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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2016-001732

Hilda Stott, individually and as Personal Representative of the Estate of Jolly P. Davis, deceased, and as Personal Representative of the Statutory Beneficiaries,.....Respondents

v.

White Oak Manor, Inc.; White Oak Management, Inc.; and White Oak Manor-Spartanburg, Inc. d/b/a White Oak of Spartanburg, ...Appellants

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FINAL BRIEF OF RESPONDENTS

POLIAKOFF & ASSOCIATES, P.A.

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COUNTER-STATEMENT OF THE ISSUES ON APPEAL

I. Did the trial court err in concluding that the parties' arbitration agreement is unenforceable because Hilda Stott lacked authority to sign the agreement on behalf of the competent decedent, Jolly Davis, and Jolly Davis's wrongful-death beneficiaries under South Carolina's Wrongful Death Statute?

II. Did the trial court correctly conclude that White Oak Manor, Inc. and White Oak Management, Inc. were not signatories and could not compel arbitration?

COUNTER-STATEMENT OF THE CASE

This is a wrongful death and survival case involving nursing home and corporate negligence resulting in the wrongful death of Jolly Davis ("Decedent"). Decedent was admitted to Defendants' facility in stable condition on **January 2, 2013** and was emergency transferred to hospital on **January 8, 2013**, where he died on **January 11, 2013**. Hilda Stott ("Niece") is Decedent's niece and was appointed to serve as the personal representative of Decedent's estate on **April 10, 2013**.

Niece brought an action against White Oak Manor, Inc., White Oak Management, Inc., and White Oak Manor-Spartanburg, Inc. d/b/a White Oak of Spartanburg, asserting numerous causes of action related to Decedent's death in Defendants' facility. Defendants moved to dismiss and/or compel arbitration, and the circuit court denied the motion.

This appeal follows.

FACTS

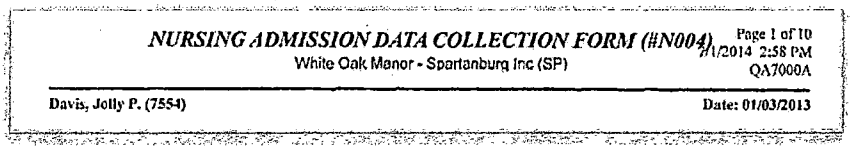
This matter arises out of both Wrongful Death and Survival actions which the Estate of Jolly Davis brought against Defendants involving nursing home negligence, custodial negligence, and the resulting wrongful death of Jolly Davis ("Decedent"). Hilda Stott is Decedent's niece and serves as personal representative of Decedent's estate. She was appointed Personal Representative on **April 10, 2013**.

On **January 2, 2013**, Decedent was admitted to White Oak Manor – Spartanburg, Inc. d/b/a White Oak of Spartanburg ("facility"), a skilled nursing facility. Neither White Oak Manor, Inc. nor White Oak Management, Inc. are signatories to the alleged arbitration agreement. (R. pp. 98-102). White Oak Manor, Inc. operates the facility as the parent corporation. White Oak Management, Inc. is a related entity that provides management services to the facility. Plaintiffs allege that while the Corporate Defendants did not provide direct care or services to Decedent, they are Defendants in this matter because their control over the facility directly affected the quality of care Decedent received.

At the time of admission, an employee at the facility presented Mrs. Stott with a stack of admission papers and told her to sign all of them so that her uncle could receive care. This stack of papers included the Resident and Facility Admission Agreement (the "Agreement") and the Arbitration Agreement. (R. pp. 74-97, R. pp. 98-102). Hilda Stott signed the Agreement and the Arbitration Agreement on behalf of Decedent without authority to bind Decedent to the agreements, and specifically without the authority to bind Decedent to arbitration, thereby waiving Decedent's right to a jury trial.

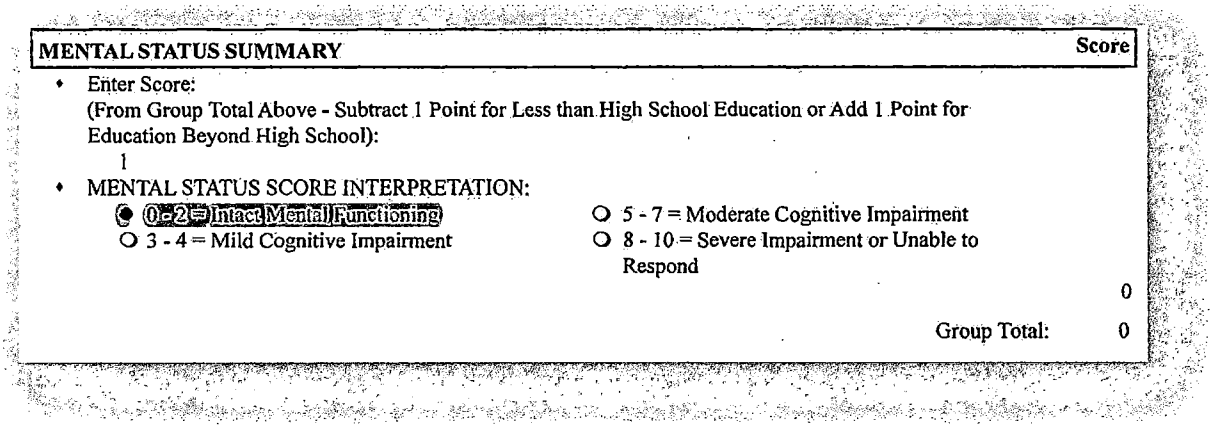
Facility staff not only had an unauthorized person sign the agreements on behalf of Decedent, they did so without asking Decedent to sign, despite his full capacity to do so.

