at 4:31 PM. *See* Notice of Electronic Filing filed June 23, 2022 at 4:31 PM (R. pp. 25-26). The Defendants filed their Notice of Appeal on July 27, 2022 – four days after the deadline for filing a Notice of Appeal. *See* Defendants' Notice of Appeal dated July 27, 2022 (R. pp. 485-504). It is worth noting that in the first Notice of Appeal filed by Appellants, Appellants represented that they were appealing the June 27, 2022 Order of Judge Kelly, and that they received "written notice of entry of the most recent order on June 27, 2022." *See id* (R. p. 487, lines 13-14) (R. p. 497, lines 13-14).

The time-stamp on the circuit court's e-mail providing the parties notice of the entry of its order was the starting point for calculating the thirty-day deadline. *See* Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC, 422 S.C. 211, 217, 810 S.E.2d 856, 859 (2018). In Wells Fargo, our

supreme court discussed the thirty-day deadline for filing a notice of appeal and stated, "[A]n email providing written notice of entry of an order or judgment for purposes of Rule 203(b)(1), SCACR[,] triggers the time to appeal *as long as the email is received from the court, an attorney of record, or a party*." *See* 422 S.C. at 217, 810 S.E.2d at 859. The court explained that the notice of entry of the order being appealed does not have to be formally served by the court or an opposing party but rather "[a]ll that is required to trigger the time to appeal is that the parties *receive* such notice." *Id.* At 215-16, 810 S.E.2d at 858.

"The question of whether the e-mail's time-stamp can be presumed to be the date of a party's receipt of the notice has not yet been addressed by our appellate courts. In the absence of our supreme court's pronouncement of such a presumption, this court must look to the Record on Appeal to determine the date of receipt of the circuit court's e-mail notice according to the standards of section 26-6-150(B). *See* S.C. Code Ann. § 26-6-150(B). ("Unless otherwise agreed between a sender and the recipient, an electronic record is received when it: (1) *enters* an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; *and* (2) is in a form capable of being processed by that system." (*emphasis added*)). Lemmons v. Maced. Water Works, Inc., 431 S.C. 186, 193, 847 S.E.2d 471, 476 (Ct. App. 2020).

The failure to timely serve a notice of appeal "divests this court of subject matter jurisdiction and results in dismissal of the appeal." Canal Ins. Co. v. Caldwell, 338 S.C. 1, 5, 524 S.E.2d 416, 418 (Ct. App. 1999).

The jurisdiction of this Court was raised by Respondent (and preserved) in a Motion to Dismiss the Appeal filed with the Court on August 1, 2022. The Appellants admit that they

received notice of the entry of the Order of Judge Kelley on June 23, 2022. *See* Appellants' Return to Motion to Dismiss Appeal at 3 (R. p. 535, lines 17-18). However, inexplicably and without any supporting case law, the Appellants assert that because the Court entered an order in the companion case on June 27, 2022, that the entry of the first order does not begin to run the time to appeal. [1] This argument is without merit and there is no statute or caselaw that support this position.

Appellants received notice of the entry of the order denying their Motion to Compel Arbitration and failed to file a Notice of Appeal for thirty-four days. This Court lacks jurisdiction to entertain this appeal and it should be dismissed.

II. THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANTS' MOTION TO COMPEL ARBITRATION AND MOTIONS TO STAY AS THE ARBITRATION AGREEMENT WAS EXECUTED WITHOUT AUTHORITY.

In support of the motion to compel arbitration, the Defendants/Appellants asserted that the DSS representative had authority, pursuant to the statutes authorizing them to provide protective services, to execute an arbitration agreement waiving the constitutional right to a jury trial. Defendants/Appellants argued also that in the event that the DSS representative lacked such authority, the Admission Agreement was merged with the Arbitration Agreement and Respondent is equitably estopped from denying enforcement of the Arbitration Agreement.

In his arguments before the Circuit Court, the Plaintiff/Respondent asserted that the Arbitration Agreement presented by the Defendants/Appellants was not enforceable for the following reasons: (1) the Arbitration Agreement was not executed by someone with legal authority to act for Mr. Pace; and (2) the Arbitration Agreement cannot be enforced against

[1] Counsel for Appellants acknowledged in the hearing before Judge Kelly that the motions were "separately filed actions for wrongful death and survival." *See* Transcript of Hearing January 20, 2021 at 5, ¶¶22-25 (R. p. 178, lines 22-25).

