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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2022-CP-42-02595
Appellate Case No. 2023-001371

Steven McCarson, as Personal Representative of the Estate of
Louie Arches.....Respondent,

v.

THI of South Carolina at Magnolia Manor-Inman, LLC
d/b/a Magnolia Manor-Inman, THI of South Carolina at Inman, LLC,
THI of South Carolina, LLC, Hunt Valley Holdings, LLC,
Fundamental Administrative Services, LLC,
Fundamental Clinical and Operational Services, LLC,
THI of Baltimore, LLC, and James H. Mack.....Appellants.

INITIAL BRIEF OF RESPONDENT

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INTRODUCTION

At its core, this Appeal presents a narrow issue that this Court, and the Supreme Court of South Carolina, has conclusively determined on at least twelve occasions in the recent past by the undersigned's last count: whether Appellants may bind a nonsignatory resident, or his estate, to an arbitration agreement when there is ambiguity as to whether the Appellants' arbitration agreement and a separate facility admission agreement ever merged. In fact, in January of 2023 in a reported Opinion this Court analyzed the exact same admission and arbitration agreements that are now presented to the Court by Appellants and held that the subject agreements did not merge and that the personal representative of a resident's estate would not be precluded by estoppel from denying the validity of the arbitration agreement if it was not signed by the decedent or a properly authorized representative. *See Estate of Solesbee by Bayne v. Fundamental Clinical and Operational Servs., LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023).

The Court's, and the Supreme Court's, prior decisions have clearly set forth that in order for a healthcare facility to rely on estoppel doctrines to prevent an estate from arguing that it would not be bound by an arbitration agreement signed by a third party, the admission and arbitration agreements must avoid any ambiguity in their terms that would indicate an intention contrary to merger. If a healthcare facility purposefully muddies the water and makes such terms unclear, presumably so that it may conveniently argue, depending on the circumstances, that the agreements are alternatively separate or merged, it has created an ambiguity that

must be construed against the healthcare facility as the drafter of the documents. This exact scenario is presented by the subject agreements, and that is exactly why this Court has previously looked at these exact same agreements on numerous occasions and held that they do not merge, and that a resident (or his estate) as a nonsignatory of the agreements is not estopped from denying the arbitration agreement's validity. For these and the following reasons, the Circuit Court's Orders should be affirmed.

COUNTERSTATEMENT OF THE CASE

This action was commenced on July 14, 2022, by filing a Summons and Complaint in the Spartanburg County Court of Common Pleas. (*See generally* Compl.). Respondent Steven McCarson, as Personal Representative of the Estate of Louie Arches ("the Estate"), alleged wrongful death and survival claims against Appellants THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman, THI of South Carolina at Inman, LLC, THI of South Carolina, LLC, Hunt Valley Holdings, LLC, Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, THI of Baltimore, LLC, and James H. Mack ("the Facility") as a result of the care and treatment provided to the decedent, Mr. Louie Arches, while he was a resident at the Facility.[1] (*Id.*). The Estate properly complied with the Notice of Intent and affidavit requirements of S.C. Code Ann. §§ 15-79-125 and 15-36-100 prior to filing suit.[2] The Facility Defendants

[1] McCarson is Arches' grandson. (Pl.'s Mem. in Opp. to Mot. to Compel 2).
[2] *McCarson v. THI of South Carolina at Magnolia Manor-Inman LLC et al*, Case No. 2022-NI-42-00005.

individually answered the Complaint on August 22, 2022, and August 24, 2022, and generally denied all allegations pertaining to any liability for the decedent's treatment while he was in the Facility's care. (*See generally* Answers). The Facility Defendants raised as an affirmative defense the potential arbitrability of this action and reserved the right to file a motion to dismiss and compel arbitration.[3] (Answers ¶¶ 8, 10, 11).

On February 3, 2023, Appellant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman ("THISC") filed a Motion to Compel Arbitration, arguing that a valid and binding arbitration agreement had been entered between the parties. (Mot. to Compel at 1-2). THISC contended that the Federal Arbitration Act ("FAA"), as opposed to the South Carolina Uniform Arbitration Act, applied to the arbitration agreement.[4] (*Id.*). THISC also requested that the Circuit Court stay all discovery, pretrial motions practice, and any requirements to file any responsive pleadings until its Motion could be resolved. (*Id.*). The remaining Facility Defendants filed Motions to Stay the proceedings pending THISC's Motion to Compel Arbitration the same day.

[3] Appellant THI of Baltimore, Inc. did not raise the arbitrability of this action as an affirmative defense and instead denied that it has ever been a licensed operator of a skilled nursing facility. (THI of Baltimore Answer ¶ 6).

[4] The Circuit Court did not specifically find in its July 10, 2023 Order that the agreements involve or affect interstate commerce and are thus governed by the FAA. (July 10, 2023 Order). Regardless, even if the FAA did govern the agreement, it does not give "the party seeking arbitration a leg up" in determining whether arbitration should be compelled. *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 229, 847 S.E.2d 268, 271 (Ct. App. 2020).

The Facility's Motions were set for hearing by the Circuit Court on June 1, 2023. The Facility Defendants filed supporting memoranda, with the arbitration agreement and admission agreement attached as exhibits to the Motion to Compel Arbitration, further arguing that the FAA governed the arbitration agreement, that arbitration agreements are favored and under state law are required to be placed on equal footing with all other contracts, that the arbitration agreement was not facially invalid or unconscionable, that the Estate's claims were within the scope of the arbitration agreement, and that the proceedings were subject to a stay pending the outcome of the Motion to Compel. (THISC's Mem. in Supp. of Mot. to Compel 4-10; *see generally* Defs.' Mots. to Stay). In the alternative, THISC argued that even if the arbitration agreement was not valid, that the arbitration agreement and admission agreement merged such that it would be inequitable for the Estate to be permitted to argue that the arbitration agreement was not valid. (THISC's Mem. in Supp. of Mot. to Compel 11-32). Lastly, THISC requested that the Circuit Court permit it to conduct limited discovery on the issue of agency if the Court were inclined to deny its Motion on the issue of agency. (*Id.* at 32-35).

