THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CALHOUN COUNTY
In the Court of Common Pleas

The Honorable Maite Murphy, Circuit Court Judge

Appellate Case No. 2021-000700

Jeffery White, individually and as Personal Representative of the Estate of Lizzie White . . . . . Respondent

v.

St. Matthews Healthcare, LLC, d/b/a Calhoun Convalescent Center . . . . . Appellant

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FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On March 6, 2018, Lizzie White died from complications arising from injuries she suffered while in the care of Appellant St. Matthews Healthcare, LLC, d/b/a Calhoun Convalescent Center ("Calhoun"). Thereafter, Respondent Jeffery White, individually and as Personal Representative of the Estate of Lizzie White, filed a notice of intent to file suit and a complaint against Calhoun. On February 20, 2020, Calhoun filed a motion to compel arbitration, which was later withdrawn by consent of the parties, and without prejudice to Calhoun, due to the COVID-19 crisis.

Four months later, Calhoun refiled its motion to compel arbitration. Respondent filed a memo in opposition to the motion on August 10, 2020, and Calhoun filed a memo in support the next day. The circuit court heard the motion to compel on August 12, 2020, and granted the motion on November 24, 2020. Respondent timely filed a motion for reconsideration on December 3, 2020. A little over two months later, Calhoun filed a memo in opposition to the motion for reconsideration and a hearing was held on February 10, 2021. After the hearing, the circuit court granted Respondent's motion for reconsideration in a March 31, 2021 Order.

Calhoun timely filed a motion for reconsideration of the March 31, 2021 Order, and Respondent filed a memo in opposition to the motion. On June 2, 2021, the circuit court entered an order denying Calhoun's motion to reconsider. This appeal followed.

FACTS

Calhoun is a for-profit long term and skilled nursing facility located in St. Matthews, South Carolina. (R. 29). Respondent's mother, Lizzie White, was admitted to Calhoun on June 1, 2017, by her daughter Mildred Scott, for long-term care and rehabilitation following a hospitalization at Regional Medical Center. (R. 125, 141). Two days later, Ms. White's other daughter, Darlene Nunnally, signed the Admission Agreement and the Arbitration Agreement[1] at issue on appeal. (R. 118; R. 167–78).

Before signing the documents, Ms. Nunnally presented Calhoun with a Health Care Power of Attorney ("White HPOA"), signed April 29, 2017, vesting her with the authority to make all health care decisions on behalf of Ms. White "upon, and only during, any period of mental incompetence . . . ." (R. 119–23). Upon such a period of incompetence, the White HPOA, in pertinent part, vested Ms. Nunnally with the authority

> A. To consent, refuse, or withdraw consent to any and all types of medical care, treatment, surgical procedures, diagnostic procedures, medication, and the use of mechanical or other procedures that affect any bodily function . . . ;
>
> B. To authorize, or refuse to authorize, any medication or procedure intended to relieve pain, even though such use may lead to physical damage, addiction, or hasten the moment of, but not intentionally cause, my death;
>
> C. To authorize my admission to or discharge, even against medical advice, from any hospital, nursing care facility, or similar facility or service; [and]
>
> D. To take any other action necessary to making, documenting, and assuring implementation of decisions concerning my health care, including, but not limited to, granting any waiver or release from liability required by any hospital, physician, nursing care provider, or other health care provider; signing any documents relating to refusals of treatment or the leaving of a facility against medical advice, and pursuing any legal action in my name, and at the expense of my estate to force compliance with my wishes as determined by my agent, or to seek actual or punitive damages for the failure to comply[.]

[1] Ms. White did not personally sign any documents during her admissions process.

(R. 120).

The Admission Agreement signed by Ms. Nunnally outlined the nature of the services Calhoun would provide, insurance considerations, and methods of payment. (R. 167–78). Notably, the Admission Agreement did not contain any reference to the Arbitration Agreement and established South Carolina law as the governing law.[2] (R. 176, Section IX). Additionally, the Admission Agreement included an Entire Agreement clause providing:

> I/we hereby acknowledge that I/we have read this page and all preceding pages and acknowledge that this Agreement represents the entire agreement and understanding between the parties and supersedes all previous representations, understandings or agreements, oral or written, between the parties and may not be amended except by written agreement of the parties.
>
> . . .
>
> The undersigned further acknowledges that he/she has received and read the *Admission Handbook* and other Admissions materials and understand that these documents are made a part of this Agreement by reference herein.