Plaintiff/Respondent Kenneth Pace as a non-signer because (i) the Admission Agreement and Arbitration Agreement are not merged and (ii) the doctrine of equitable estoppel does not apply to the facts of this case. *See* Plaintiff's Memorandum at 4-18 (R. pp. 243-257) (R. pp. 308-322). The Circuit Court rejected each of the Defendants/Appellants' arguments and those issues are now the precise issues raised on appeal before this Court.

In order to compel arbitration pursuant to the Federal Arbitration Act, a litigant must demonstrate a valid arbitration agreement that purports to cover the dispute. *See* Aiken v. World Finance Corp. of S.C., 373 SC 144, 149, 644 SE2d 705, 708 (2007). Where one party denies the existence of a valid arbitration agreement, a court must immediately determine whether the agreement exists in the first place. *See* Simpson v. MSA of Myrtle Beach, Inc., 373 SC 14, 644 SE2d 663, 667 (2007). If no agreement is found to exist, the court must deny the request to arbitrate. *See id.* Whether a valid arbitration agreement exists is a matter for judicial determination. *See* York v. Dodgeland of Columbia, Inc., 406 SC 67, 749 SE2d 139, 144 (Ct. App. 2013).

Although there is public policy favoring arbitration – it is applied only as an aid in interpreting the scope and enforcement of validly entered arbitration agreements. *See* Weaver, *supra.* The FAA does not give the party seeking arbitration a "leg up in the threshold determination of whether a valid arbitration agreement exists." *Id* at 269. The "first principle that underscores all…arbitration decisions is that [a]rbitration is strictly a matter of consent." *Id* quoting Lamps Plus, Inc., v. Varela, 139 S.Ct. 1407, 1415 (2019). "[A]lthough arbitration is viewed favorably by the courts, it is predicated on an agreement to arbitrate because parties are waiving their fundamental right to access to the courts." Wilson, 426 S.C. at 337, 827 S.E.2d at 173. "[T]he presumption in favor of arbitration applies to the scope of an arbitration agreement; it does not

apply to the existence of such an agreement *or to the identity of the parties who may be bound* to such an agreement." *Id.* (internal quotation omitted). "In fact, if the party resisting arbitration is a nonsignatory, a presumption against arbitration arises." *Id* at 337-38, 827 S.E.2d at 173.

The Arbitration Agreement in this case was executed by Calvin Hill, an employee of DSS. Mr. Hill documented that he was signing as the "DSS Representative." *See* Facility-Resident/Representative Arbitration Agreement executed by Calvin Hill dated January 29, 2015 (R. p. 216). Because Mr. Pace did not execute the Arbitration Agreement himself, Calvin Hill must have had the appropriate legal authority to execute the Arbitration Agreement for it to be enforceable. At the time of admission to Lake Emory, Mr. Pace had both a GAL, Ms. Metcalf, and a court appointed attorney, Mr. Mitchell. *See* Plaintiff's Memorandum at Exhibit B (R. pp. 265-267). However, Mr. Hill would have no legal authority to execute an arbitration agreement for Mr. Pace.

There is no support for the contention that an arbitrary employee of DSS has authority to bind a vulnerable adult to arbitration. Nor is there a statute that would authorize such execution of an arbitration agreement.

"Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." Gissel v. Hart, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009). "[T]he presumption in favor of arbitration applies to the scope of an arbitration agreement; it does not apply to the existence of such an agreement or to the identity of the parties who may be bound to such an agreement." Wilson, 426 S.C. at 337, 827 S.E.2d at 173 (emphasis omitted). "[B]ecause arbitration, while favored, exists solely by agreement of the parties, a presumption against arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate." *Id.* At 337-38, 827 S.E.2d at 173 (emphasis omitted).

Because it is undisputed that Mr. Pace lacked capacity to execute any contract or arbitration agreement, and because Mr. Pace did not, in fact, execute any agreement in the case at hand, in order for the arbitration agreement to be enforceable, Appellants must demonstrate that Calvin Hill had authority to execute the arbitration agreement under some other statute or law.

Appellants argue that the statute authorizing DSS to petition the court for protective services, along with the definition of "protective services," granted to Calvin Hill the right to waive Mr. Pace's constitutional right to a trial by jury.