The Estate submitted a memorandum in opposition to THISC's Motion, arguing in particular that in McCarson's individual capacity he did not have authority under any agency theory or other source of authority to enter the arbitration agreement at the time it was signed, that an executed durable financial power of attorney was not effective at the time the arbitration agreement was signed, that an executed health care power did not grant him authority to enter the

arbitration agreement, that the arbitration agreement and admission agreements were separate agreements that did not merge, that the Estate was not estopped from denying the validity of the arbitration agreement under any theory of estoppel, that the arbitration agreement did not reach the wrongful death claims of the wrongful death beneficiaries, and that additional discovery was not necessary as the power of attorney was facially invalid, no other source of authority existed, and S.C. Code Ann. § 15-48-20 mandated that the Circuit Court was required to summarily proceed to the determination of whether arbitration was appropriate. (*See generally* Pl.'s Mem. in Opp. to Mot. to Compel).

The Circuit Court denied the Facility's Motions by way of a formal Order filed July 10, 2023.[5] (July 10, 2023 Order). The Order finds that arbitration agreements are unenforceable when a family member signs an arbitration agreement near the time of admission to a health care facility and does not have authority to do so, that estoppel and merger do not apply against a non-signatory when the admission and arbitration agreements contain language recognizing the separateness of the agreements, that McCarson would not have had authority to enter the arbitration agreement through the health care power of attorney, that the wrongful death claims did not belong to the Estate, and that the Court was required to summarily procced to a determination on the issue of arbitration under South Carolina law. (*See generally* July 10, 2023 Order).

[5] The Motions to Stay were technically mooted once the Circuit Court correctly denied the Motion to Compel Arbitration.

Notably, the Circuit Court did not rule on whether the FAA actually applied to the subject arbitration agreement. The Facility filed a Motion for Reconsideration on July 20, 2023. (Defs.' Mot. for Reconsideration). In its Motion, the Facility argued that the agreements merged, that a theory of direct benefits estoppel would preclude the Estate from denying that McCarson had authority to enter the arbitration agreement, that the July 10, 2023 Order violated the FAA's "equal footing" rule, that the arbitration agreement would be enforceable against the wrongful death claims, that discovery into the nature of the decedent and McCarson's relationship should have been permitted to determine if there was any evidence supporting an actual or apparent agency theory, and that the FAA, and not S.C. Code § 15-48-20, governed the arbitration agreement. (*Id.* at 4-30). The Facility did not argue that McCarson did in fact have authority to execute the arbitration agreement under any theory, and solely based its arguments on the issues of merger, estoppel, whether the wrongful death claims were precluded from arbitration, and whether further discovery was necessary prior to a ruling on its Motion.

On July 24, 2023, the Estate filed a memorandum in opposition to the Facility's Motion for Reconsideration, arguing that the agreements did not merge, that even if they did merge the Estate would still not be precluded from arguing that McCarson did not have authority under a direct benefits theory, that the wrongful death claim does not belong to the Estate, that discovery was not warranted given the circumstances, and that the Circuit Court was free to apply S.C. Code Ann. § 15-48-20 to the arbitration agreement because the FAA did not apply. (*See generally* Pl.'s

Mem. in Opp. to Mot. for Reconsideration). On July 27, 2023, the Circuit Court denied the Facility's Motion for Reconsideration. (July 27, 2023 Order). This Appeal followed. (Not. of Appeal).

STANDARD OF REVIEW

An appeal from an order denying a motion to compel arbitration is subject to de novo review. *Solesbee*, 438 S.C. at 645, 885 S.E.2d at 147. "Whether an arbitration agreement may be enforced against a nonsignatory to the agreement is a matter subject to de novo review by an appellate court" with no presumption in favor of arbitration. *Wilson v. Willis*, 426 S.C. 326, 335, 337, 827 S.E.2d 167, 172-73 (2019). Under de novo review, a circuit court's underlying factual findings will not be reversed on appeal if any evidence reasonably supports those findings. *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 228, 847 S.E.2d 268, 271 (Ct. App. 2020).

ARGUMENT

The Circuit Court's July 10, 2023 and July 27, 2023 Orders should be affirmed by the Court because they do not contain any clear legal errors, and the factual conclusions of the Circuit Court are reasonably supported by the evidence in the record. Under this Court's prior rulings, the exact same arbitration agreement and admission agreement at issue have been found by this Court not to merge, and that a nonsignatory would not be precluded from denying the validity of the arbitration agreement. And since the Facility has not contested the Circuit Court's implicit finding that McCarson did not have authority, either by way of the Adult Health Care Consent Act, a valid power of attorney, or common law agency principles, to enter the

arbitration agreement, it is now the law of the case, and the Facility can only argue that the Estate should have been estopped from opposing arbitration. *See Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case.").

The Facility also argues that the wrongful death claims are derivative in nature and belong to the Estate, that the Circuit Court erred in denying its request to conduct limited discovery on the issue of agency, and that the FAA precluded the Circuit Court from relying on S.C. Code Ann. § 15-48-20. As to the first argument, it is not necessary for the Court to consider the issue since resolution of the merger/estoppel issue is dispositive. *See Hagood v. Sommerville*, 362 S.C. 191, 199, 607 S.E.2d 707, 711 (2005) (declining to address an issue when the resolution of a prior issue is dispositive). As to the second, the Facility has mooted its own argument by not contesting the Circuit Court's implicit finding that McCarson did not have authority to enter the arbitration agreement. If the remaining parts of the Circuit Court's Orders were reversed, the Circuit Court's conclusion of no authority would still be valid, and there would be no need for discovery on the issue. And as to the third, South Carolina law applies to the initial determination of whether an arbitration agreement exists, and since no valid, binding arbitration exists, the FAA does not apply. *See MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 213, 659 S.E.2d 209, 211 (Ct. App. 2008).