(R. 178, Section XVIII).

The Arbitration Agreement signed by Ms. Nunnally was separate and distinct from the Admission Agreement. The Arbitration Agreement bore its own title, was separately paginated, and was governed by federal law.[3] (R. 118). Additionally, the last paragraph provided, "This

[2] Specifically, the Admission Agreement provided it was governed by "applicable Federal regulations and those laws of the State in which [the] Facility is located." (R. 176, Section IX).

[3] The Arbitration Agreement established that,

> because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law.

(R. 118).

agreement shall remain in effect for all care rendered at Facility and shall survive any termination or breach of this Agreement or the Admission Agreement." (R. 118).

Ms. White remained at Calhoun until her discharge on January 29, 2018. (R. 124–25). At the time of her discharge, Ms. White had developed a sacral pressure ulcer the size of a small dinner plate, which required surgical debridement. (R. 125). Ms. White ultimately died from sepsis as a result of complications from her wounds. (R. 124–25).

Ms. White's son, Respondent Jeffery White, individually and as Personal Representative of Ms. White's estate, filed a complaint against Calhoun alleging, *inter alia*, negligence, gross, negligence, and wrongful death. (R. 27–56). Calhoun ultimately filed a motion to compel arbitration pursuant to the Arbitration Agreement signed by Ms. Nunnally. In its motion, Calhoun solely argued Darlene Nunnally validly entered the Arbitration Agreement on her mother's behalf, and attached the Arbitration Agreement and White HPOA as its exclusive exhibits. (R. 115–23).

On August 10, 2020, Respondent filed a memo in opposition arguing that (1) Calhoun had not presented sufficient evidence of Ms. White's incompetence to render the White HPOA effective, (2) the White HPOA did not vest Ms. Nunnally with the authority to waive Ms. White's right to a jury trial, (3) equitable estoppel did not apply because the documents did not merge, and (4) Calhoun failed to present any evidence supporting the application of equitable estoppel. (R. 124–139). The next day, Calhoun filed a memo in support arguing that (1) federal policy mandated arbitration, (2) Ms. Nunnally possessed actual authority under the White HPOA to bind Ms. White to the Arbitration Agreement, and (3) the Arbitration Agreement and Admission Agreement merged such that Respondent was estopped from denying arbitration. (R. 140–184). Notably, Calhoun conceded in its memo that the Arbitration Agreement was not required or necessary for admission to the facility. (R 158, 160). In addition to the exhibits filed with its

original motion, Calhoun submitted with its memo the Admission Agreement and a Physician Certification Regarding Ability to Consent. (R. 167–178; R. 181).

At the hearing, Calhoun argued that the White HPOA was a "springing power of attorney" that would become effective upon Ms. White's incompetence. (R. 74, l. 14–R. 75, l. 1). Calhoun asserted that the evidence "suggest[ed]" Ms. White did not have competency to handle her affairs, so the springing power of attorney took effect on June 3, 2017, when Ms. Nunnally signed the Arbitration Agreement. (R. 76, ll. 7–11). Calhoun further argued that the clause in the White HPOA vesting Ms. Nunnally with the authority to take any other action necessary to enforce compliance with Ms. White's health care decisions, including pursuing legal action, gave Ms. Nunnally the authority to waive Ms. White's right to a jury trial. (R. 77, l. 21–R. 78, l. 18). Alternatively, Calhoun argued that the Admission Agreement and Arbitration Agreement merged because they were signed at the same time, and Respondent should be estopped from accepting the benefits of the Admission Agreement while denying arbitration. (R. 82, l. 12–R. 85, l. 25). During the hearing, Calhoun again conceded that the Arbitration Agreement was not a requirement for admission. (R. 85, l. 25–R. 86, l. 2).