"Protective services" under the South Carolina statute authorizing the DSS is defined as those services whose objective is to protect a vulnerable adult from harm caused by the vulnerable adult or another. These services include, but are not limited to, evaluating the need for protective services, securing and coordinating existing services, arranging for living quarters, obtaining financial benefits to which a vulnerable adult is entitled, and securing medical services, supplies, and legal services." *See* S.C. Code Ann. § 43-35-10(9). Appellants continue to place particular emphasis on the words "legal services" for their contention that DSS was authorized to waive the right to a jury trial – a constitutionally protected right.

Clearly what is meant by the plain reading of this provision is that the DSS is expected to arrange for living quarters, secure medical care, and hire an attorney for the vulnerable adult if one is needed. It strains credulity to suggest that this grants authority for any random person employed by DSS to waive a constitutional right. As the Appellants repeatedly argued in their various filings, courts must give statutory words "their plain and ordinary meaning without resort to subtle or forced construction" in an effort to reach a particular result. Sloan v. Sc Bd. Or Physical Therapy Exam'rs, 370 SC 452, 469 (2006).

The Circuit Court correctly rejected the Appellants' argument that Calvin Hill had the

authority to waive Mr. Pace's constitutional right to a jury trial through the definition of "protective services." The Circuit Court held that the Adult Protection Statute sets forth the authority and procedure for the State of South Carolina to take a vulnerable adult into custody. The court held that the provisions of the Adult Protection Statute would grant authority to DSS to hire a doctor or medical facility for Mr. Pace and would authorize DSS to hire an attorney to provide legal services for Mr. Pace but that the statute did *not* give DSS authority to perform legal services for Mr. Pace nor execute an arbitration agreement that waived the constitutional right to a jury trial. *See* Hon. R. Keith Kelly Order of April 8, 2021 at 5 (R. p. 5, lines 2-21). The Circuit Court found that the provision of "legal services" did not encompass executing an arbitration agreement or waiving constitutional rights. *See id* (R. p. 5, lines 2-21).

South Carolina Code §43-35-220 provides for the responsibilities of the Guardian *ad Litem*. Respondent can find no authority in South Carolina for the proposition that the GAL has authority to bind the vulnerable adult to arbitration and waive the constitutional right to a jury trial. *See also* CL SNF, LLC v. Fountain, 355 Ga. App 176 (Ga. Ct. App. 2020) (wherein the court determined that the court appointed guardian did not have authority to execute an arbitration agreement when the arbitration agreement was not part of the admission agreement and was not reasonably necessary to provide for the incapacitated individual's support, care, education, health, or welfare).

The South Carolina Health Care Consent Act, (hereafter "SCHCA"), codified at South Carolina Code Ann. § 44-66-10 *et seq.* provides that in the event an adult is unable to provide consent regarding proposed healthcare, the SCHCA creates a priority list of those able to consent on his behalf. It is clear from that section that Ms. Metcalf and Mr. Mitchell were the first and second health care surrogates thereunder. A careful reading of the section suggests that Mr. Hill would have authority under the SCHCA to admit Mr. Pace to the facility under § 44-66-30(A)(10).

However, while courts have routinely held that healthcare surrogates may make healthcare related decisions under the Act, including admission to a nursing home, the SCHCA does not give authority for those surrogates to waive the constitutionally protected right to a trial by jury.

Appellants have asserted that they are not relying on the SCAHCA. *See* Transcript of Hearing January 20, 2021 at 9 (R. p. 181, line 21-p. 182, line 6). However, it is the SCAHCA that would have given Calvin Hill and DSS the authority to execute the Admission Agreement to admit Mr. Pace into the facility. However, as is abundantly clear from a large number of cases, our appellate courts reject entirely the notion that the individuals authorized under the SCHCA to admit someone to a medical facility similarly possess the authority to waive their constitutional right to a jury trial.

The South Carolina Supreme Court has expressly ruled that a health care surrogate does not have authority under the SCHCA to execute an arbitration agreement. *See* Scott v. Heritage Healthcare of Estill, *LLC,* 2014 S.C. App. Unpub. LEXIS 403 (S.C. Ct. App. Aug. 6, 2014). Scott involved a case in which the personal representative of the estate of a patient who died at a nursing home brought suit and the defendants sought to compel arbitration. *Id*. The patient's sister had signed an arbitration agreement on behalf of the patient when admitting her to the facility. *Id.* The sister did not possess a health care power of attorney to sign either contract on her behalf. *Id*. The court held that the arbitration agreement was not enforceable because the SCHCA did not give authority for a surrogate to execute an arbitration agreement.