Decedent's ability to make his own decisions is evidenced by the medical records including Spartanburg Regional Healthcare System *Progress Note Addressing Decisional Capacity,* dated **January 2, 2013**, the very same day Mrs. Stott signed the agreements. (R. pp. 73). That Progress Note states "[t]his patient DOES possess the decisional capacity to make healthcare decisions for self." [*emphasis in original*]. (R. pp. 73). The "Nursing Evaluation" from Spartanburg Regional Medical Center (SRMC), which is part of the nursing home chart, on the day of admission to White Oak Manor designates that Decedent had normal speech, normal hearing, normal sight, and Independent Mental Status. (R. pp. 126-127). Put simply, Decedent was admitted for short term rehabilitation; he was awake, aware, and able to enter or refuse to enter contracts on his own. In fact, Defendants' own documentation states this. The Nursing Admission Data Collection Form, filled out by Defendant White Oak Manor – Spartanburg on day of admission states he scored a zero on Mental Status Test, indicating "Intact Mental Functioning." (R. pp. 128-136).



NURSING ADMISSION DATA COLLECTION FORM (#N004) Page 1 of 10
White Oak Manor - Spartanburg Inc (SP) 7/1/2014 2:58 PM
QA7000A

Davis, Jolly P. (7554) Date: 01/03/2013



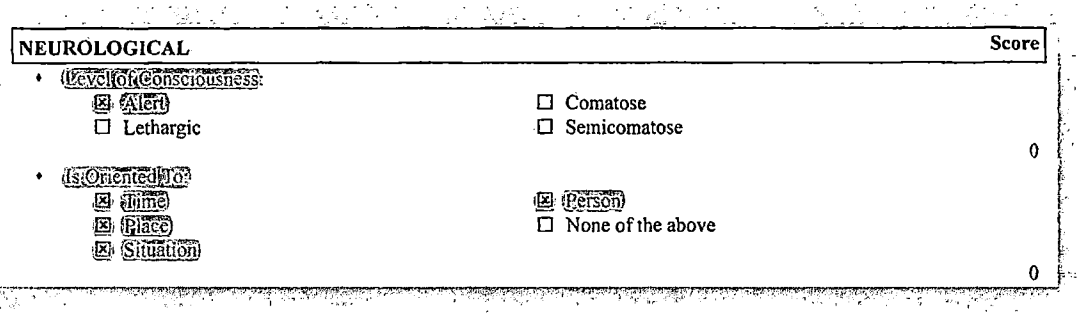
MENTAL STATUS SUMMARY **Score**

- Enter Score:
  (From Group Total Above - Subtract 1 Point for Less than High School Education or Add 1 Point for Education Beyond High School):
  1
- MENTAL STATUS SCORE INTERPRETATION:
  - ● 0-2 = Intact Mental Functioning
  - ○ 3 - 4 = Mild Cognitive Impairment
  - ○ 5 - 7 = Moderate Cognitive Impairment
  - ○ 8 - 10 = Severe Impairment or Unable to Respond

0

Group Total: 0

The following are marked under "Neurological" in the Data Collection Form: Alert, Oriented to Time, Place, Person, and Situation.



NEUROLOGICAL		Score
• Level of Consciousness:		
☒ Alert	☐ Comatose	
☐ Lethargic	☐ Semicomatose	0
• Is Oriented To:		
☒ Time	☒ Person	
☒ Place	☐ None of the above	
☒ Situation		0

This is supported by Dr. Warren's History and Physical which states, "He is oriented x 4." (R. pp. 137-140).

At the hearing on Defendants' Motion to Compel Arbitration, counsel for Defendants stated:

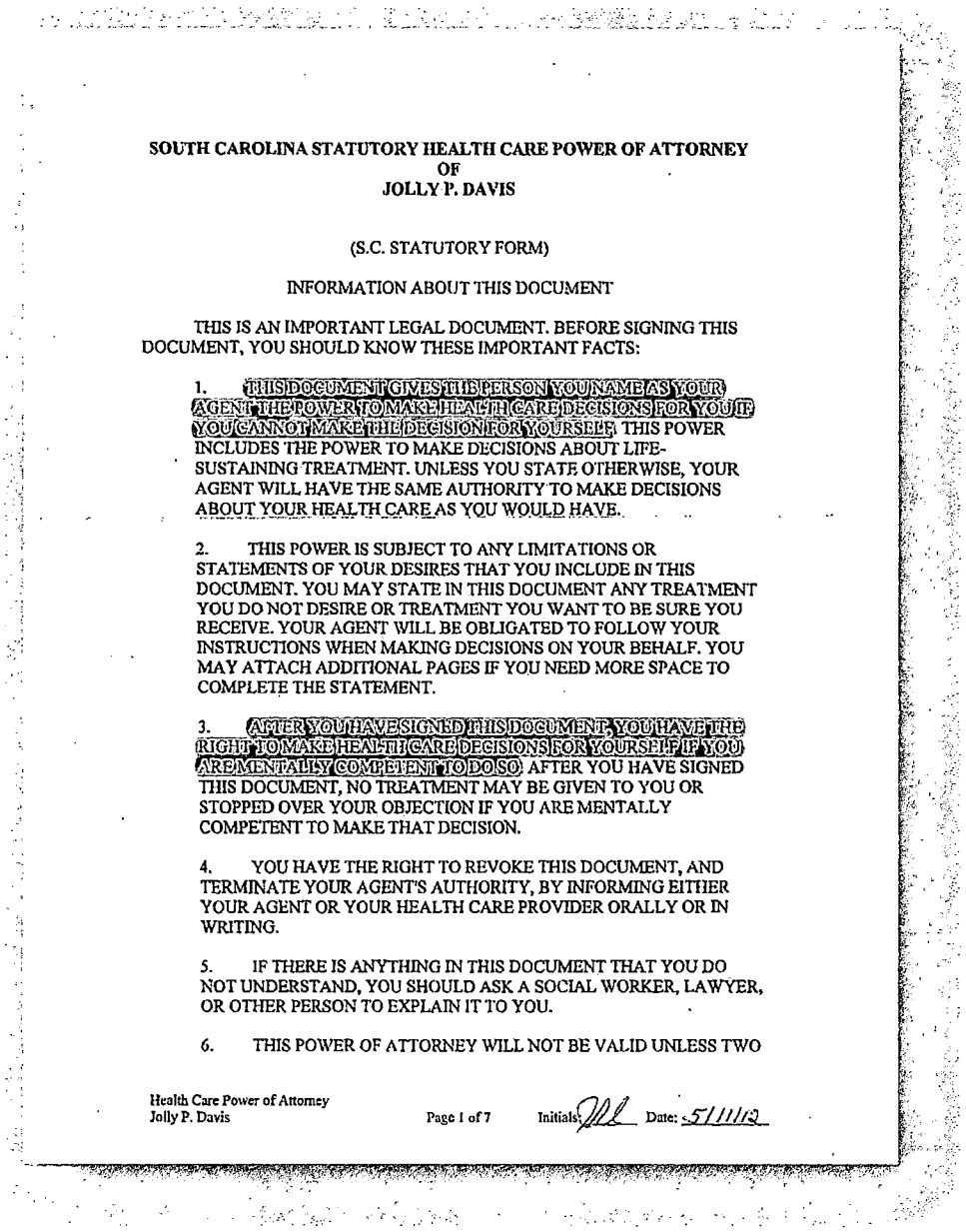
> "[W]e don't take issue with the fact that Mr. Jolly appeared to be mentally competent. So we're not over here today saying that this man was incompetent and just couldn't manage his own affairs. Mentally speaking, we're not saying that at all." (R. pp. 43 lines 4-8).

