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**Mar 08 2024**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

Courtney Clyburn Pope, Circuit Court Judge

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Appellate Case No. 2020-001441

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Thelma Rudd, as Personal Representative  
of the Estate of Charles S. Rudd, ..... Respondent,

v.

Pepper Hill Nursing & Rehab Center, LLC  
d/b/a Pepper Hill Nursing & Rehab Center,  
The Place at Pepper Hill, LLC, Pepper Hill  
Senior Properties, LLC n/k/a The Place at  
Pepper Hill, LLC and Shiloh Management,  
Company, Inc. .... Defendants,

Of whom Shiloh Management, Company,  
Inc., Pepper Hill Nursing & Rehab Center,  
LLC d/b/a Pepper Hill Nursing & Rehab  
Center, ..... Appellants.

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**RETURN TO PETITION FOR REHEARING**

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As requested by the Court’s February 29, 2024, letter, Respondent Thelma Rudd, in her role as personal representative of her husband Charles S. Rudd’s Estate (“Estate”) respectfully submits her return to Appellants Pepper Hill Nursing & Rehab Center, LLC d/b/a Pepper Hill Nursing & Rehab Center (“Facility”), The Place at Pepper Hill, LLC, Pepper Hill Senior Properties, LLC n/k/a The Place at Pepper Hill, LLC and Shiloh Management, Company, Inc.’s (collectively “Pepper Hill”) Petition for Rehearing. The Petition should be denied in full because (1) its third-party beneficiary argument mis-cites the record; (2) its agency argument fails to address a core requirement for proving any form of agency relationship; and (3) its estoppel argument ignores binding precedent in favor of outdated, unreported, and inapplicable federal district court orders.

**1. The Court correctly rejected Pepper Hill’s third-party beneficiary argument.**

Pepper Hill’s attempt to address the Court’s preservation concerns does not correctly cite the record. Pepper Hill claims its third-party beneficiary argument was preserved based on pages 136-137 of the Record on Appeal. (Pet. at 2). However, those pages are not even a Pepper Hill filing. Instead, Pepper Hill has cited Ms. Rudd’s memorandum in opposition to the motion to compel arbitration. Nothing in that document could show Pepper Hill properly raised and ruled the third-party beneficiary argument on which it relies on appeal. Perhaps, Pepper Hill intended to cite page 192 of the record on this point. However, the argument raised there is plainly not for a third-party beneficiary. There is a reference on this page to “direct benefits” and the South Carolina Supreme Court’s ruling in Wilson v. Willis, 426 S.C. 326, 827 S.E.2d 167 (2019). Wilson is not a third-party beneficiary case and is, at best, ambivalent as to whether the doctrine can be used to force arbitration on nonsignatories. Id. at 338-39 n. 7, 827 S.E.2d at 174 n. 7 (citing Comer v. Micor, Inc., 436 F.3d 1098, 1102 (9th Cir. 2006)). “Direct benefits” references a form of equitable

estoppel some courts apply in the arbitration context. This language is insufficient to preserve a third-party beneficiary argument. Plus, as discussed below, Wilson does not aid Pepper Hill's argument on estoppel either. 426 S.C. at 345, 827 S.E.2d at 177 (finding equitable estoppel "should be used sparingly" and nonsignatories "should not be compelled to arbitrate their claims based on equitable estoppel").

Pepper Hill's third-party beneficiary argument is equally flawed on the merits. This Court has rejected previous attempts to use the third-party beneficiary doctrine in this manner. Thompson v. Pruitt Corp., 416 S.C. 43, 56-58, 784 S.E.2d 679, 687 (Ct. App. 2016); see also Hodge v. Unihealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 574, 813 S.E.2d 292, 308 (Ct. App. 2018) (noting nursing home conceded that Thompson "extinguished their third-party beneficiary argument").<sup>1</sup> Consistent with Thompson, there are three reasons why this Court should affirm the circuit court's order refusing Appellants' third-party beneficiary argument: (1) there can be no third-party beneficiary in the absence of a valid contract and there is no valid contract concerning arbitration; (2) Mr. Rudd was not a third-party beneficiary to the Admission Agreement's arbitration provision because that provision did not intend to benefit her *as a third-party*; and (3) Mr. Rudd never consented to arbitration and a non-consenting person cannot be bound to arbitrate.