The Scott unpublished opinion was discussed in detail in the case of Hodge v. UniHealth Post-Acute Care of Bamberg, *LLC,* 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018). The Court determined that a nursing home could not compel the plaintiff to arbitration when the competent resident had not executed the arbitration agreement. *Id.* The arbitration agreement was executed

by the patient's husband who did not have a power of attorney for his wife. *Id.* The Court determined that the SCHCA did not provide the husband with authority to execute an arbitration agreement and the arbitration agreement was not enforceable. *See also* Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014); Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016).

In Thompson, the court determined "the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial." *Id* at 55, 784 S.E.2d at 686. Like Scott and Hodge *supra*, Thompson involved a nursing home facility seeking to compel arbitration. A woman's children had their mother transferred from a hospital to a nursing home facility. *Id.* The son signed an admission agreement, an arbitration agreement, and several other documents on behalf of his mother, who suffered from dementia. *Id*. The mother was not present at the time, as she was in the process of being transported to the facility. *Id*. After the mother's death, the daughter brought suit, individually and as personal representative, and the facility and its owners filed a motion to compel arbitration. *Id.* The circuit court denied the motion to compel, finding the son did not have authority to execute the arbitration agreement on his mother's behalf. *Id.* This Court determined that neither common law agency principles nor the SCAHCA would authorize the execution of an arbitration agreement. *Id.*

Coleman addressed an arbitration agreement that was wholly separate from the admissions agreement executed by the sister of the patient. Although the signatory did have the requisite authority to make healthcare decisions – because admission to the nursing home was not contingent on the execution of the arbitration agreement, the court held that the signatory did not have authority to bind the patient to the separate voluntary arbitration agreement. *See id.* The

court concluded that the arbitration agreement was not enforceable. *See id.*

Calvin Hill did not have the legal authority to execute the Arbitration Agreement for Mr. Pace. Furthermore, Calvin Hill lacked common law agency authority to execute an arbitration agreement for Mr. Pace. Agency is a fiduciary relationship that results when one person consents to be subject to the control of the other and to act on his behalf. *See* R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 540 S.E.2d 113 (S.C. Ct. App. 2000). Mr. Pace was diagnosed with dementia, was incompetent, and unable to provide consent or acquiesce to Mr. Hill's actions. *See* Thompson, *supra*. Furthermore, even if authority had been given to Mr. Hill, which is expressly denied, the Thompson court recognized the principle that the authority conveyed to an agent does not encompass executing an agreement to resolve legal claims through arbitration. *See id.*

The Arbitration Agreement presented by the Appellants in this case was executed by a person without any authority to bind Mr. Pace to arbitration or waive his right to a jury trial. Accordingly, the Arbitration Agreement cannot be enforced.[2]

III. THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANTS' MOTION TO COMPEL ARBITRATION BECAUSE THE ADMISSION AND ARBITRATION AGREEMENTS WERE WHOLLY INDEPENDENT AND THERE WAS NOT A MERGER.

State law controls when a party is attempting to enforce an arbitration agreement against someone who has not signed it. *See* Weaver, *supra quoting* Wilson, 426 S.C. at 338, 827 S.E.2d

[2] Another South Carolina Court has concluded that an arbitration agreement cannot be enforced against a decedent's wrongful death beneficiaries as the wrongful death claims are independent of the survival claims and are not derivative. *See* Wilson v. NHC Healthcare/Mauldin, 2018 S.C. C.P. LEXIS 421.

at 173-74. It is undisputed that neither Mr. Pace nor his son, Kenneth Pace, executed the arbitration agreement in this case.

Because Mr. Hill lacked the authority to execute the arbitration agreement on behalf of Mr. Pace, Appellants argue that Kenneth Pace should be equitably estopped from denying the effect of the arbitration agreement. The Arbitration Agreement here is a completely separate contract under which Mr. Pace derived **no** benefits. Because the Arbitration Agreement was not executed by someone with authority, and in order for the Arbitration Agreement to be enforceable, this Court must determine that the Admission Agreement and Arbitration Agreement are one document under which Mr. Pace derived benefits as a patient of the Appellants. *See* Thompson, *supra* at 60, in which the court expressly stated that "any possible benefit emanating from the arbitration agreement alone is offset by the arbitration agreement's requirement that [the patient] waive her right to access to the courts and her right to a jury trial." In order for equitable estoppel to apply to the case at hand, there must have been a merger of the Admission Agreement and the Arbitration Agreement.