Respondent argued the White HPOA did not give Ms. Nunnally the authority to waive Ms. White's right to a jury trial, as such action exceeded the scope of the "health care decisions" Ms. Nunnally was authorized to make. (R. 87, l. 18–R. 89, l. 1). Respondent further argued the evidence presented by Calhoun was insufficient to demonstrate Ms. White's incompetence or that the White HPOA had become effective. (R. 89, ll. 4–25). Respondent alternatively argued that equitable estoppel did not apply because the Admission Agreement and Arbitration Agreement expressed a clear intention that the documents be construed as two separate agreements, pointing specifically to the documents' separate titles, separate pagination, and separate choice of law

provisions, as well as the entire agreement provision in the Admission Agreement, and the last paragraph of the Arbitration Agreement separately identifying the two documents. (R. 90, l. 23–R. 92, l. 11). Finally, Respondent argued that estoppel should not apply because Calhoun presented no evidence of conduct on the part of Respondent Jeffery White or Ms. White that would have represented anything to the facility regarding agency outside the plain language of the White HPOA. (R. 92, ll. 16–23).

The circuit court granted the motion to compel arbitration on November 24, 2020. (R. 1–15). After Respondent timely filed a motion to reconsider, the circuit court granted the motion and entered a new order on March 31, 2021. (R. 16–23; R. 185–194). In its order, the circuit court found Ms. Nunnally did not have the power to bind Ms. White to the arbitration agreement because such action was outside the scope of authority granted by the White HPOA, and there was no evidence to support the claim that the White HPOA sprung into a durable power of attorney that would have conferred greater authority. (R. 19). The court also rejected Calhoun's merger and estoppel argument, finding (1) the plain language of the agreements evidenced an intent that the documents be construed independently, and (2) Calhoun failed to establish the necessary elements of estoppel. (R. 21–22).

Following the March 31, 2021 Order, Calhoun filed a motion to reconsider which was denied by the circuit court on June 2, 2021. (R. 24–26; R. 197–213). This appeal followed.

STANDARD OF REVIEW

"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." *Wilson v. Willis*, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019). "Under de novo review, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Id*. Moreover,

"an appellant is not relieved of his burden to demonstrate error in the [circuit] court's findings of fact." *Lewis v. Lewis*, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011).

ARGUMENT

The circuit court properly refused to compel arbitration because the federal and state policies favoring arbitration of disputes cannot overcome the absence of an agreement to arbitrate that is enforceable under South Carolina law.

"The basic purpose of the [Federal Arbitration Act] is to overcome state courts' refusal to enforce arbitration agreements." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 590–91, 553 S.E.2d 110, 115 (2001). "[F]ederal policy favoring arbitration, as expressed in the FAA, is now binding even in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements." *Id*. at 590, 553 S.E.2d at 115. As such, it is well established that "[t]he policies of the United States and this State favor arbitration of disputes." *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 630, 667 S.E.2d 1, 6 (Ct. App. 2008).

While viewed favorably by the courts, arbitration "is predicated on an agreement to arbitrate because parties are waiving their fundamental right to access to the courts." *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173. Thus, "[t]he purpose of the FAA is 'to make arbitration agreements as enforceable as other contracts, *but not more so*.'" *Id*. at 336, 827 S.E.2d at 173 (emphasis added) (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n. 12 (1967)). In other words, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *see also Wilson*, 426 S.C. at 337, 827 S.E.2d at 173 ("Even the exceptionally strong policy favoring arbitration cannot justify requiring litigants to forego a judicial remedy when they have not agreed to do so." (quoting *Carr v. Main Carr Dev.*,

LLC, 337 S.W.3d 489, 496 (Tex. App. 2011)). Accordingly, "[t]he presumption in favor of arbitration applies to the scope of an arbitration agreement; *it does not apply to the existence of such an agreement or to the identity of the parties who may be bound to such an agreement*." *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173 (emphasis added) (quoting *Carr*, 337 S.W.3d at 496). Rather, "[a] party seeking to compel arbitration under the FAA must establish that (1) there is a valid agreement [to arbitrate], and (2) the claims fall within the scope of the agreement." *Id*. at 336, 827 S.E.2d at 173.