Defendants claim that Decedent was "disabled," but no evidence supports Defendants' contention. Prior to admission to White Oak Manor, Decedent was living independently at home. Plaintiff described Decedent as a "vulnerable adult" under South Carolina's Adult Protection Act (APA) because **all** nursing home residents are defined as vulnerable adults under that statute without consideration of the resident's mental or physical capabilities. The APA provides, "A resident of a facility[1] is a vulnerable adult." (Adult Protection Act, S.C. Code Ann. §§ 43-35-10, -11).

When Hilda Stott signed the Admissions Agreement, which covered issues relating to admission and care at the facility, facility staff left blank the section of the Agreement which designates the type of legal authority the signatory has and the scope of that representative's

[1](4) "Facility" means a nursing care facility, community residential care facility, a psychiatric hospital, or any residential program operated or contracted for operation by the Department of Mental Health or the Department of Disabilities and Special Needs. (*Adult Protection Act*, Section 43-35-10, 4).

authorization to make decisions for Decedent. (R. pp. 79). The fact that Hilda Stott signed documents so that her uncle could be admitted to the facility and receive medical care in no way indicates a manifestation of authority from Decedent to Stott. Decedent never manifested any form of consent that established Hilda Stott was his agent, despite being wide awake, lucid, and able to make his own decisions regarding his rights. Decedent was competent at the time he was admitted to the facility. The Arbitration Agreement is null and void because Hilda Stott lacked the capacity and authority to enter into it. Defendants allege that Hilda Stott had a valid power of attorney based on an executed South Carolina Healthcare Power of Attorney ("HCPOA"). That document clearly states in the first paragraph that the power arises "if you cannot make the decision for yourself." (R. pp. 103).



SOUTH CAROLINA STATUTORY HEALTH CARE POWER OF ATTORNEY
OF
JOLLY P. DAVIS

(S.C. STATUTORY FORM)

INFORMATION ABOUT THIS DOCUMENT

THIS IS AN IMPORTANT LEGAL DOCUMENT. BEFORE SIGNING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS:

1. THIS DOCUMENT GIVES THE PERSON YOU NAME AS YOUR AGENT THE POWER TO MAKE HEALTH CARE DECISIONS FOR YOU IF YOU CANNOT MAKE THE DECISION FOR YOURSELF. THIS POWER INCLUDES THE POWER TO MAKE DECISIONS ABOUT LIFE-SUSTAINING TREATMENT. UNLESS YOU STATE OTHERWISE, YOUR AGENT WILL HAVE THE SAME AUTHORITY TO MAKE DECISIONS ABOUT YOUR HEALTH CARE AS YOU WOULD HAVE.

2. THIS POWER IS SUBJECT TO ANY LIMITATIONS OR STATEMENTS OF YOUR DESIRES THAT YOU INCLUDE IN THIS DOCUMENT. YOU MAY STATE IN THIS DOCUMENT ANY TREATMENT YOU DO NOT DESIRE OR TREATMENT YOU WANT TO BE SURE YOU RECEIVE. YOUR AGENT WILL BE OBLIGATED TO FOLLOW YOUR INSTRUCTIONS WHEN MAKING DECISIONS ON YOUR BEHALF. YOU MAY ATTACH ADDITIONAL PAGES IF YOU NEED MORE SPACE TO COMPLETE THE STATEMENT.

3. AFTER YOU HAVE SIGNED THIS DOCUMENT, YOU HAVE THE RIGHT TO MAKE HEALTH CARE DECISIONS FOR YOURSELF IF YOU ARE MENTALLY COMPETENT TO DO SO. AFTER YOU HAVE SIGNED THIS DOCUMENT, NO TREATMENT MAY BE GIVEN TO YOU OR STOPPED OVER YOUR OBJECTION IF YOU ARE MENTALLY COMPETENT TO MAKE THAT DECISION.