Appellants' equitable estoppel argument is further premised on the contention that, under state law, the Admission Agreement and the Arbitration Agreement are merged. In South Carolina, 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." *See* Klutts 268 S.C. at 88, 232 S.E.2d at 24. If the language of the admission agreement created an ambiguity as to merger, the law is clear that any ambiguity shall be construed against the facility. *See* Coleman at 355-56.

Coleman, *supra,* addressed an arbitration agreement that was wholly separate from the admissions agreement executed by the sister of the patient. The Coleman admissions agreement did not reference the execution of the arbitration agreement – it was freestanding and voluntary. Declining to find that the sister had authority to execute the arbitration agreement, Coleman considered whether the two agreements should be considered "merged" in order to conclude that the sister was equitably estopped from denying applicability of the arbitration agreement. *Id.* The court considered the admission agreement's merger clause and determined that the two contracts were indeed separate. *See id*. "By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply." *Id* at 455. Because the arbitration agreement was separate from the admission contract under which the patient had received care and treatment, the doctrine of equitable estoppel was inapplicable. *See id.* The court noted that the plaintiff was not suing for a breach of the admission agreement and not attempting to enforce the same. *See id.* As such, equitable estoppel did not bar the plaintiff's claims. *See id; see also* Hodge, *supra.* Hodge declined to apply the doctrine of equitable estoppel to enforce an arbitration agreement because the arbitration agreement was wholly separate from the admission agreement and the documents were not merged. *See id. See also* Thompson, *supra.*

When an arbitration agreement that is separate from the admission agreement concerns "neither healthcare nor payment, but instead provided an option method for dispute resolution between [the facility] and [the patient] should issues arise in the future" the South Carolina Supreme Court has declined to find a merger has occurred. Coleman, *supra.*

In this case, it is clear from a plain reading of the documents, that the Admission Agreement and the Arbitration Agreement were wholly independent and should not be construed together. *See* Admission Agreement – South Carolina executed by Calvin Hill dated January 29, 2015

(bearing bates number PACE0006-0017) (R. pp. 271-282) and Facility-Resident/Representative Arbitration Agreement executed by Calvin Hill dated January 29, 2015 (R. p. 216) respectively. In fact, counsel for the Appellants made the following representation before the Circuit Court at a hearing of this matter: "There was an arbitration agreement. Well there's two – two documents that are essential to our argument. One is an admission agreement where he was admitted to our facility in January of 2015. The other is an arbitration agreement. It's a separate document that was signed in conjunction with his admission." *See* Transcript of Hearing January 20, 2021 at 6, ¶¶10-17 (R. p. 179, lines 10-17). Counsel for the Appellants goes on to state "In fact, it's a standalone. As I said, it's a separate instrument. It does stand alone". *See id* at 32 ¶15-17 (R. p. 205, lines 15-17).

There is no reference whatsoever within the 12 pages of the Admission Agreement regarding arbitration. *See* Admission Agreement – South Carolina executed by Calvin Hill dated January 29, 2015 (bearing bates number PACE0006-0017) (R. pp. 271-282). The Admission Agreement does refer to a "Grievance Procedure" that is included in the Admission Handbook and is incorporated by reference. *See id* (R. p. 274, lines 37-41). The signer is asked to acknowledge that he/she has received the Admission Handbook and that it is incorporated by reference in the Admission Agreement. *See id* 4 (R. p. 274) and 12 (R. p. 282). There is no reference to arbitration and the Admission Agreement does not state anywhere that admission is contingent upon execution of an arbitration agreement. *See id* (R. pp. 271-282). In fact, counsel for Appellants admitted at a hearing on this matter "…it's a voluntary document that's not required for admission." *See* Transcript of Hearing January 20, 2021 at 32, ¶19-20 (R. p. 205, lines 19-20).

The Admission Agreement provides expressly that it will be governed by the laws of the State in which "Facility" is located – South Carolina. *See* Admission Agreement – South Carolina

executed by Calvin Hill dated January 29, 2015 (bearing bates number PACE0006-0017) at 10 (R. p. 280, lines 1-5). Finally, the Admission Agreement provides an "Entire Agreement" or merger clause. *See id* at 12 (R. p. 282, lines 5-18). The merger clause provides:

> I/we hereby acknowledge that I/we have read this page and all preceding pages and acknowledge that this Agreement represents the entire agreement and understanding between the parties and supersedes all previous representations, understandings or agreements, oral or written, between the parties…
> *Id* (R. p. 282, lines 6-9).