The case law is clear that wrongful death claims do not belong to the decedent's estate, and since there is no evidence in the form of an affidavit or recorded power of

attorney substantiating that McCarson was the decedent's agent at the time the arbitration agreement was signed, further discovery in the form of a deposition of McCarson would have been insufficient to prove agency.[6] *See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 579, 813 S.E.2d 292, 311 (Ct. App. 2018) (finding that discovery would be futile where the only discoverable evidence on the issue of agency would have been the agent's testimony). For these and the following reasons, the Circuit Court's Orders denying the Facility's motions should be affirmed.

I. Statement of Facts.

On April 26, 2019, Louie Arches was admitted to Defendants' Facility, Magnolia Manor-Inman. (Compl. ¶ 10; Trahant Aff. ¶ 4). At the time of his admission, Arches had short- and long-term memory loss, impaired decision making, an inability to communicate, and a documented history of Alzheimer's disease and dementia. (Pl.'s Mem. in Opp. to Mot. to Compel Ex. C; Trahant Aff. ¶¶ 4-5). Upon admission, Arches also suffered from balance deficits and an unsteady gait. (*Id.*). While in the Facility's care, Arches fell at least six times in a seven-month period, resulting in injuries to his eye and forehead, amongst other unknown, undocumented injuries. (Compl. ¶¶ 12-16; Trahant Aff. ¶¶ 6-11). Arches passed away on May 18, 2020. (Compl. ¶ 17; Trahant Aff. ¶ 12).

[6] The undisputed evidence before the Circuit Court demonstrated that Arches did not have capacity to enter the arbitration agreement or admission agreement, and under South Carolina law a durable power of attorney must be recorded to be effective upon incapacitation. S.C. Code Ann. § 62-8-109; (Pl.'s Mem. in Opp. to Mot. to Compel Exh. C).

Arches executed a South Carolina health care power of attorney designating McCarson as his health care agent on April 24, 2019, but it was never recorded. (Pl.'s Mem. in Opp. to Mot. to Compel, Exh. B). A general durable financial power of attorney designating McCarson as his agent for the purposes of financial decisions was executed by Arches on April 24, 2019 as well, but it was not recorded until July 29, 2019, over two months after McCarson signed the Facility's arbitration agreement in his individual capacity. (Pl.'s Mem. in Opp. to Mot. to Compel, Exh. A; Def.'s Mem. in Supp. of Mot. to Compel, Exh. 2). The health care power of attorney grants McCarson the authority to consent to medical care on Arches' behalf, to authorize his admission to a medical facility, and to take other actions *necessary* to making decisions concerning Arches' health care. (*Id.*). It does not contain a broad grant of authority empowering McCarson to do anything Arches may have done in situations concerning the provision of health care to Arches.[7] The Facility has not appealed the Circuit Court's implicit finding that there was no evidence of any actual or apparent agency relationship between McCarson and Arches, it has not appealed the Circuit Court's implicit finding that the health care power of attorney and general durable financial power of attorney were insufficient or ineffective to grant authority to McCarson to enter an arbitration agreement on behalf of Arches, and it has not

[7] The Facility has never contested the Estate's position that the health care power of attorney was ineffective as a grant of authority to waive the Estate's right to a jury trial.

appealed the Circuit Court's implicit finding that McCarson had no authority to execute the arbitration agreement, so these finding are the law of the case.[8]

McCarson signed the Facility's arbitration agreement and admission agreement on May 6, 2019. (Def.'s Mem. in Supp. of Mot. to Compel, Exhs. 1 & 2). The admission agreement contains provisions regarding the Facility's obligations, Arches' obligations, and a financial agreement, as well as provisions regarding the termination of the admission agreement, governing law, and an entirety of agreement provision. (*Id.*). The admission agreement has its own signature page, is separately entitled "Admission Agreement – South Carolina", and is separately paginated as pages one through 12. (*Id.*).

The arbitration agreement sets forth that all claims arising out of or relating to the Facility's admission agreement are to be resolved by arbitration and provides the governing law for the arbitration agreement. The arbitration agreement has its own separate signature page, is entitled "Facility – Resident/Representative Arbitration Agreement", and is paginated as "Page 1 of 1". (*Id.*). The Facility has acknowledged that the arbitration agreement is optional, and it contains no provision for medical, nursing, or health care services to be provided to residents, nor does it require any financial commitment to pay for such services. Since it is undisputed that McCarson did not have authority to enter the arbitration agreement, the Court's

[8] The authority conveyed by a principal to an agent to make health care decisions or handle finances does not encompass executing an agreement to arbitrate. *Hodge*, 422 S.C. at 572, 813 S.E.2d at 307.

analysis is confined to whether the Estate should have been precluded from denying the validity of the arbitration agreement under a merger/estoppel theory.

II. The arbitration agreement and admission agreement did not merge because they are governed by separate bodies of law, the contract terms recognize them as separate documents, they have separate procedures for termination, they are separately paginated and have their own signature pages, and the arbitration agreement was optional and not a precondition to admission.

Because arbitration exists solely by agreement of the parties, a presumption against arbitration arises where the party resisting arbitration (the Estate) is a nonsignatory to the written agreement to arbitrate.[9] *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173. State law provides when an arbitration agreement may be enforced against a nonsignatory, and South Carolina permits a nonsignatory to be bound by an arbitration agreement under several theories: incorporation by reference, assumption, agency, veil piercing/alter ego, and estoppel. *Solesbee*, 438 S.C. at 647, 885 S.E.2d at 148. Only two of these theories were at play before the Circuit Court, and the Facility has declined to appeal any issues concerning agency. Therefore, the Facility may only prevail if it can show there is no evidence reasonably supporting that the Estate should not have been estopped from denying the validity of the arbitration agreement.