"Moreover, because arbitration, while favored, exists solely by agreement of the parties, *a presumption against arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate*." *Id*. at 337–38, 827 S.E.2d at 173 (emphasis added). Ultimately, because determining the "enforceability of an arbitration agreement is guided by general principles of contract law[,]" *Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 573, 828 S.E.2d 82, 85 (Ct. App. 2019) (citation omitted), "[w]hether an arbitration agreement may be enforced against nonsignatories, and under what circumstances, is an issue controlled by state law." *Wilson*, 426 S.C. at 338, 827 S.E.2d at 173–74. "South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law." *Id*. at 338, 827 S.E.2d at 174. Calhoun raises only estoppel and agency in the instant appeal.

I. The circuit court properly determined Respondent was not equitably estopped from denying arbitration because there was no merger of the Admission Agreement and Arbitration Agreement, and the evidence presented by Calhoun was insufficient to support the application of estoppel.

The plain language of both agreements reveals an intention that they be construed separately, and the record is devoid of any evidence demonstrating bad faith conduct or exploitation of contractual benefits necessary to support the application of equitable estoppel.

a. The Admission Agreement and Arbitration Agreement each evidenced an expressed intention that the documents be construed separately.

Respondent should not be estopped from denying arbitration because the Admission Agreement and Arbitration Agreement were separate documents that did not merge.

> Equitable estoppel,
>
> known also as direct benefits estoppel[4] in the arbitration realm, estops a nonsigner from refusing to comply with an arbitration provision of a contract if
>
> (1) the nonsigner's claim arises from the contractual relationship,
> (2) the nonsigner has "exploited" other parts of the contract by reaping its benefits, and
> (3) the claim relies solely on the contract terms to impose liability.

Weaver v. Brookdale Senior Living, Inc., 431 S.C. 223, 230, 847 S.E.2d 268, 272 (Ct. App. 2020). "Notably, in those opinions addressing equitable estoppel in the arbitration context, the nonsignatory's contractual benefit is not typically an alleged benefit of arbitration[,] . . . rather, the contractual benefit typically arises from another provision of the *same contract that includes the arbitration provision*." *Thompson v. Pruitt Corp.*, 416 S.C. 43, 59, 784 S.E.2d 679, 688 (Ct. App. 2016) (emphasis added).

Here, because the Admission Agreement and Arbitration Agreement at issue are two separate documents, there must be a merger of the two agreements before estoppel can apply. *See Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 356, 755 S.E.2d 450, 455 (2014) ("Since there was no merger here, appellants' equitable estoppel argument was properly denied by the circuit court."); *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 563, 813

[4] Calhoun argues the circuit court erred in engaging in a traditional six-factor equitable estoppel analysis, *see e.g.*, *Strickland v. Strickland*, 375 S.C. 76, 650 S.E.2d 465 (2007), rather than the direct benefits test. However, because the record does not support the application of estoppel under either analysis, the circuit court's refusal to apply the doctrine should be affirmed. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("Appellate courts recognize . . . an overriding rule of civil procedure which says: whatever doesn't make any difference, doesn't matter.").

S.E.2d 292, 302 (Ct. App. 2018) ("Because Mable, Husband, and the Estate received no benefit from the Arbitration Agreement, equitable estoppel would only apply if documents were merged.").

"The general rule is that, *in the absence of anything indicating a contrary intention*, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the instruments together." *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977) (emphasis added). In *Coleman*, *Thompson*, and *Hodge*, our courts identified several factors which evidence an intent to treat separate admission and arbitration agreements, signed at the same time and during the same transaction, as individual documents.

In *Coleman*, the admission agreement contained an "Entirety of Agreement" clause providing:

> This Agreement, including all Exhibits hereto, and the Arbitration Agreement between the Facility and the Resident, if the parties sign one, supersede all other agreements, either oral or in writing between the parties, and contain all of the promises and agreements between the parties. Each party to this Agreement acknowledges that no representations, inducements, or promises have been made by any party or anyone acting on behalf of any party, that are not contained in this Agreement or in the Arbitration Agreement. This Agreement may be amended only by a written agreement signed on behalf of the Facility and the Resident.

407 S.C. at 355, 755 S.E.2d at 455. The Supreme Court noted that on its face, this clause recognized the "separatedness" of the two agreements rather than a merger. *Id*. Additionally, the Court pointed to the fact that the arbitration agreement could be disclaimed within thirty days while the admission agreement could not. *Id*. Finally, the Court explained "[e]ven if the 'Entirety' clause create[d] an ambiguity as to merger, the law is clear that any ambiguity in such a clause is construed against the drafter." *Id*. at 355–56, 755 S.E.2d at 455.