In contrast, the Arbitration Agreement is governed by federal law and the Federal Arbitration Act.[3] *See* Facility-Resident/Representative Arbitration Agreement executed by Calvin Hill dated January 29, 2015 (R. p. 216, lines 26-29). Moreover, the Arbitration Agreement, on its face, is separate from the Admission Agreement. "This [arbitration] 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.**" *See id* (R. p. 216, lines 31-32) (emphasis added). Finally, there is no language in the Arbitration Agreement that execution of the same was required for admission to Defendants' facility. *See id* (R. p. 216).

As in Thompson, Coleman, and Hodge discussed above, the Arbitration Agreement signed by Calvin Hill was wholly separate from the Admission Agreement. The terms of the two separate contracts make clear that they were independent of each other and that admission to the facility was not contingent upon the execution of arbitration. The Admission Agreement and Arbitration

[3] *See* Hodge, *supra* wherein the Court found that the admission agreement and arbitration provisions were not merged, in part because state law governed the admission agreement and federal law the arbitration agreement. The Hodge court determined that plaintiff would not be equitably estopped from denying arbitration noting that "…even if the Admission Agreement and Arbitration Agreement [were] merged, because [plaintiffs] are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement. *See id*.

Agreement should not be construed as one document.[4]

This Court recently considered an identical argument in the case of Est. of Solesbee v. Fundamental Clinical & Operational Servs., LLC, 885 S.E.2d 144 (Ct. App. 2023). The admission agreement provided that it was governed by South Carolina law, and the arbitration agreement provided it was governed by federal law. The arbitration agreement recognized the two documents were separate, stating the arbitration agreement "shall survive any termination or breach of this Agreement or the Admission Agreement." The arbitration agreement was silent as to whether it could be revoked, but the admission agreement provided, "Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility." The admission agreement and arbitration agreement were separately paginated and had their own signature pages. *See id.* Thus, like the Coleman and Hodge courts, this Court found there was no merger in this case and the equitable estoppel argument was rejected by the Court. *See id* at 144.

South Carolina Courts have repeatedly rejected the very argument that Appellants have made before this Court. The Appellants merger argument fails as a matter of law.

IV. THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANTS' MOTION TO COMPEL ARBITRATION BECAUSE THE DOCTRINE OF EQUITABLE ESTOPPEL DOES NOT APPLY.

Equitable estoppel is a theory by which a party attempts to enforce an arbitration agreement against a non-signer when (1) the non-signer's claim arises from the contractual relationship; (2) the non-signer has "exploited" other parts of the contract by taking advantage of its benefits; and (3) the claim relies solely on the contract terms to impose liability. *See* Weaver, *supra.*

[4] Any ambiguity should be construed against the Appellants as drafters of agreement. *See* Davis v. KB Home of S.C., Inc., 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011).

Appellants' theory is that a nonsigner is estopped from refusing to comply with an arbitration provision if the claim arises from the contractual relationship and the nonsigner has "exploited" other parts of the contract by reaping its benefits and the claim relies solely on the contract terms to impose liability. *See* Wilson, 426 S.C. at 340-44, 827 S.E.2d at 175-177.

In the recent case of Weaver, the Court of Appeals considered whether "direct benefits estoppel" or "equitable estoppel" applied to the enforcement of an arbitration agreement with respect to a granddaughter's claims against a nursing facility wherein the grandmother had eloped undetected from the facility and wandered into an alligator pond, resulting in her death. *See id.* The court concluded that Weaver was not bound by the arbitration provision. *See id*. Brookdale argued that Weaver's claims were funneled to arbitration because her ability to sue stemmed from the residency agreement containing the arbitration agreement.[5] *See id*. The court determined that this argument was "easily scotched." *Id.*