A nonsignatory may be estopped from denying the validity of an arbitration agreement when it receives a direct benefit from a contract containing an arbitration

[9] McCarson was acting in his individual capacity, and not in his capacity as personal representative of Arches' Estate, at the time he entered the arbitration agreement. *See Thompson v. Pruitt Corp.*, 416 S.C. 43, 61, 784 S.E.2d 679, 689 (Ct. App. 2016) (recognizing the concept that a person may act separately in individual and representative capacities).

clause. *Solesbee*, 438 S.C. at 647, 885 S.E.2d at 148. It is undisputed in this case that the Facility's arbitration agreement was not a clause in its admission agreement, and neither McCarson nor the Estate have received any direct benefit from the arbitration agreement itself. The Facility thus argues that under a theory of merger, the arbitration agreement and the admission agreement became a unified contract once they were executed, and since Arches benefited from the terms of the admission agreement, his Estate is precluded from denying the validity of the arbitration agreement. However, the language and formatting of the agreements serve as evidence that the two agreements were intended to be separate documents, and at minimum, create an ambiguity as to merger that must be construed against the Facility.

> In South Carolina, "[t]he 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.

Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014) (emphasis added). Here, the terms of the agreements indicate an intent that the doctrine of merger would not apply to the agreements, and at minimum create an ambiguity as to merger. *See id.* at 355-56, 755 S.E.2d at 455 (stating that ambiguity as to merger must be construed against the drafter). The Facility makes an argument that there is a presumption of merger when documents are executed at the same time and for the same purpose, and that any ambiguity in the documents demonstrative

of the drafter's intent therefore cannot be construed against the drafter.[10] This makes little sense and misrepresents the language of *Coleman*, as the rule makes clear that there is an exception to any presumption of merger when *anything* exists which would indicate a contrary intention. Ambiguity in the documents as to whether they merge is clearly *something* which could indicate contrary intent and cautions against a finding of merger.

In determining whether a health care facility's admission and arbitration agreements merge, this Court has looked to the following factors: (1) whether the two agreements are governed by separate bodies of law, (2) whether the language of the agreements recognizes the two agreements as separate, (3) whether the agreements contain different terms regarding revocation and termination, (4) whether the agreements are separately paginated and have their own signature pages, and (5) whether both agreements are required for the execution of the other, or whether one agreement is optional. *Hodge*, 422 S.C. at 562-63, 813 S.E.2d at 302. This Court has previously analyzed the exact admission and arbitration agreements at issue here in *Solesbee* and found the agreements do not merge.

In *Solesbee*, the Court found that the admission agreement is governed by South Carolina law, while the arbitration agreement is governed by federal law. *Solesbee*, 438 S.C. at 648, 885 S.E.2d at 149. To be precise, the admission agreement is governed by "applicable Federal regulations" and South Carolina law. (Def.'s Mem. in Supp. of Mot. to Compel, Exh. 1). The arbitration agreement, on the other hand,

[10] To be clear, South Carolina law has never stated that there is any sort of evidentiary presumption of merger.

purports to be governed by the FAA's statutes and specifically not by South Carolina law.[11] Therefore, the two agreements are not governed by identical spheres of law: one is subject to state law and the federal code of regulations, while the other claims to be subject to the statutes contained within the FAA.

Second, the Court has previously found that the language of the agreements recognizes that they are separate: "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.'" *Solesbee*, 438 S.C. at 648-49, 885 S.E.2d at 149. This language mirrors that addressed in *Coleman* and *Thompson*, in which the Supreme Court and this Court found such language to be proof that an admission agreement was separate and did not merge with an arbitration agreement:

> The court then explained the evidence of the parties' intent to keep the two agreements separate by highlighting the admission agreement's recognition of the arbitration agreement as a separate document, i.e., "This Agreement, including all Exhibits hereto, and the Arbitration Agreement . . . ."

Thompson, 416 S.C. at 52, 784 S.E.2d at 685.

The Facility argues that the admission agreement's "Entire Agreement" clause contains language indicating that the agreements merged, specifically the statement that "[t]he undersigned further acknowledges that he/she has received and read the

[11] The Facility argues that both agreements are broadly governed by South Carolina and federal law; however, the arbitration agreement specifically states it will only be enforced under the FAA. To the extent that the arbitration agreement provides that the arbitration *proceedings* will be governed by the South Carolina Alternate Dispute Resolution/Mediation Rules, these Rules only govern the proceedings and are irrelevant to the enforcement of the arbitration agreement and the Court's determination of merger.

Admission Handbook and other Admissions materials and understand that these documents are made a part of this Agreement by reference **herein**." (Def.'s Mem. in Supp. of Mot. to Compel, Exh. 1 at 12) (emphasis added). Problematically, there is no reference to the arbitration agreement anywhere within the entire admission agreement, and even if there was, when viewed alongside the other details of the agreements, there remains an ambiguity as to merger at best that must be construed against the Facility.

The Facility wholly relies on dicta from prior decisions of this Court discussing that arbitration agreements can be part of admissions documentation to support that its arbitration agreement was an "Admissions material" that was incorporated into its admission agreement, but those decisions have no evidentiary value to this Appeal. Additionally, the "Entire Agreement" provision purports to incorporate the Admissions materials by reference within the admission agreement itself, but nowhere within the admission agreement, including the "Entire Agreement" provision, does it ever refer to the arbitration agreement. The "Entire Agreement" provision creates at best an ambiguity as to merger when taken in context of the totality of the circumstances.

Third, the Court has found that the arbitration agreement contains no language indicating that it may be revoked or terminated, but the admission agreement provides that a resident may terminate the admission agreement at any time. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149. Fourth, the Court has found that the agreements at issue are separately paginated and have their own signature

pages. *Id.* Since the arbitration and admission contracts have different pagination with different signature pages, and the arbitration contract is entitled "Arbitration Agreement" at the top of its first page, these factors further indicate the drafter's intent for the arbitration agreement to stand by itself as an independent contract, at least when it suits the Facility for it to do so. *See Thompson*, 416 S.C. at 53 n.1, 784 S.E.2d at 685 n.1 (noting that a separately labeled arbitration agreement indicates the drafter's intent for the agreement to stand by itself as an independent contract). Lastly, the Court has found that the arbitration agreement is optional and voluntary, while the admission agreement is required for admission. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149. The Facility does not dispute in this case that the arbitration agreement is voluntary and optional.