Similarly, in *Thompson*, this Court found that separate admission and arbitration agreements did not merge because the arbitration agreement could be disclaimed within thirty days while the admission agreement could not, and the execution of the arbitration agreement was not a condition precedent for admission to the nursing facility. 416 S.C. at 53, 784 S.E.2d at 685.

In *Hodge*, this Court again found no merger between separate admission and arbitration agreements. 422 S.C. at 563, 813 S.E.2d at 302. In reaching its conclusion, this Court noted that the admission agreement was governed by South Carolina law, but the arbitration agreement was governed by federal law. *Id*. at 562, 813 S.E.2d at 302. Additionally, like the agreements in *Coleman*, the arbitration agreement recognized the separateness of the documents by referring to them separately as "this Agreement" and "the Patient/Resident's Admission Agreement. *Id*. The Court further relied on the facts that each document was separately paginated, each had its own signature space, and the arbitration agreement was not required for admission to the facility. *Id*. at 562–63, 813 S.E.2d at 302.

Like the documents in *Coleman*, *Thompson*, and *Hodge*, the following factors evidenced an expressed intention that the Admission Agreement and the Arbitration Agreement be construed separately. The documents bore separate titles, were separately paginated, and each had its own signature space. The Admission Agreement was governed by South Carolina law while the Arbitration Agreement was governed by federal law.[5] The Admission Agreement made no

[5] Calhoun asserts that there is no discrepancy in the governing law provisions in the Admission Agreement and Arbitration Agreement because "both instruments provide that South Carolina law applies except where it is displaced by federal law." Notably, however, Calhoun's second argument asserts that our Supreme Court's holding in *Arredondo* is improper and should not be applied to the case at bar because it violates the Federal Arbitration Act. (App's Final Brief, section I(B)).

Moreover, the Arbitration Agreement explicitly provided that it was controlled by the FAA "notwithstanding any . . . contrary state law." (R. 118). Furthermore, while the Arbitration

reference to the Arbitration Agreement and contained an "Entire Agreement" clause. Moreover, the separateness of the documents was acknowledged on the face of the Arbitration Agreement itself, as the last paragraph provided, "This agreement shall remain in effect for all care rendered at Facility and shall survive any termination or breach of this Agreement *or the Admission Agreement*." (R. 118) (emphasis added). Ultimately, the Admission Agreement and Arbitration Agreement plainly evidence an intent to remain separate on their face, and the circuit court properly determined the documents did not merge.

Calhoun argues the documents should be construed together because the "Entire Agreement" clause in the Admission Agreement refers to "other Admission materials." This argument is unavailing. Such language, at most, creates an ambiguity as to merger. In *Coleman*, the entire agreement clause in a facility admission agreement made express reference to an "Arbitration Agreement between the Facility and the Resident, if the parties sign one." 407 S.C. at 355, 755 S.E.2d at 455. In its analysis, the Supreme Court acknowledged the possibility that this language could create an ambiguity as to merger, and concluded "the law is clear that *any ambiguity in such a clause is construed against the drafter*." *Id*. at 355–56, 755 S.E.2d at 455 (emphasis added). Consequently, the vague reference to "other Admission materials" creates an ambiguity at best, and such ambiguity must be construed against Calhoun.

Ultimately, because the Admission Agreement and Arbitration Agreement did not merge, the circuit court properly refused to estop Respondent from denying arbitration. *See id*. at 356, 755 S.E.2d at 455 ("Since there was no merger here, appellants' equitable estoppel argument was

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Agreement provided that the *form of arbitration* was governed by the South Carolina Rules of Alternative Dispute Resolution, these procedural rules do not supplant the FAA as the governing law. Rather, when a conflict between state procedural rules and the FAA arises, procedural rules must yield to the substantive law of the FAA. *See Bean v. S.C. Cent. R.R. Co.*, 392 S.C. 532, 545, 709 S.E.2d 99, 105 (Ct. App. 2011) ("[A] local form of practice may not defeat a federal right.")

properly denied by the circuit court."); *Hodge*, 422 S.C. at 563, 813 S.E.2d at 302 ("Because Mable, Husband, and the Estate received no benefit from the Arbitration Agreement, equitable estoppel would only apply if documents were merged.").

b. Calhoun presented no evidence demonstrating that Respondent reaped the benefits of the Admission Agreement or that his claims arise solely from the contract, nor did Calhoun present any evidence suggesting that Respondent or Ms. White misled the facility.