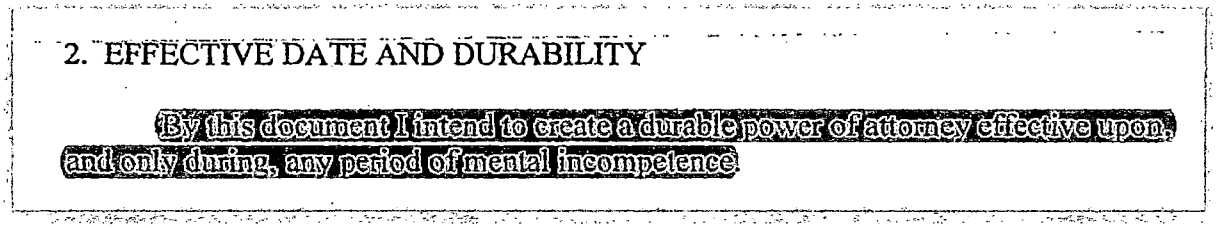
4. YOU HAVE THE RIGHT TO REVOKE THIS DOCUMENT, AND TERMINATE YOUR AGENT'S AUTHORITY, BY INFORMING EITHER YOUR AGENT OR YOUR HEALTH CARE PROVIDER ORALLY OR IN WRITING.

5. IF THERE IS ANYTHING IN THIS DOCUMENT THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A SOCIAL WORKER, LAWYER, OR OTHER PERSON TO EXPLAIN IT TO YOU.

6. THIS POWER OF ATTORNEY WILL NOT BE VALID UNLESS TWO

Health Care Power of Attorney
Jolly P. Davis Page 1 of 7 Initials: JPD Date: 5/11/12

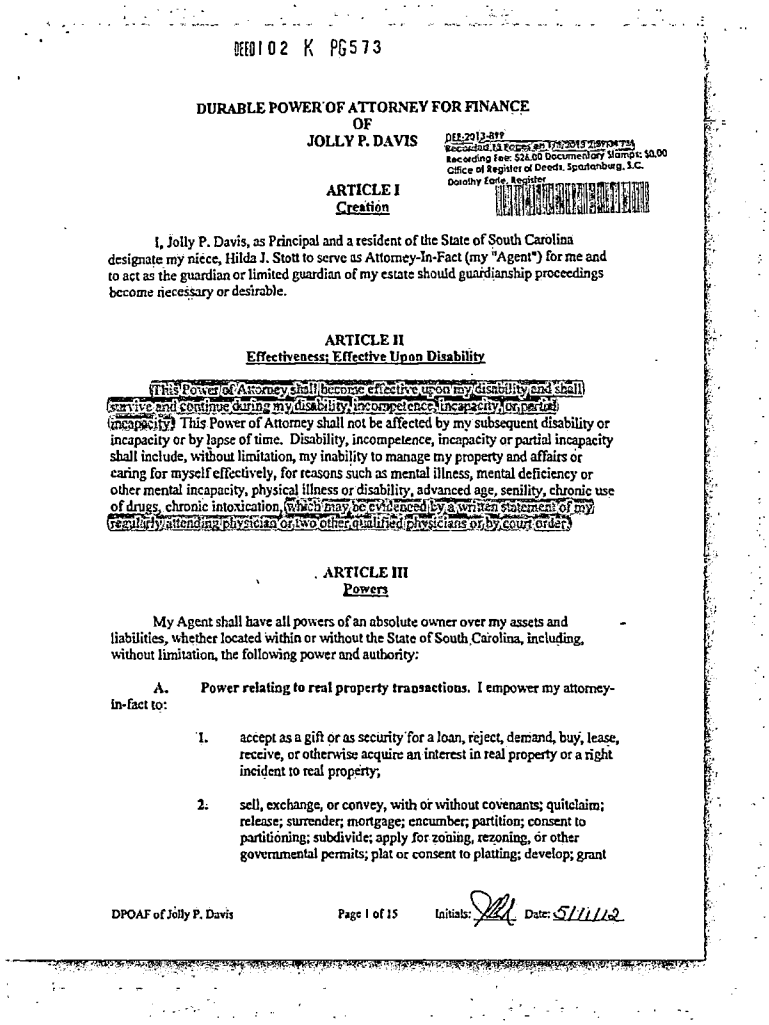
The HCPOA later states: "By this document, I intend to create a durable power of attorney effective upon, and ***only*** during, any period of mental incompetence." [*emphasis added*] (R. pp. 105).



2. EFFECTIVE DATE AND DURABILITY

By this document I intend to create a durable power of attorney effective upon, and only during, any period of mental incompetence.

Defendants also allege that Hilda Stott had a valid power of attorney based on a Durable Power of Attorney for Finance ("DPOA"); however, that legal instrument only became valid once it was filed on **January 8, 2013**, after Decedent left the facility, and after Decedent was incapacitated due to Defendants' neglect. The DPOA states: "This Power of Attorney shall become effective upon my disability and shall survive and continue during my disability, incompetence, incapacity, or partial incapacity… [My incompetence] may be evidenced by a written statement of my regularly attending physician or two other qualified physicians or by court order." (R. pp. 111).



DEED102 K PG573

DURABLE POWER OF ATTORNEY FOR FINANCE
OF
JOLLY P. DAVIS

DEE-2013-899
Recorded 13 Pages on 1/8/2013 2:59:04 PM
Recording Fee: $26.00 Documentary Stamps: $0.00
Office of Register of Deeds, Spartanburg, S.C.
Dorothy Earle, Register

ARTICLE I
Creation

I, Jolly P. Davis, as Principal and a resident of the State of South Carolina designate my niece, Hilda J. Stott to serve as Attorney-In-Fact (my "Agent") for me and to act as the guardian or limited guardian of my estate should guardianship proceedings become necessary or desirable.