In this case, the text of the agreements constitutes "actual evidence" and at minimum creates ambiguity as to whether the agreements merged. The Facility misconstrues that there is a legal presumption of merger, and that the above-discussed factors are not sufficient to overcome this presumption. However, the language of *Coleman* never states that there is a presumption of merger in the context of health care facility arbitration agreements, or that one interpretation as to merger or the other is favored in any way, and in fact the Court's precedents state that *there is a presumption against arbitration, and therefore merger, when an arbitration agreement is attempted to be enforced against a nonsignatory*. *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173. Instead, *Coleman* dictates that the Court can assume merger only if the agreements were made at the same time, by the same parties, for the same

purpose, and in the course of the same transaction, so long as there is no language or other indications within the agreements of a contrary intent. The fact that there is ample evidence that the agreements were drafted in such a manner that they could, if necessary, be construed as separate contracts only strengthens the Circuit Court's reasoning and cautions against a finding of merger. The language, pagination, and formatting of the admission agreement and arbitration agreement evince an intent for the agreements to be considered separately, presumably when such a position would work to the advantage of the Facility.

The Facility argues that this evidence is not "actual evidence", and that the Circuit Court's and this Court's former decisions were based on speculation. This begs the question of what else was the Circuit Court supposed to rely on to determine if there was an intent contrary to merger that could be gleaned from the agreements. Additionally, if the above-discussed evidence is not indicative of a contrary intent, and the Facility intended the documents to merge, then why hasn't it made the arbitration agreement a provision of the admission agreement, or merged the two documents with an explicit merger provision? Why make separate documents to begin with? The answer to these questions is that for certain purposes, the Facility and other skilled nursing facilities want the agreements to be separate. The language of the agreements purposefully creates an ambiguity that must be construed against the drafter and required the Circuit Court to find that in this instance there was no merger of the documents. This Court has repeatedly reached the same conclusion based on the same language and agreements. The Court should adhere to stare

decisis and uphold its recent decision in *Solesbee* by affirming the Circuit Court's Orders.

III. Even if the arbitration agreement and admission agreement did merge, the Estate would not be estopped from denying the validity of the arbitration agreement.

Equitable estoppel is "a theory designed to prevent injustice, and it should be used sparingly." *Wilson*, 426 S.C. at 345, 827 S.E.2d at 177. Equitable estoppel is only available when the party seeking to invoke the doctrine "was misled to his injury". *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 601, 799 S.E.2d 912, 916 (2017). The Estate would have been estopped from denying its validity only if the Facility could have proven the elements of estoppel to the Circuit Court. The Facility failed to do so.

A nonsignatory such as the Estate is estopped from refusing to comply with an arbitration clause "when it receives a direct benefit from a contract containing an arbitration clause." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000)). The direct benefits test is frequently used to determine whether a theory of estoppel is applicable within the arbitration context. *Solesbee*, 438 S.C. at 647, 885 S.E.2d at 148. Here, the arbitration agreement is not a clause within the admission agreement, and the two agreements did not merge. However, even if the agreements did merge, the Facility cannot satisfy the remaining requirements of the direct benefits estoppel test.

Direct benefits estoppel precludes a nonsignatory from denying the validity of 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*. *Weaver*, 431 S.C. at 230, 847 S.E.2d at 272 (emphasis added). Thus, even if the arbitration agreement and admission agreement merged, the Facility would still have to demonstrate that the Estate's negligence claims rely solely on the terms of the admission agreement to impose liability in order to benefit from a direct benefits estoppel theory.

The Estate has not asserted a breach of contract claim, or a violation of contractual duties, and instead has brought its lawsuit under a negligence theory arising from common law duties. *See Wilson*, 426 S.C. at 342, 827 S.E.2d at 176 (noting that a claim may rely on general principles of South Carolina law in addition to or to the exclusion of contractual rights). The Estate does not claim that the Facility breached a contractual duty created by the admission agreement, but that it breached a duty owed by all healthcare practitioners, regardless of any contractual agreements, not to negligently care for their patients. Any contractual duties between the decedent and the Facility are irrelevant as to whether the Facility breached common law tort duties owed to the decedent. The Estate's claims rely on common law tort duties owed by the Facility to anyone in its care and not solely on any provision of the admission agreement and as such, the claims do not rely solely on the contract terms to impose liability, and the Estate is not precluded by direct benefits estoppel from denying the validity of the arbitration agreement. *Weaver*, 431 S.C. at 232-33, 847 S.E.2d at 273-74.

Simply because the alleged conduct would not have arisen in the absence of the admission agreement (and Arches' admission to the Facility) does not mean that direct benefits estoppel is implicated.

> When a claim depends on the contract's existence and cannot stand independently – that is, the alleged liability "arises solely from the contract or must be determined by reference to it" – equity prevents a person from avoiding the arbitration clause that was part of that agreement. But "when the substance of the claim arises from general obligations imposed by state law, including statutes, torts, and other common law duties, or federal law," direct benefits estoppel is not implicated even if the claim refers to or relates to the contract *or would not have arisen "but for" the contract's existence*.

Wilson, 426 S.C. at 343, 827 S.E.2d at 176 (quoting *Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 637 (Tex. 2018)). Therefore, just because Arches benefited from the admission agreement by receiving "every night's stay, every meal, every amenity/service provided, every instance of care/treatement" as argued by the Facility, it does not mean that his Estate's tort claim against the Facility depends on the agreement's existence. This lawsuit is predicated on the breach of common law duties owed by the Facility to Arches and would be justiciable even if McCarson did not have authority to enter the admission agreement or if it was accidentally never executed.

Despite the Facility's contentions, the analysis does not stop and start with whether Arches, and thus his Estate, received any benefits from the admission agreement. There are other requirements that must be met before direct benefits estoppel is implicated. Here, direct benefits estoppel is not applicable because the Estate's claims derive from common law duties and are not solely derived from

contractual claims. The Circuit Court also correctly found that since the documents did not merge the Estate was not estopped from denying the arbitration agreement's validity. The Court should affirm the Circuit Court's finding that direct benefits estoppel is inapplicable under the facts of this case.