Assuming, arguendo, that that the Admission Agreement and Arbitration Agreement merged, there is not sufficient evidence in the record to satisfy the elements of estoppel.

Direct benefits estoppel applies when (1) the nonsignatory's claim arises from the contractual relationship, (2) the nonsignatory has exploited other parts of the contract by reaping its benefits, and (3) the claim relies only on the contract terms to impose liability. *Weaver*, 431 S.C at 230, 847 S.E.2d at 272. Crucially, because equitable estoppel is "[b]orn of equity, the heart of the theory 'is that the party entitled to invoke the principle was misled to his injury." *Id*. at 233, 847 S.E.2d at 274 (quoting *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 601, 799 S.E.2d 912, 916 (2017)). Accordingly, "[e]stoppel cannot exist if the knowledge of both parties is equal and nothing is done by one to mislead the other." *Zabinski*, 346 S.C. at 589, 553 S.E.2d at 114 (quoting *Evins v. Richland Cty. Historic Pres. Comm'n*, 341 S.C. 15, 20, 532 S.E.2d 876, 878 (2000)). Because "[e]quitable estoppel is, ultimately, a theory designed to prevent injustice,[] it should be used sparingly." *Wilson*, 426 S.C. at 345, 827 S.E.2d at 177.

First, Calhoun failed to present any evidence that Ms. White or Respondent exploited the benefits of the Admission Agreement. While Ms. White was admitted to Calhoun, within nine months, Calhoun caused the injuries that led to her death. This Court has previously found that a party received no benefit from an admission agreement under similar circumstances. *See Hodge*, 422 S.C. at 563, 813 S.E.2d at 302 ("The only agreement from which Respondents even arguably

received a benefit was the Admission Agreement because Mable was admitted to the Facility as a result of it. However, *because the Facility allegedly caused Mable's injuries that later led to her death, we find it difficult to find she benefited even from being admitted*." (emphasis added)).

Similarly, Calhoun presented no evidence indicating that Respondent exploited the benefits of the Admission Agreement. Calhoun contends that Respondent exploited the benefits by failing to repudiate the Admission Agreement or otherwise remove Ms. White from the facility.[6] But any alleged failure to act on the part of Respondent does not constitute the active exploitation of the Admission Agreement necessary to satisfy the elements of estoppel. *See Weaver*, 431 S.C. at 232, 847 S.E.2d at 273 ("Weaver has not 'exploited' or otherwise sought to enforce or benefit from the residency agreement, any more than a pedestrian run over by a truck has benefited from the contract for the purchase of the truck."); *id*. at 233, 847 S.E.2d at 274 ("This portrayal of Weaver as a stranger to Appellants contradicts their depiction of her, in their equitable estoppel argument, as *actively exploiting the residency agreement by looting its benefits*." (emphasis added)). Moreover, because "Respondent[is] not suing for a breach of the Admission Agreement, [he is] not attempting to enforce that agreement." *Hodge*, 422 S.C. at 563, 813 S.E.2d at 302.

Second, Calhoun failed to demonstrate that Respondent's claims arose solely from the Admission Agreement. "[D]irect benefits estoppel is not implicated simply because a claim relates to or would not have arisen 'but for' a contract's existence." *Wilson*, 426 S.C. at 343, 827 S.E.2d at 176. Rather, direct benefits estoppel applies only when the claim is *dependent* on the existence of a contract. *See id*. ("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

[6] Notably, the assertion that Respondent should have repudiated the Admission Agreement or removed Ms. White from its facility contradicts the assertion that Darlene Nunnally was vested with the authority to make Ms. White's health care decisions.