Equitable estoppel is not implicated simply because a claim relates to or would not have arisen but for the contract's existence. *See id*. The court reasoned that Weaver's claims rely on general tort duties owed by NHC to its patients – and did not flow from any provision of the residency agreement. *See id*. The duty to provide care consistent with the applicable nursing standards of care does not flow directly from the residency agreement. *See id.* A benefit is "direct" if it flows "directly from the [contract]" but is indirect if the claim relates generally to the contractual relationship of the parties but does not "exploit" the agreement itself. *See id.* The court went on to opine that Weaver had not exploited or sought to enforce or benefit from the residency agreement "any more than a pedestrian run over by a truck has benefited from the contract for the purchase of the truck." *Id.* Weaver had not attempted to procure a direct benefit

[5] The arbitration agreement in the case at hand is **not** contained within the residency agreement.

from the residency agreement while trying to avoid the arbitration agreement. *See id.*

In a similar analysis, the Hodge court considered whether the plaintiff had received a direct benefit and expressly held that "[t]he only agreement from which [plaintiffs] even arguably received a benefit was the admission agreement because [patient] was admitted to the facility as a result of it. However, because the facility allegedly caused [the patient]'s injuries that later led to her death, we find it difficult to find she benefited even from being admitted." Hodge, *supra*. Equitable estoppel is a theory to prevent ***injustice*** and it should be used sparingly. *See* Weaver, *supra.*

The Court in Thompson declined to apply equitable estoppel to the arbitration agreement under both the federal caselaw and pursuant to South Carolina law. *See id* at 43. The court determined that the arbitration agreement was not incorporated into the admission agreement and the two agreements were independent of one another. *See id.* In finding no merger, the court concluded that equitable estoppel had no application to the present case under the federal substantive law. *See id*. The court went on to consider the doctrine of equitable estoppel under South Carolina law. The elements that must be proven as to the non-signer are as follows:

> (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.
> *Id* at 60.

The court concluded that because the patient had dementia prior to her admission, her

incapacity prevented her from forming the intent to mislead the nursing home or assent to the arbitration terms. *See id.* The court found that equitable estoppel was inapplicable. *See id*.

In a recent unpublished opinion, this Court determined that the doctrine of equitable estoppel did not apply wherein the spouse of a nursing home resident brought claims against the facility. Orveletta Alston As Pers. Representative of the Estate of Willie Earl Alston v. Manor, No. 2021-UP-105, 2021 S.C. App. Unpub. LEXIS 102, at *8-9 (Ct. App. Mar. 31, 2021). The daughter of the decedent had executed the arbitration agreement without authority. *See* id. This Court determined that the spouse did not rely on duties set forth in the admission agreement as a basis for her claims nor asserted a breach of the admission agreement as a cause of action. *See id.* This Court relied on the Hodge case, *supra* at 563, 302, ("[E]ven if the Admission Agreement and Arbitration Agreement merged, because Respondents are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement. Therefore, the circuit court did not err in finding equitable estoppel did not bar Respondents' claims."). This Court in Alston reasoned that "rather, the causes of action set forth in the complaint in this case rely on alleged breaches of common law, regulatory, and statutory duties." *See* Alston *supra* at *8-9 *relying on* Weaver, 431 S.C. at 230, 847 S.E.2d at 272, (explaining equitable estoppel "estops a nonsigner from refusing to comply with an arbitration provision of a contract if (1) the nonsigner's claim arises from the contractual relationship, (2) the nonsigner has 'exploited' other parts of the contract by reaping its benefits, and (3) the claim relies solely on the contract terms to impose liability").

In the present case, as set forth above, the Admission Agreement is a separate contract from the Arbitration Agreement. But even assuming *arguendo,* that the Court were to find the documents to be merged, equitable estoppel is inapplicable. Respondent is not attempting to enforce any provision of the Admission Agreement and at the same time deny an arbitration

agreement contained within. There has been no exploitation of the contracts' provisions by the Appellant, no benefit was derived under the contracts by Mr. Pace[6], and the Respondent's claims flow from alleged breaches in general tort law, regulatory and statutory duties and not from the Admission Agreement or Arbitration Agreements. *See* Weaver, *supra.* Because Appellant is not attempting to enforce any agreement and no claim flows therefrom he is not equitably estopped from denying the arbitration agreement. *See e.g.* Hodge, *supra* "…even if the Admission Agreement and Arbitration Agreement [were] merged, because [plaintiffs] are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement."