The fact that McCarson signed the arbitration agreement in his individual capacity and is now a party to this action as a nonsignatory in his capacity as personal representative of the Estate does not bind the Estate to the arbitration agreement, at least as far as equitable estoppel is concerned. The Court addressed this concept in *Thompson v. Pruitt Corp.*:

> Respondent is attempting to use equitable estoppel against [the patient's] estate based on actions that [patient's daughter] took *in her individual capacity*. The fact that [the patient's daughter] is *now the personal representative for [the patient's] estate* is of no moment; we will not hold this circumstance against [the patient's] estate. Simply put, [the patient's] estate is the plaintiff in this case, and Respondent has alleged no conduct on the part of [the patient's] estate, that has affected Respondent's position. This, too, is a necessary element of an equitable estoppel defense.

Thompson, 416 S.C. 43, 61, 784 S.E.2d 679, 689 (Ct. App. 2016). Likewise, there is no evidence in the record, nor were any arguments made to the Circuit Court, demonstrating that some conduct on the part of the Estate or Arches affected the Facility's position in a detrimental manner, making estoppel inapplicable under these circumstances.

IV. The wrongful death beneficiaries' claims do not belong to the Estate.

The Court need not reach this issue as the previously addressed issues are dispositive to the resolution of this Appeal. However, even if a resident's estate was

estopped from denying the validity of a facility's arbitration agreement, or if the arbitration agreement was valid, the wrongful death claims of the statutory beneficiaries would not strictly as a matter of law be subject to arbitration. South Carolina law is very clear that wrongful death claims belong to the statutory beneficiaries and are distinct and separate from survival claims belonging to the estate. *Bennett v. Spartanburg Ry. Gas and Elec. Co.*, 97 S.C. 27, 81 S.E. 189, 190 (1914). Wrongful death actions are brought by the personal representative of the decedent directly for the benefit of the statutory beneficiaries and include pecuniary loss, mental shock and suffering, grief and sorrow, and loss of companionship: all losses suffered by the beneficiaries themselves. S.C. Code Ann. §§ 15-51-10, -20; *Self v. Goodrich*, 300 S.C. 349, 351, 387 S.E.2d 713, 714 (Ct. App. 1989). Survival actions, on the other hand, are separate claims for separate injuries, and belong to the estate, not the statutory beneficiaries. *See Bennett*, 97 S.C. at 27, 81 S.E. at 189-90.

The Facility argues that the wrongful death claims actually belong to the personal representative of an estate and not the statutory beneficiaries, and that the wrongful death claim is derivative of claims belonging to the decedent; ergo, a personal representative would have authority to waive jury trial rights belonging to all statutory beneficiaries. This argument mistakenly conflates the wrongful death claim and survival claims.[12] The history and development of South Carolina's wrongful death and survival statutes show that wrongful death is something entirely different from the survival of tort claims after an individual's death. South Carolina

[12] McCarson was obviously not personal representative of the Estate at the time he executed the arbitration agreement.

courts have long recognized that these are two disparate theories of liability with distinct origins, purposes, and results. *See Grainger v. Greenville, S. & A. Ry. Co.*, 101 S.C. 399, 85 S.E. 968, 969 (1915). The statutory scheme shows wrongful death and survival are distinct claims accruing at different times and are governed by different statutes of limitation. *See* S.C. Code Ann. § 15-3-560(6).

Wrongful death claims are often erroneously perceived as derivative of survival claims. In both types of claims, the decedent's personal representative is the named plaintiff. *Complete Auto Transit, Inc. v. Bass*, 229 S.C. 607, 612, 93 S.E.2d 912, 914 (1956). However, this fact alone is not determinative of any derivative nature the wrongful death claim may have. When asserting wrongful death and survival claims, a personal representative "function[s] under two separate and distinct trusteeships." *Id.* In other words, while it is the personal representative's name in the caption for a wrongful death claim, "it is clear . . . the real parties to the action were the beneficiaries." *Claussen v. Brothers*, 148 S.C. 1, 145 S.E. 539, 541 (1928).

In light of the history and structure of wrongful death and survival claims, a number of other reported opinions have rejected the notion that the former is derivative of the latter. As early as 1907, the South Carolina Supreme Court recognized a wrongful death action is not the survival of an action which the deceased had in his lifetime, but is a "new cause of action." *Osteen v. Southern Ry., Carolina Division*, 76 S.C. 368, 57 S.E. 196, 200 (1907). *Claussen* held a wrongful death claim is "not a continuation" of any claim the decedent had before her death. *Claussen*, 145 S.E. at 540. And contrary to the Facility's assertion that wrongful death claims belong

to the personal representative, *Claussen* states that "as has been pointed out, the party in whose favor the right of action in reality exists under Lord Campbell's Act **is not the personal representative of the deceased person**." *Id.* at 541 (emphasis added).

A wrongful death claim is "independent" of claims the decedent had during his life and "wholly different" than any other claim available at his death. *Wellman v. Bethea*, 243 F. 222 (E.D.S.C. 1917); *In re Mayo's Estate*, 60 S.C. 401, 38 S.E. 634, 638 (1901). Wrongful death and survival claims are "separable and distinct." *Keel v. Seaboard Air Line Ry.*, 122 S.C. 17, 114 S.E. 761, 762 (1922). In sum, the Facility would mislead the Court into finding that a wrongful death claim is derivative of survival claims and belongs to the personal representative, despite the fact that "[t]he object, scope, and measure of damages" is different for the two claims. *In re Mayo's Estate*, 38 S.E. at 638.