ARTICLE II
Effectiveness; Effective Upon Disability

This Power of Attorney shall become effective upon my disability and shall survive and continue during my disability, incompetence, incapacity, or partial incapacity. This Power of Attorney shall not be affected by my subsequent disability or incapacity or by lapse of time. Disability, incompetence, incapacity or partial incapacity shall include, without limitation, my inability to manage my property and affairs or caring for myself effectively, for reasons such as mental illness, mental deficiency or other mental incapacity, physical illness or disability, advanced age, senility, chronic use of drugs, chronic intoxication, which may be evidenced by a written statement of my regularly attending physician or two other qualified physicians or by court order.

ARTICLE III
Powers

My Agent shall have all powers of an absolute owner over my assets and liabilities, whether located within or without the State of South Carolina, including, without limitation, the following power and authority:

A. **Power relating to real property transactions.** I empower my attorney-in-fact to:

1. accept as a gift or as security for a loan, reject, demand, buy, lease, receive, or otherwise acquire an interest in real property or a right incident to real property;

2. sell, exchange, or convey, with or without covenants; quitclaim; release; surrender; mortgage; encumber; partition; consent to partitioning; subdivide; apply for zoning, rezoning, or other governmental permits; plat or consent to platting; develop; grant

DPOAF of Jolly P. Davis Page 1 of 15 Initials: JPD Date: 5/11/12

Two physicians are required to establish incompetency; only one is necessary to confirm

competency due to the presumption of competency. Incompetency can be defined as:

> "Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person or property." (S.C. Code Ann. § 62-5-101).
>
> "Unable to consent means unable to appreciate the nature and implications of the patient's condition and proposed health care, to make a reasoned decision concerning the proposed health care, or to communicate that decision in an unambiguous manner...**A patient's inability to consent must be certified by two licensed physicians**, each of whom has examined the patient." [*emphasis added*] (Adult Health Care Consent Act, S.C. Code Ann. § 44-66-20, Section 8).

Hilda Stott did not have authority under the DPOA to bind Decedent to arbitration because the DPOA was not valid at the time Hilda Stott signed the agreements. It was filed after his discharge from the facility on **January 8, 2013** because Decedent was incapacitated from the neglect at White Oak Manor – Spartanburg and could no longer make healthcare decisions. Under SC Code Ann. § 62-5-501 (2012), Protection of Persons Under Disability and Their Property, the power of attorney must be recorded in the county's registry of deeds:

> (C) A power of attorney executed under the provisions of this section must be executed and attested with the same formality and with the same requirements as to witnesses as a will. In addition, **the instrument must be recorded in the same manner as a deed in the county where the principal resides at the time the instrument is recorded.** After the instrument has been recorded, whether recorded before or after the onset of the principal's physical disability or mental incompetence, it is effective notwithstanding the mental incompetence or physical disability. If the authority of the attorney in fact relates solely to the person of the principal, the instrument is effective without being recorded. [*Emphasis added*]

Here, the DPOA was recorded six days **after** the agreements were signed.

Defendants had the burden of proving Decedent was incapacitated at the time his niece signed the arbitration agreement. "[T]he party alleging incompetence bears the burden of proving

incapacity at the time of the transaction by a preponderance of the evidence." Hairston v. McMillan, 387 S.C. 439, 692 S.E.2d 549 (Ct. App. 2010) citing In re Thames, 344 S.C. 564, 572, 544 S.E.2d 854, 858 (Ct. App. 2001). No evidence was provided by Defendants that Decedent was incompetent, disabled or could not make the decision regarding arbitration himself. Decedent had the authority to bind himself and his claims to arbitration but was not given the chance. But even if Decedent had agreed to arbitration, he did not have the legal authority to bind his statutory beneficiaries, who were not parties to the Arbitration Agreement.

In this case, Defendants had the capacity to determine whether Hilda Stott had authority to sign an arbitration agreement on Decedent's behalf. Defendant is a sophisticated business entity frequently interacting with residents and their families during the nursing home admission process. Defendants are familiar with the legal concepts of guardianship and powers-of-attorney, as evidenced by Defendant's employee filing the DPOA with the Office of Register of Deeds in order to make the DPOA valid, Defendant's filing the DPOA after Decedent was no longer a resident of the facility. Defendants had the ability to ask Hilda Scott if she had a valid power of attorney and if she was Decedent's attorney in fact. Defendants had the ability to request supporting documentation. Since Defendants have failed to provide supporting information for the alleged valid authority of Hilda Scott, this Court should affirm.

The Order (R. pp. 1-4) denying the motion to dismiss and compel arbitration made the following rulings:

1. The burden of proof to establish the existence of a valid arbitration agreement lies with Defendants;
2. Decedent was mentally competent to make decisions for himself and not disabled

or incapacitated;

3. Hilda Stott lacked the authority to contract on behalf of Decedent therefore the arbitration agreement was not enforceable.

Defendants now claim that the Arbitration Agreement did not become effective until **January 19, 2013** because there was a 10 day opt out clause. This argument was not made to the trial court. (See below Section entitled Objection to Documents and Argument Not Presented to Lower Court). However, the new argument fails on the merits also. Decedent died on **January 11, 2013**, therefore any Power of Attorney enabling Stott to "opt out" was extinguished at the moment of death. Hilda Stott was not appointed Personal Representative until **April 10, 2013**. Therefore, the Arbitration Agreement did not become effective on **January 19, 2013**, even under Defendants new theory. Here, there is no evidence of "false representation or concealment" on Hilda Stott's part. Furthermore, Defendants could not reasonably rely on the contract/agreement when they knew that Hilda Stott lacked the authority to enter into such a contract/agreement.