by reference to it'—equity prevents a person from avoiding the arbitration clause that was part of that agreement." (quoting *Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 637 (Tex. 2018))). Stated differently, if a claim is based on general duties imposed by law, direct benefits estoppel does not apply. *See id*. ("'[W]hen 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*." (quoting *Jody James Farms, JV*, 547 S.W.3d at 637)). South Carolina law does not allow a party to act in a tortious manner while shielding itself from a jury trial with an arbitration clause agreed to only by the offending party.[7]

Here, Respondent brought claims for negligence, gross negligence, and wrongful death against Calhoun. These claims arise from the general duties of care imposed on Calhoun by South Carolina tort law.[8] Therefore, Respondent's claims do not rely on the Admission Agreement and could stand independently. As such, the mere existence of the Admission Agreement is not sufficient to support the application of estoppel. *See id*. ("[D]irect benefits estoppel is not implicated simply because a claim relates to or would not have arisen 'but for' a contract's existence.").

[7] *Cf. Wilson*, 426 S.C. at 342, 827 S.E.2d at 176 ("General principles of South Carolina law form the basis for most of Petitioners' claims. For example, Petitioner's allegation that Respondents possibly conspired with Willis and others to commit fraud is misconduct that does not arise from the contract. *To hold otherwise would arguably allow Respondents to commit unfair trade practices and conspire to destroy the businesses of other insurance agencies while shielding themselves from the possibility of a jury trial with an arbitration clause agreed to only by the conspiring parties*." (emphasis added)).

[8] Notably, Ms. White was admitted to Calhoun's facility for two days before Ms. Nunnally signed the Admission Agreement. Accordingly, had Ms. White suffered from negligent conduct during these two days, her claims could only arise from the general duties imposed on Calhoun.

Finally, Calhoun failed to present any evidence demonstrating that it was misled by Ms. White, Darlene Nunnally, or Respondent. *See Weaver*, 431 S.C at 233, 847 S.E.2d at 274 ("Born of equity, the heart of the theory 'is that the party entitled to invoke the principle was misled to his injury.'" (quoting *Rodarte*, 419 S.C. at 601, 799 S.E.2d at 916)).

Any allegation that Ms. White misled Calhoun is directly contradicted by Calhoun's assertion that she suffered from dementia and was incapable of making her own health care decisions. *See Thompson*, 416 S.C. at 60, 784 S.E.2d at 689 ("Here, Mother had dementia prior to being admitted to UniHealth. Therefore, *her incapacity prevented her from forming the intent or having the requisite knowledge to mislead Appellants*." (emphasis added)). Similarly, as to Respondent, Calhoun did not present any evidence demonstrating that the two parties had any contact prior to the institution of the case at bar.

As to Darlene Nunnally, the only evidence offered by Calhoun demonstrates that she presented the White HPOA to Calhoun before completing the Admission Agreement and Arbitration Agreement. Calhoun produced no evidence that Ms. Nunnally held herself out as having more authority than that which was clearly delineated in the White HPOA. Moreover, Calhoun produced no evidence that Ms. Nunnally had a better understanding of the White HPOA's scope than Calhoun. To the contrary, as a corporate entity specializing in long-term care and skilled nursing, Calhoun was significantly more sophisticated and experienced with regard to the operation of powers of attorney. *See Zabinski*, 346 S.C. at 589, 553 S.E.2d at 114 ("Estoppel cannot exist if the knowledge of both parties is equal and nothing is done by one to mislead the other." (quoting *Evins*, 341 S.C. at 20, 532 S.E.2d at 878)). Any misunderstanding as to authority granted by the White HPOA was the result of Calhoun's own failure to ascertain its scope rather than any bad faith conduct on the part of Ms. Nunnally. *See McCall*, 294 S.C. at 6, 362 S.E.2d at

29 ("[I]t is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority." (alteration in original) (quoting *Justus v. Universal Credit Co.*, 189 S.C. 487, 495, 1 S.E.2d 508, 511 (1939))).

Accordingly, the record is devoid of evidence supporting the application of equitable estoppel in favor of Calhoun, and the circuit court's refusal to do so should be affirmed.

II. The circuit court properly refused to compel arbitration because the power to bind Ms. White and her estate to the Arbitration Agreement was outside the scope of authority vested by Ms. White's health care power of attorney.