South Carolina's appellate courts have held wrongful death claims are "distinct," "independent," "separate," "wholly different," and "not a continuation" of claims a decedent could have filed during his lifetime. The Facility does not address any of the extensive South Carolina law showing wrongful death as a distinct, independent claim that solely belongs to the statutory beneficiaries. Instead, the Facility cites to federal case law to suggest South Carolina courts have already held that wrongful death is a derivative claim. None of the authorities the Facility cites support that conclusion and none squarely address the question now before the Court.

The Facility claims the Supreme Court of South Carolina addressed the arbitrability of wrongful death claims in *Dean v. Heritage Healthcare of Ridgeway,*

LLC, 408 S.C. 371, 759 S.E.2d 727 (2014). However, *Dean* addressed a very different issue related to forum selection clauses. *See id.* at 382, 759 S.E.2d at 733 (finding the "outcome of this appeal turns" on effect of arbitral forum provision). Plus, *Dean* did not even compel arbitration in the case before it. The Facility relies on a sentence in one of *Dean*'s footnotes but reads far too much into that sentence. *See id.* at 378 n.3, 759 S.E.2d at 731 n.3 ("We note that courts may not refuse to compel arbitration simply because a wrongful death claim is involved").

This footnote addressed an overly broad pronouncement in the appealed order suggesting wrongful death claims are categorically excluded from arbitration. *Id.* (citing circuit court order statement stating that "wrongful death actions are not something that's arbitrated"). That type of rule would violate the FAA's equal footing principle. *Id.* (citing *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532-33, 132 S. Ct. 1201, 1203-04, 182 L. Ed. 2d 42 (2012)); *see also Kindred Nursing Ctrs., Ltd. P'ship v. Clark*, 581 U.S. 246, 251, 137 S. Ct. 1421, 1426, 197 L. Ed. 2d 806 (2017). However, that is not the argument the Estate makes here. A wrongful death claim may be arbitrable in instances where the statutory beneficiaries agree to do so. McCarson simply argues an individual's consent to arbitrate may not be grafted into a wrongful death claim that pays different people for different losses. *Dean* does not reject that argument or even consider it.

Moreover, the Facility incorrectly argues that the Circuit Court's Order violates the "equal footing" principle. Several other courts have held that rejecting arbitration for wrongful death claims in similar cases does not violate *Marmet* or any

other Supreme Court precedent on the equal footing principle.[13] Refusing to compel arbitration here does not mean wrongful death claims can categorically never be arbitrated. Instead, as other courts have recognized, it simply means the Facility violated a generally applicable contract law rule by failing to prove it had consent for arbitration from all of the proper parties. Finally, reading *Dean*'s footnote to have any bearing on the parties' dispute does not adequately account for either side's arguments on the key issue. *Dean* had no reason to undertake this analysis and has nothing to offer the Court in resolving this Appeal.

The Facility also asks the Court to declare wrongful death a "derivative" claim based essentially on one sentence in *South Carolina Jurisprudence* that has been cited in various authorities. However, the Facility fails to direct the Court to a more pertinent entry in the treatise. In a chapter devoted to wrongful death claims, a section entitled "[s]eparate, independent cause of action" notes the existence of two claims at the tortious death of a person and, crucially, "**the wrongful death action and the survival action involve different, independent claims**." 28 S.C. Jur. *Wrongful Death* § 5 (emphasis added).

Finally, the Facility contends that, since S.C. Code Ann. § 15-51-10 permits wrongful death claims only when the decedent would have had a claim if he survived,

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

then the decedent, or the estate's personal representative, has the authority to waive the statutory beneficiaries' right to a jury trial, citing *Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939 (D.S.C. 1988) and *Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 699 S.E.2d 143 (2010). However, *Quattlebaum* (and *Stokes*) did not address arbitration at all. Instead, they simply held that if an individual allows the statute of limitations on a personal injury claim to lapse during his life, then a wrongful death claim may not be used after his death to "revive" the stale claim. *Stokes*, 389 S.C. at 349, 699 S.E.2d at 146.

The statute of limitations is not at issue here and neither *Quattlebaum* nor *Stokes* have ever been cited as justification for binding nonsignatories to an arbitration contract. Plus, just because there is legal authority holding that an individual may forfeit a wrongful death claim by ignoring or settling a personal injury suit during his life does not mean the individual, or someone purportedly acting on his behalf, may control the manner in which valid future wrongful death claims will be resolved. Several courts have made this distinction explicitly. Oklahoma, like South Carolina, bars a wrongful death suit if the decedent ended a personal injury claim during his lifetime based on the same tortious conduct. *Boler v. Sec. Health Care, L.L.C*, 2014 OK 80, 336 P.3d 468, 477 (Okla. 2014) (citing *Haws v. Luethje*, 1972 OK 146, 503 P.2d 871 (Okla. 1972)). Even so, the court in *Boler* refused to apply a nursing home resident's arbitration contract to a wrongful death claim because doing so would violate contract principles requiring mutual assent. *Id.* at 471.

Pennsylvania also bars wrongful death claims if the decedent allowed his personal injury claim to lapse. *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 657 (Pa. Super. Ct. 2013) (citing *Moyer v. Rubright*, 651 A.2d 1139 (Pa. Super. Ct. 1994)). Yet, just like Oklahoma, Pennsylvania does not extrapolate from that rule the notion that an individual can bind other wrongful death beneficiaries to arbitration. *Pisano*, 77 A.3d at 657, 662 (refusing to find wrongful death beneficiaries lost jury trial right "where they did not waive it of their own accord"). Thus, *Quattlebaum*'s, and by extension, *Stoke*'s, interpretation of section 15-51-10 does not necessarily require arbitration in this case. Had Arches settled any claims against the Facility before his death, or if the statute of limitations had lapsed on his claim, the Estate could not now bring a wrongful death claim on behalf of the statutory beneficiaries. But it does not follow that theoretically McCarson in his individual capacity had the ability to direct the wrongful death claim to arbitration on behalf of any remaining wrongful death beneficiaries.[14] Since Arches had a viable dispute with the Facility when he died, any proposed arbitration of the wrongful death claim must consider whether all beneficiaries agreed to waive a jury trial. In short, none of the authorities cited by the Facility support that a wrongful death claim is derivative.