ARGUMENT

The determination whether a claim is subject to arbitration is subject to *de novo* review. Partain v. Upstate Automotive Group, 386 S.C. 488, 689 S.E.2d 602 (2010). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Id.*

Whether the parties agreed to arbitrate is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007), states, "General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause." The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). It is well established that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. If no agreement is found to exist, the court must deny any application to arbitrate." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 667 (2007) (internal citation omitted)). Defendants have not met the burden.

Arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate. Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 843-44 (Ct. App. 1999). A contractual obligation to arbitrate claims is unenforceable if it is signed by a third party acting without proper legal authority. "Accordingly, a party may seek revocation of the contract under 'such grounds as exist at law or in equity,' including fraud, duress, and unconscionability." Simpson v. MSA of

Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). General contract principles of state law apply to arbitration clauses, even those governed by the FAA. Davis v. KB Home of South Carolina, Inc., 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011).

The primary issues in this appeal are whether Hilda Stott had the authority to bind Decedent's estate and the wrongful death beneficiaries to the Arbitration Agreement and whether the wrongful death statutory beneficiaries and corporate defendants are bound to that Agreement, despite being non-signatories. The trial court ruled correctly that she did not have such authority, either actually or apparently. The Supreme Court of South Carolina made clear in Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014), that authority to make healthcare decisions does not extend to arbitration agreements. Coleman v. Mariner Health Care, Inc., at page 7 states, "The scope of Sister's authority to consent to 'decisions concerning Decedent's health care' extend to the admission agreement, which was the basis upon which Facility agreed to provide health care and Sister agreed to pay for it. The separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution between Facility and Decedent." Thus, without Decedent's actual representation to facility staff that Hilda Stott could and should sign the agreements, Defendants' attempts to bind Decedent, his Wrongful Death beneficiaries, and other Defendants not party to the alleged Arbitration Agreement to binding arbitration are fruitless and without merit.

I. Signatory's Lack of Legal Authority

Where a principal lacks capacity to make decisions regarding his legal rights, a third party may, in some instances, step into his shoes to make healthcare decisions on the principal's behalf. However, Decedent had capacity to make decisions regarding his legal rights.

The alleged principal in this matter, Decedent Jolly Davis, was never consulted about the arbitration agreement nor is there any evidence he made representations to Defendants regarding Hilda's authority to act on his behalf. There is no question that Decedent had the capacity to contract. Gaddy v. Douglass, 359 S.C. 329, 597 S.E.2d 12 (Ct. App. 2004). In Dean v. Heritage Healthcare of Ridgeway, 408 S.C. 371, 759 S.E.2d 727 (2014), Chief Justice Toal in Footnote 1 stated: "We are concerned that according to the record, the patient did not sign either the residency agreement or the agreement on her own behalf despite being competent at the time." Hilda Stott did not have the authority regardless of how she may have behaved. Defendants did not produce any evidence indicating that Hilda Stott represented that she was Decedent's agent. However, Defendants could not rely on those representations anyway. As the Court stated in WDI Meredith & Co. v. American Telesis, Inc., *supra*, "Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or he should realize his conduct is likely to create such a belief. **An agency may not, however, be established solely by the declarations and conduct of an alleged agent.**" (citing Muller v. Myrtle Beach Golf & Yacht Club, 303 S.C. 137, 142-143,399 S.B.2d at 433 (Ct. App. 1990) overruled on other grounds by Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000)).

Under South Carolina law, "[t]he elements which must be proven to establish apparent agency are: (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." Graves v. Serbin Farms, Inc., 306 S.C. 60, 63, 409 S.E.2d 769, 771 (1991). "Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which,

reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him." Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244–45, 473 S.E.2d 865, 868 (Ct.App.1996). "Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief." *Id.* at 245, 473 S.E.2d at 868. "Moreover, an agency may not be established solely by the declarations and conduct of an alleged agent." *Id.*

"Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or he should realize his conduct is likely to create such a belief. An agency may not, however, be established solely by the declarations and conduct of an alleged agent." (citing Muller v. Myrtle Beach Golf & Yacht Club, 303 S.C. 137, 142-143,399 S.B.2d at 433 (Ct. App. 1990) overruled on other grounds by Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000)). In our present matter, the principal was never consulted.

"The first element of a contract is that the parties have the capacity to contract... Further, capacity to contract relates to the status of the person rather than to circumstances surrounding the contract." 17 C.J.S. Contracts §32. Hilda Stott did not have that authority. Decedent did not lack the capacity to contract for himself. He was not demented, incompetent, or disabled. Because Decedent had never been adjudicated incompetent or incapacitated by any physician or by the probate court, there exists a presumption of competency. Dominick v. Rhodes, 202 S.C. 139, 24 S.E.2d 168 (1943); Mordecai v. Canty, 86 S.C. 470, 68 S.E. 1049 (1910). Defendants cannot meet the burden of proving Decedent was incompetent or disabled.

The capacity to contract relates to the status of the person rather than to circumstances surrounding the contract. This is the rule embraced by the Restatement. General Motors v. Jackson, 900 P.2d 345 (Nev. 1995) (citing Restatement (Second) of Contracts § 12 (1981)). The court correctly concluded Hilda Stott did not have the authority to execute the contract for Decedent.