First, Pepper Hill's third-party beneficiary argument must fail because there can be no third-party beneficiary in the absence of a valid contract. Thompson, 416 S.C. at 57, 784 S.E.2d at 687 (citing Dickerson, 995 A.2d at 742). Since Mr. Rudd did not sign the Admission Agreement

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<sup>1</sup> Again, Pepper Hill overlooks this South Carolina precedent in favor of an outdated, non-precedential ruling in THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert, Civil Action NO. 7:13-cv-2929-BHH, 2014 WL 6863550 (D.S.C. Oct. 31, 2014). This district court order has been displaced by Thompson/Hodge's rejection of the third-party beneficiary theory in the nursing home context and the substantial doubt Willis casts on whether the theory can ever be used to compel a nonsignatory to arbitration.

and Ms. Rudd lacked authority to assent to it (or at least its arbitration provision) on Mr. Rudd's behalf, there was no valid contract to arbitrate to which Mr. Rudd could be a third-party beneficiary. Second, the third-party beneficiary doctrine does not apply to the Admission Agreement's because the contract's intent was not to benefit Mr. Rudd as a third-party. The third-party beneficiary doctrine is an exception to the rule barring enforcement of a contract by or against a non-party. Windsor Green Owners Ass'n v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004). The exception only applies if the contracting parties intended to create a direct benefit in a "third person." Id. The purported parties' intent is a material element of the third-party beneficiary doctrine. The parties must recognize the attempted beneficiary as a non-party and intend to benefit that person as a non-party. To determine Pepper Hill's intent for the Admission Agreement, this court must look beyond Pepper Hill's current statements to the moment when the purported contract was formed. Laser Supply & Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009).

When the Admission Agreement was presented to Ms. Rudd, Pepper Hill intended to make Mr. Rudd a party. For the many reasons discussed above, Pepper Hill failed to effectuate this intent by obtaining the assent of Mr. Rudd or one authorized to act on his behalf. Pepper Hill only seeks to deem Mr. Rudd a third-party because their efforts to label him a party do not comply with South Carolina contract law. The letter and spirit of that law would be severely undermined if Pepper Hill succeed. Pepper Hill's intent to make Mr. Rudd a party to the contract means it cannot prove a material element required to bind the Estate to the agreement as a third-party beneficiary. The circuit court's rejection of Pepper Hill's third-party beneficiary argument is supported by Thompson and by rulings from other jurisdictions. 416 S.C. at 57, 784 S.E.2d at 687; see also Dickerson, 995 A.2d at 742 n. 21 (rejecting nursing home's third-party beneficiary argument when

combined with home’s attempt to bind resident to contract as party and finding “inconsistency belies [home’s] arguments”) Barbee v. Kindred Healthcare Operating, Inc., No. W2007-00517-COA-R3-CV, 2008 WL 4615858 at \*10 n. 3 (Tenn. App. Oct. 20, 2008).

Third, Pepper Hill’s third-party beneficiary argument is flawed because it would force a person to enter arbitration for claims for which he never consented to arbitrate. South Carolina contract law generally precludes enforcement of a contract’s terms against a person failing to manifest assent. Laser Supply & Servs., Inc., 382 S.C. at 334, 676 S.E.2d at 143-44. More specifically, Thompson holds that the third-party beneficiary cannot be used to force arbitration on a nursing home resident who did not assent to it. 416 S.C. at 57, 784 S.E.2d at 687 (citing Drury v. Assisted Living Concepts, Inc., 262 P.3d 1162, 1166 n. 5 (Or. App. 2011) (“[U]nless the third-party beneficiary in some way assents to a contract containing an arbitration clause, the contracting parties have waived the beneficiary’s right to a jury trial without her consent”).

In sum, Pepper Hill may not rely on the third-party beneficiary theory to require arbitration for the Estate’s claims because the underlying contract (i.e. Admission Agreement) was not a valid arbitration contract. Moreover, as recognized in Thompson, labeling Mr. Rudd a third-party beneficiary to the Admission Agreement is inconsistent with its stated intent and would improperly bypass the requirement that a person bound to arbitrate must assent to arbitration.