Appellants have relied on the Wilson case in support of their equitable estoppel argument. 426 S.C. at 345, 827 S.E.2d at 177. "Equitable estoppel is, ultimately, a theory designed to prevent injustice, and it should be used sparingly." *See id quoting* Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 71 A.3d 849, 852 (N.J. 2013) (observing equitable estoppel should be used sparingly to compel arbitration and noting it "is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration"); 28 Am. Jur. 2d Estoppel and Waiver § 29 (2011) (stating equitable estoppel should be used with restraint and only in exceptional circumstances). Ultimately the Wilson court ***declined*** to apply the doctrine of equitable estoppel to the facts before it. "Considerations of equity do not warrant estopping such attenuated individuals from asserting their nonsignatory status." *Id.*

The Appellants have not shown that any of the factors set forth in the Thompson decision exist in this case. There is not even any allegation of a false representation, any expectation of reliance on a false representation, nor any detrimental reliance. Equitable estoppel does not apply

[6] *See* Weaver, *supra*, wherein the court expressed difficulty in finding that the admission agreement resulted in benefit to the decedent as her death was the result of negligence on the part of the facility.

under any federal or state theory to the Respondent in the case before this Court.

CONCLUSION

For each of the reasons set forth above, the Respondent respectfully asserts that the Circuit Court did not err in denying the Appellant Facility's Motion to Dismiss Plaintiff's Complaint, Compel Arbitration and Motions to Stay Court Proceedings. The Circuit Court did not err in finding that Mr. Hill lacked authority to execute an arbitration agreement. The Circuit Court did not err in finding that the arbitration and admission agreements were wholly independent and separate and therefore there was no merger of the documents. Finally, the Circuit Court did not err in finding that the doctrine of equitable estoppel was inapplicable.

The Respondent respectfully asserts that Orders of the Circuit Court should be affirmed and the case remanded to the Circuit Court for a jury trial on these matters.

Respectfully submitted,

HARBIN & BURNETT, LLP

s/ Jennifer Spragins Burnett
Jennifer Spragins Burnett
Harbin & Burnett, LLP
P.O. Box 35
Anderson, SC 29622
Ph: 864-964-0333
Fax: 864-964-0930
Attorneys for Respondent

Anderson, South Carolina
July 25, 2023

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

JUDGE R. KEITH KELLY, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2022-001059

Kenneth Pace, Individually and as Personal Representative of the Estate of Earl E. Pace, Respondent,
v.

Lake Emory Post Acute Care; THI of South Carolina at Camp Care, LLC; THI of South Carolina, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical and Operational Services, LLC; Fundamental Clinical Consulting, LLC; Fundamental Long Term Care Holdings, LLC, and Kerry L. Wheeler, DO, Defendants,

Of which Lake Emory Post Acute Care; THI of South Carolina at Camp Care, LLC; THI of South Carolina, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical and Operational Services, LLC; and Fundamental Long Term Care Holdings, LLC, are Appellants.

CERTIFICATE OF COUNSEL

The undersigned certified that the Final Brief complies with Rule 211(b), SCACR.

{signature on the following page}

Respectfully submitted,

HARBIN & BURNETT, LLP

s/ Jennifer Spragins Burnett

Jennifer Spragins Burnett
Harbin & Burnett, LLP
P.O. Box 35
Anderson, SC 29622
Ph: 864-964-0333
Fax: 864-964-0930
Attorneys for Respondent

Anderson, South Carolina
July 25, 2023

RECEIVED
Jul 26 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

JUDGE R. KEITH KELLY, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2022-001059

Kenneth Pace, Individually and as Personal Representative of the Estate of Earl E. Pace, Respondent,
v.

Lake Emory Post Acute Care; THI of South Carolina at Camp Care, LLC; THI of South Carolina, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical and Operational Services, LLC; Fundamental Clinical Consulting, LLC; Fundamental Long Term Care Holdings, LLC, and Kerry L. Wheeler, DO, Defendants,

Of which Lake Emory Post Acute Care; THI of South Carolina at Camp Care, LLC; THI of South Carolina, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical and Operational Services, LLC; and Fundamental Long Term Care Holdings, LLC, are Appellants.

CERTIFICATE OF COUNSEL

The undersigned certified that the Final Brief complies with Rule 211(b), SCACR.

{signature on the following page}

Respectfully submitted,

HARBIN & BURNETT, LLP

s/ Jennifer Spragins Burnett

Jennifer Spragins Burnett
Harbin & Burnett, LLP
P.O. Box 35
Anderson, SC 29622
Ph: 864-964-0333
Fax: 864-964-0930
Attorneys for Respondent

Anderson, South Carolina
July 25, 2023