Defendants contend that Hilda Stott had the authority to sign the Arbitration Agreement for Decedent because (A) an effective DPOA existed or (B) a valid HCPOA existed. A valid DPOA would allow Hilda Stott to waive Decedent's constitutional right to a jury trial against the Defendants' facility, however the DPOA in the present matter was not valid at the time of execution of the Arbitration Agreement; therefore, Hilda Stott did not have legal authority to sign on her uncle's behalf. The DPOA submitted with Defendants' Motion was not valid at the time of signing of the agreements as it was not filed with the Register of Deeds until after Decedent had left the facility. Under South Carolina Code Ann. § 62-5-501 (2012), a durable power of attorney requires the same executory actions as a deed, including filing with the deeds office. In the present matter, the DPOA was not recorded with the Office of Register of Deeds for Spartanburg County until **January 8, 2013, two days after** Decedent permanently left the facility and **six days after** Hilda Stott signed the alleged Arbitration Agreement.

While the HCPOA granted Hilda Stott the authority to make "healthcare decisions" for Decedent, if (and only if) Decedent could not make his own decisions; however, making healthcare decisions is not the same as binding a competent person to an Arbitration Agreement. Entering a contract to waive the right to a jury trial is not a decision that involves health care, including whether to place a person in a facility or remove the person from the facility.

Granting a niece the authority to consent to health care decisions for an incompetent person cannot stretch to the point of permitting that person to extinguish the competent person's right to judicial process. Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements. Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conduct 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.*

Defendants cannot meet their burden to establish these elements. There is no evidence that Decedent acted in a way amounting to a false representation to Defendants. Decedent's lack of knowledge of the alleged Arbitration Agreement prevented him from forming the required intent for Defendants to rely on his conduct.

II. Wrongful Death Statutory Beneficiaries are not bound by the alleged Arbitration Agreement

Defendants are also attempting to bind the statutory beneficiaries of the wrongful death claim who were not parties to the agreement. Even if Hilda Stott had the ability to bind Decedent to the agreement, she could not bind the statutory beneficiaries of the wrongful death claim. The alleged Arbitration Agreement, by its own terms, is an agreement between "White Oak Spartanburg ("the Facility") and Hilda Stott/Jolly Davis ("the Resident") ... TO ARBITRATE ALL MONETARY CLAIMS that may arise between them

(with the exception of monetary claims of less than $25,000.00)." [*emphasis in original*] (R. pp. 99).

The question of whether a wrongful death action is subject to mandatory arbitration pursuant to the terms of a contract is one of relative novelty in South Carolina. The majority of states that have addressed this issue have held that an arbitration agreement does not bind decedent's statutory beneficiaries who were not a party to the contract. Carter v. SSC Odin Operating Company, LLC, 976 N.E.2d 344, 360 (Ill. 2012); Lawrence v. Manor, 273 S.W.3d 525, 530 (Mo. 2009); Bybee v. Abdulla, 189 P.3d 40,47, 50 (Utah 2008); Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1262 (Ohio 2007); Mcfarren v. Emeritus at Canton, 997 N.E.2d 1254 (Ohio App. 2013); Pisano v. Extendicare Homes, Inc., 77 A.3d 651 (Pa. Super. 2013); Woodall v. Avalon Care Center-Federal Way, LLC, 231 P.3d 1252, 1257-59 (Wash. App. 2010); Peltz ex rel. Estate of Peltz v. Sears, Roebuck & Co., 367 F.Supp.2d 711, 718-19 (E.D. Pa. 2005); Laizure v. Avante at Leesburg, Inc., 109 So. 3d 752, 762 (Fla. 2013); Ruiz v. Podolsky, 237 P.3d 584, 591 n. 2 (Cal. 2010); In re Labatt Food Service, L.P., 279 S.W.3d 640, 647 (Tex. 2009); Briarcliff Nursing Home, Inc. v. Turcotte, 894 So.2d 661, 665 (Ala. 2004); Allen v. Pacheco, 71 P.3d 375, 379 (Colo. 2003); Estate of Richard Heiney v. Life Care Centers of America, Inc., 2013 WL 1846599 (Ariz. App. 2013).

South Carolina law is clear that a Wrongful Death claim exists for the statutory beneficiaries and that such claims are distinct and separate claims from those that are brought under Survival claims. See Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914). In Bennett, the Supreme Court held that wrongful death and survival actions are different claims for different injuries. 97 S.C. at 29-30, 81 S.E. at 189-90. The Court stated: "Necessarily, therefore, there must be separate verdicts and separate judgments, and hence

there should be separate actions." 97 S.C. at 31, 81 S.E. at 190. The Supreme Court affirmed an appeal from circuit court's ruling noting that survival claims are independent of wrongful death claims. Strickland v. Southern Ry. Co., 111 S.C. 248, 97 S.E. 695 (1918) and Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539 (1928).

According to the Wrongful Death Act:

> Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages. (S.C. Code Ann. § 15-51-10 (1977)).

The wrongful death beneficiaries are as follows:

> Every such action shall be for the benefit of the wife or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the heirs of the person whose death shall have been so caused. (S.C. Code Ann. § 15-51-20 (Supp. 2001)).

The general elements of damages recoverable are: (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 interstate's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries. Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d 713, 714 (Ct. App. 1989).

As the Supreme Court of Kentucky said in Ping v. Beverly Enterprises, Inc., 376 SW 3d 581 (2012), pages 599 – 600,:

> [A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is

> the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third party are appropriately subjected to the contract's arbitration provisions, at least where the tort and the contract are significantly intertwined. *See, In re Weekly Homes, L.P.*, 180 S.W.3d 127 (Tex.2005) (negligent repair claim by homeowner's daughter against contractor was subject to repair contract's arbitration clause because daughter, although a non-party was at direct and principal beneficiary under the contract. It is something else entirely, however, to say that incidental beneficiaries of a contract – individuals or entities with no substantive rights under the contract and no direct benefits – may have their tort claims against the parties swept up into the contract's arbitration provisions merely by being mentioned in the contract as potential claimants. This is what Beverly purports to do. Arbitration is a matter of contract, however; it is something that one party may simply impose upon another. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed.2d 491 (2002) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Citation and internal quotation marks omitted.). Since Beverly's theory would allow us that, *i.e.*, would allow one party merely by referring to someone else in an arbitration clause to thereby bind that pother person to arbitration as a "third party beneficiary" of the arbitration agreement, we reject it out of hand.