**2. The Court correctly rejected Pepper Hill’s agency argument.**

The Court correctly ruled Pepper Hill failed to meet its burden to prove an agency relationship between Charles Rudd (as purported principal) and Thelma Rudd (as purported agent) under either South Carolina’s Adult Health Care Consent Act (S.C. Code Ann. § 44-66-10 to -80) (“AHCCA”) or common law principles governing agency. Rudd v. Pepper Hill Nursing & Rehab Ctr., LLC, Unpublished Op. No. 2024-UP-040 (S.C. Ct. App. filed Jan. 31, 2024), at 2-3. The

Petition does not challenge the AHCCA ruling and its common law agency argument continues the precise failing identified in the Court’s opinion. Id. (citing Hodge, 422 S.C. at 566, 813 S.E.2d at 304 (“[A]n agency may not be established solely by the declarations and conduct of an alleged agent”). Pepper Hill continues to argue Thelma was Charles’s agent based on alleged representations Thelma made to the Facility. (Pet. at 3) (citing “Ms. Rudd’s own signed representations contained in the arbitration agreement”). Just as important is what the Petition fails to address. The Court correctly concluded Pepper Hill could not prove agency because it could not even show Charles was even present when the contract in question was presented to Thelma. Rudd, Unpublished Op. No. 2024-UP-040, at 3. The Petition points to nothing in the record to address this fatal flaw in its agency theory.

The other supposed evidence of agency Pepper Hill cites is insufficient under precedent applying agency principles both generally and specifically to nursing home arbitration cases. To prove apparent authority, a party must show (1) purported principal consciously or impliedly represented another to be his agent; (2) reliance on the representation by a third party; and (3) change in position by third party in reliance on the representation. Cowburn, 366 S.C. at 39-40, 619 S.E.2d at 448. For apparent authority to exist, “[e]ither 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 belief.” R & G Constr., Inc. v. Lowcountry Reg’l Transp. Auth., 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000).

Multiple South Carolina appellate opinions have rejected agency arguments to enforce arbitration contracts signed by a nursing home resident’s family member, and these cases show the flaws in Pepper Hill’s arguments. Most of the conduct Pepper Hill cites as evidence of an agency relationship were things Ms. Rudd allegedly did. Appellants’ Br. at 11-12. Pepper Hill asks

the court to imply an agency relationship from the fact that Ms. Rudd accompanied Mr. Rudd to the Facility, and the fact that Ms. Rudd signed the Admission Agreement on a line designated for a “representative.” Appellants Br. at 11.<sup>2</sup> However, South Carolina courts have consistently held that an agency relationship may not be created solely from the acts of the purported agent. Hodge, 422 S.C. at 566, 813 S.E.2d at 304 (citing Cowburn, 366 S.C. at 39-40, 619 S.E.2d at 448). Hodge also specifically held that signing a contract as a nursing home resident’s “authorized representative” does not create an agency relationship. 422 S.C. at 571, 813 S.E.2d at 307 (quoting Ashburn Health Care Ctr., Inc. v. Poole, 648 S.E.2d 430, 433 (Ga. App. 2007)).

Pepper Hill points to no actions taken by Mr. Rudd that would support actual agency or apparent authority. Pepper Hill relies mostly on the notion that Mr. Rudd “passively permitted” Ms. Rudd to act on his behalf in agreeing to the Admission Agreement’s arbitration provision. Appellants’ Br. at 11-12. But, Pepper Hill offers no evidence to support that conclusion. Pepper Hill did not even offer an affidavit from the employee who presented the Admission Agreement for signature. There is no evidence to even establish Mr. Rudd was present at that time. A nursing home resident who is absent when an arbitration contract is presented cannot confer apparent authority on a family member to sign it on his behalf. Hodge, 422 S.C. at 571, 813 S.E.2d at (quoting Poole, 648 S.E.2d at 433); Thompson, 416 S.C. at 48, 784 S.E.2d at 682 (noting resident was not present at nursing home when contract was presented to her son).

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<sup>2</sup> Pepper Hill also argues Ms. Rudd’s status as Mr. Rudd’s agent for purposes of arbitration should be inferred from the fact that she now serves as the Estate’s personal representative. (Pet. at 3). However, the role of personal representative, which arose only after Mr. Rudd’s death, serves distinct, limited roles in probate and to bring legal claims on the Estate’s behalf. S.C. Code Ann. § 15-51-20; § 62-3-703. Ms. Rudd’s current status as personal representative does nothing to suggest Ms. Rudd was Mr. Rudd’s agent for purposes of the disputed arbitration contract. Thompson, 416 S.C. at 61, 784 S.E.2d at 689 (quoting Dickerson v. Longoria, 995 A.2d 721, 743 (Md. 2010) (finding fact that signer of arbitration contract is now decedent’s personal representative “is of no moment” and will not be held against the estate)).