In light of the historical and structural differences between South Carolina's wrongful death and survival statutes, and the remedies afforded by them, as well as substantial case law defining and treating wrongful death and survival claims

[14] Ancillary to this argument is the issue of whether there is sufficient consideration for a health care facility's arbitration agreement to bind a nonresident signing in their individual capacity, but this issue is not properly before the Court.

distinctly, the Court should reject the Facility's attempt to use McCarson's purported assent to the arbitration agreement to force arbitration on any remaining wrongful death beneficiaries. At least a dozen other jurisdictions have rejected Appellants' argument. *See FutureCare NorthPoint, LLC v. Peeler*, 143 A.3d 191, 209-10, 213 (Md. App. 2016); *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 494 n. 1 (Pa. 2016) (citing *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 660 (Pa. Super. 2013)); *Boler v. Sec. Health Care, LLC*, 336 P.3d 468, 477 (Okla. 2014); *Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc.*, 316 P.3d 607, 614 (Ariz. Ct. App. 2014); *Daniels v. Sunrise Sr. Living, Inc.*, 212 Cal. App. 4th 674, 151 Cal. Rptr. 3d 273 (2013); *Carter v. SSC Odin Operating Co, LLC*, 976 N.E.2d 344, 355-58 (Ill. 2012); *Ping v. Beverly Enters., Inc.*, 376 S.W.3d 581 (Ky. 2012); *Woodall v. Avalon Care Center-Federal Way, LLC*, 231 P.3d 1252 (Wash. App. 2010); *Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. 2009); *Bybee v. Abdulla*, 189 P.3d 40 (Utah 2008); *Peters v. Columbus Steel Castings Co.*, 873 N.E.2d 1258, 1262 (Ohio 2007); *Chapman v. Cardiac Pacemakers, Inc.*, 673 P.2d 385 (Idaho 1983); *see also Strickholm v. Evangelical Lutheran Good Samaritan Soc'y*, Case No. 4:11-CV-00059-BLW, 2011 WL 2532395 (D. Idaho June 24, 2011). At best, even if the arbitration agreement was valid, or if the Estate was precluded from denying its validity, it would only reach the Estate's survival claims. However, since it is not valid, the Circuit Court could not compel the arbitration of the wrongful death or survival claims in this action, and its Order should be affirmed.

V. The issue of whether the Circuit Court erred in denying the Facility's alternative request for discovery on the issue of agency is moot

because the Facility has failed to challenge the Circuit Court's implicit finding on the issue of agency and it is now the law of the case.

The Facility argues that at minimum the Circuit Court should have granted its request to conduct limited discovery on the issue of agency. This argument is moot. The Circuit Court in its Order implicitly found that McCarson did not have actual or apparent authority to enter the arbitration agreement. The Facility did not challenge this finding in its Motion for Reconsideration, and it has not challenged this finding in its Brief. (*See generally* Defs.' Mot. for Reconsideration; Appellants' Br.). Since the Facility has not challenged the Circuit Court's implicit finding that McCarson did not have authority to enter the arbitration agreement, it has abandoned the issue, and it is now the law of the case that McCarson did not have authority. *See First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (stating that an unchallenged ruling is the law of the case).

Since it is the law of the case that McCarson did not have authority to enter the arbitration agreement, if the Court were to reverse the Circuit Court's findings and remand the case, the Facility's request to have limited discovery on the issue of agency would be moot, because the Facility can no longer argue that the arbitration agreement is valid under an agency theory, so any discovery on the issue would not uncover evidence that would be probative of any fact in question. *See Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006) ("If there is no actual controversy, this Court will not decide moot or academic questions."). Further, there is no need for the Court to address this issue, as resolution of the prior issues will be dispositive of this Appeal. *See Solesbee*, 438 S.C. at 651, 885 S.E.2d at 151.

And even if the Court were to address the issue, the Circuit Court did not abuse its discretion in denying the Facility's request for discovery, as any theory of agency in this case would theoretically involve Arches' representations to the Facility, and he has passed away, precluding his deposition. *See Hodge*, 422 S.C. at 577, 813 S.E.2d at 310 ("Apparent authority occurs when the *principal* by written or spoken words . . .causes a third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him"). "A trial court's rulings in matters related to discovery generally will not be disturbed on appeal in the absence of a clear abuse of discretion." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016).

The Facility was provided with copies of the powers of attorney executed by Arches, and they were available for the Circuit Court's review. Even if McCarson had his deposition taken, and he provided that he was Arches' agent, this would not be enough to prove agency. *Hodge*, 422 S.C. at 579, 813 S.E.2d at 311 (stating that statements made by an agent concerning the existence or extent of his authority are insufficient to establish agency). And the Facility had the ability prior to its Motion to Compel Arbitration to undertake investigative efforts to ascertain whether any other valid power of attorney had ever been publicly recorded, and whether McCarson or Arches ever made any representations to the Facility's employees concerning authority. The Circuit Court correctly denied the Facility's request for limited discovery, as further discovery would have been futile.

Further, the Circuit Court properly relied on S.C. Code Ann. § 15-48-20 in summarily determining that this case is not arbitrable. The Facility argues that the arbitration agreement is governed by the FAA, and not the South Carolina Uniform Arbitration Act. However, even if certain aspects of the arbitration agreement were subject to the FAA, South Carolina law applies to the initial determination of whether an arbitration agreement exists. *MBNA Am. Bank, N.A. v. Christianson*, 377 S.C. 210, 213, 659 S.E.2d 209, 211 (Ct. App. 2008). If one party disputes the existence of an arbitration agreement, it is up to a court to determine whether such an agreement exists. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007). Since the Circuit Court correctly held that there was not a valid, binding arbitration agreement, the FAA does not apply or preclude S.C. Code § 15-48-20.

CONCLUSION

For the foregoing reasons, the Court should affirm the Circuit Court's Orders denying the Appellants' Motion to Compel Arbitration and Motions to Stay.

[SIGNATURE PAGE TO FOLLOW]

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