III. Corporate Defendants are not bound by the alleged Arbitration Agreement

Even if an enforceable Arbitration Agreement existed, the Agreement only applies between the facility and Decedents' Estate, and not the Corporate Defendants who were not signatories to the Agreement. Any Arbitration Agreement applies only to the Survival Action and only to the facility Defendant. In fact, at the hearing, counsel for Defendants admitted:

> "**The agreement as I read it deals with the facility only.** So, I mean, if for some reason the Court determined to bifurcate and say, well with regard to the parent company that owns the land and building and the stock or with regard to the management company there should be different rules appl[ied], I mean, that's okay. I mean, clearly this was a White Oak Manor Spartanburg arbitration agreement." [emphasis added] (R. pp. 55 lines 4-11).

Defendant White Oak Manor, Inc. and White Oak Management, Inc. did not offer any evidence to support their participation in arbitration proceedings. Accordingly, this Court should affirm the trial court's ruling that the arbitration agreement, even if valid, could not be compelled by White Oak Manor and White Oak Management.

IV. Objection to Documents and Argument Not Presented to Lower Court

Respondent objects to the inclusion of two documents Appellant's designated: (1) Authorized Representative Agreement between White Oak Manor and Jolly Davis, and (2) SRMC Discharge Summary. Neither was presented to the lower court and should not be included in the Record on Appeal or considered by the Appellate Court.

Importantly, these documents were not presented to the trial court and should not be part of the Record on Appeal. Rule 210(c), SCACR, prohibits the inclusion in the Record on Appeal of "matter which was not presented to the lower court or tribunal." Accord State v. White, 372 S.C. 364, 387, 642, S.E.2d 607, 619 (Ct. App. 2007); Sanders v. Salley, 283 S.C. 458, 460, 322 S.E.2d 829, 830 (Ct. App. 1984); see Cobb v. Benjamin, 325 S.C. 573, 581 n. 2, 482 S.E.2d 589, 593 n. 2 (Ct. App. 1997).

What "matter" means in the Rule is *material*, whether it is a writing such as a motion or pleading, an exhibit, or oral argument or testimony in transcript form. Rule 210(c), SCACR. In short, matter presented to the lower court means physical things presented to the lower court. *Id.* If any party to an appeal could include *anything* in the Record on Appeal, whether or not it was ever presented to the lower court, it would turn the appellate process on its head and make appellate courts into trial courts where new evidence may be received for consideration. Sanders, 283 S.C. at 460, 461. This is what the requirement that "the Record shall not . . . include matter which was not presented to the lower court" is designed to prevent. Rule 210(c), SCACR. It is a fundamental violation of the principles of appellate practice and review, and it seeks to undermine the very function of this Court. *Id.* See also White, 372 S.C. at 387 ("Morris' statement was not presented to the lower court and cannot be properly included in the Record on Appeal"); Norris v. Ferre, 315 S.C. 179, 183,

432 S.E.2d 491, 493 (Ct. App. 1993) (denying motion to supplement record on appeal with deposition testimony "since the matters were not presented to the trial judge"); Sanders, 283 S.C. at 460-61 (excluding mortgage from record on appeal where "mortgage was not in evidence before the master or the circuit court").

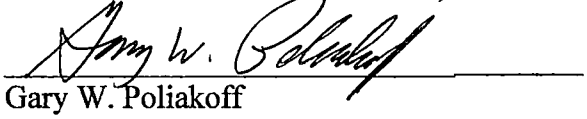
Further, the document does not support Defendants' contention. Defendants in the Initial Brief state that on December 22, 2012 Decedent became "gravely ill with numerous respiratory symptoms" and reference the Court to SRMC Discharge Summary. The document does not state such. The SRMC discharge summary does not state or indicate that Decedent was "gravely ill." In fact, that document supports Plaintiffs' position that he had an acute, not chronic, breathing problem that was "medically stable" but he needed short term rehabilitation for ambulation to recover his stre2ngth to return home to live independently. Nothing in the document indicates he was "gravely ill" or disabled. (*Spartanburg Regional Medical Center Discharge Summary - not included in Record on Appeal*).

CONCLUSION

Hilda Stott lacked the legal authority to bind her uncle to the Arbitration Agreement which removed his rights under the law and the Constitution. The determination of agency is based upon the intentions and representations of the principal, not the agent; neither Decedent nor Hilda Stott displayed any such intentions or made any such representations. The Agreement does not apply to White Oak Manor, Inc. and White Oak Management, Inc. nor does it govern the claims brought for Wrongful Death on behalf of the Statutory Beneficiaries.

For the foregoing reasons this Court should affirm the circuit court's order and remand the matter for further proceedings consistent with this Court's mandate.

RESPECTFULLY SUBMITTED,



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April 10, 2017
Spartanburg, S.C.

FORM 16
CERTIFICATE OF COUNSEL IN FINAL BRIEF

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2016-001732

Hilda Stott, individually and as Personal Representative of the Estate of Jolly P. Davis, deceased, and as Personal Representative of the Statutory Beneficiaries

Respondent,

v.

White Oak Manor, Inc.; White Oak Management, Inc.; and White Oak Manor-Spartanburg, Inc. d/b/a White Oak of Spartanburg,

Appellant.

CERTIFICATE OF COUNSEL

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

April 10, 2017

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