Thompson also rejected a similar “passive permission” argument for reasons that expose the inconsistency of Pepper Hill’s position. 416 S.C. at 55, 784 S.E.2d at 686. A nursing home resident cannot even passively present a family member as his/her agent if the resident is either not present when the disputed contract was signed or lacked the mental capacity to appreciate his/her surroundings. Id. Here, Pepper Hill argues Mr. Rudd’s faculties were so diminished that the AHCCA applied to his admission while at the same time making an agency argument that would be precluded by Mr. Rudd’s alleged incapacity. Moreover, the agency argument Pepper Hill raises is far weaker than the one rejected in Thompson. There, the nursing home presented deposition testimony showing a son who signed his mother’s admission documents had been handling the mother’s finances for years. Thompson, 416 S.C. at 55, 784 S.E.2d at 686. However, not even an established history of delegating authority for medical or financial decisions was sufficient to create an agency relationship for an arbitration contract. Id. (finding authority conveyed for financial or health care decisions “does not encompass executing an agreement to resolve legal claims by arbitration). Here, Pepper Hill offers no evidence to show a history of Ms. Rudd acting in Mr. Rudd’s stead and nothing to suggest Mr. Rudd appointed or represented Ms. Rudd as his agent to make arbitration-related decisions.

**3. The Court properly rejected Pepper Hill’s estoppel argument.**

As the Court correctly determined, appellate decisions from just the last five years reject Pepper Hill’s argument that the Estate is estopped from opposing arbitration. Rudd, Unpublished Op. No. 2024-UP-040, at 4 (citing Wilson and Weaver v. Brookdale Senior Living, Inc., 431 S.C. 223, 847 S.E.2d 223 (Ct. App. 2020)). The Petition makes the precise argument Wilson and Weaver categorically rejected. Pepper Hill contends the “direct benefits” form of equitable

estoppel must apply here because Charles would not have been in the Facility or under Pepper Hill's care absent a contract. (Pet. at 3-4).

When rejecting a "direct benefits" estoppel in the context of nursing home arbitration, this Court has held that the party asserting estoppel must make three distinction showings. Weaver, 431 S.C. at 230, 847 S.E.2d at 272. Pepper Hill would have to show (1) Charles's claim arose from a contractual relationship; (2) Charles "exploited" other parts of the contract by reaping its benefits; and (3) his claim "relies solely on the contract terms to impose liability." Id. (citing Wilson, 426 S.C. at 340-44, 827 S.E.2d at 175-77). Applying these elements, Weaver found a nursing home's resident does not gain a "direct benefit" for estoppel purposes simply by accepting the services obtained upon admission to the home. 431 S.C. at 230-31, 847 S.E.2d at 272-73.

The claims in this case also do not "arise from" the Admission Agreement. There is no breach of contract claim, and a contract is not referenced at all in the Complaint. Id. at 231, 847 S.E.2d at 272 (finding "arising from" requirement is not met just because claim would not exist "but for" a contract's existence). Instead, the Estate grounds its claims in duties arising from common law with no reference to any contract. Id. at 232, 847 S.E.2d at 273 (finding nursing home resident's claims "rely on general tort duties . . . not any provision of the residency agreement"). Under those circumstances, estoppel cannot apply because the claims do not "arise from" a contract and certainly do not "rely solely" on a contract's terms. Id. at 232-33, 847 S.E.2d at 273 (citing Hodge as further support to show "direct benefit" estoppel does not apply to nursing home resident's common law tort claim). Pepper Hill points to nothing to distinguish Wilson and Weaver or to address their holdings which forecloses the estoppel argument.

## CONCLUSION

Based on the arguments stated above and those in her earlier briefing. Ms. Rudd respectfully requests the Court deny Pepper Hill's petition for rehearing.

Respectfully submitted,

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March 8, 2024


**T. Rudd v. Pepper Hill Nursing & Rehab Ctr., LLC et al. (Appellate Case No. 2020-001441)**

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Fri 3/8/2024 12:31 PM

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 1 attachments (117 KB)

C. Rudd--Return to Pet for Reharing FINAL PDF.pdf;

**Counsel:**

I am attaching the Return to Petition for Rehearing that is being electronically filed today with the South Carolina Court of Appeals. Pursuant to Rule 262(c)(3), SCACR and Section (d)(1) of the South Carolina Supreme Court's August 25, 2021, order (Order No. 2021-08-25-02), please consider this email as service for the Return.

Thanks,

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