The White HPOA vested Ms. Nunnally with the limited authority to make, facilitate, or enforce Ms. White's health care decisions. The decision to enter into an arbitration agreement is not included within such authority. As Calhoun concedes, in *Arredondo v. SNH SE Ashley River Tenant, LLC*,[9] the South Carolina Supreme Court explicitly held that a health care power of attorney, virtually identical to the one at issue on appeal, did not create the power to bind a principal to a non-mandatory arbitration agreement. Calhoun further concedes that the *Arredondo* holding is binding on this Court. *See* S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."). Calhoun asserts, however, that *Arredondo* was wrongly decided and violative of federal law. To the contrary, *Arredondo* is grounded in general principles of contract and agency law, and does not treat arbitration agreements differently than other contracts.

a. Scope of authority granted by Ms. White's health care power of attorney

Calhoun's argument regarding the White HPOA sounds first and foremost in principles of agency. Thus, in addressing Ms. Nunnally's power, the specific scope of authority granted by the White HPOA must first be determined.

[9] 433 S.C. 69, 856 S.E.2d 550 (2021).

"Agency is a fiduciary relationship which results from the manifestation of consent by one person to another to be subject to the control of the other and to act on his behalf." *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145, 425 S.E.2d 764, 773 (Ct. App. 1992). The party asserting agency as a basis of liability bears the burden of clearly establishing the existence of an agency relationship. *McCall*, 294 S.C. at 6, 362 S.E.2d at 29. When determining the existence of an agency relationship, courts consider "the relation, the situation, the conduct, and the declarations of the party sought to be charged as principal." *Langdale v. Carpets*, 395 S.C. 194, 201, 717 S.E.2d 80, 83 (Ct. App. 2011). "The person sought to be bound must, by his word or conduct, have represented that the person assuming to act for him, had authority to do so." *ZIV Television Programs, Inc. v. Associated Grocers, Inc., of S.C.*, 236 S.C. 448, 453, 114 S.E.2d 826, 828 (1960). Consequently, "[i]t is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority." *McCall*, 294 S.C. at 6, 362 S.E.2d at 29 (quoting *Justus*, 189 S.C. at 495, 1 S.E.2d at 511).

"A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal." *First S. Bank v. Rosenberg*, 418 S.C. 170, 179, 790 S.E.2d 919, 924 (Ct. App. 2016) (quoting *Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014)). The scope of such authority is governed by general principles of contract law. *Arredondo*, 433 S.C. at 75, 856 S.E.2d at 553. Thus, when a power of attorney's language "is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Id*. at 75, 856 S.E.2d at 554 (quoting *Stott*, 426 S.C. at 577, 828 S.E.2d at 87). A health care power of attorney is an instrument in which the principal vests her agent with the authority to make and implement health care decisions on her behalf. *Stott*, 426 S.C. at 576, 828 S.E.2d at 86.

The White HPOA vested Ms. Nunnally with the authority (1) to make health care decisions on Ms. White's behalf, (2) to take any other action necessary to make, document, and assure implementation of Ms. White's health care decisions, (3) to grant any waiver or release from liability required by any health care provider, and (4) to pursue any legal action on behalf of Ms. White or her estate to force compliance with her wishes.

b. Ms. Nunnally was not vested with authority to bind Ms. White to the Arbitration Agreement.

The question before this Court is whether the White HPOA authorized Ms. Nunnally to execute the Arbitration Agreement at issue on appeal. As demonstrated, the power to bind Ms. White to the Arbitration Agreement was outside the scope of the authority clearly delineated in the White HPOA.

Our courts have consistently held that an agent's authority to make health care decisions on behalf of a principal does not include the authority to bind the principal to an arbitration agreement. *See Arredondo*, 433 S.C. at 81, 856 S.E2d at 557 ("The only health care decision in play when Arredondo signed the arbitration agreement was Arredondo's decision to seek Whaley's admission into the facility."); *Coleman*, 407 S.C. at 353–54, 755 S.E.2d at 454 ("The scope of Sister's authority to consent to 'decisions concerning Decedent's health care' extended to the admission agreement . . . . *The separate arbitration agreement concerned neither health care nor payment*." (emphasis added)); *Hodge*, 422 S.C. at 569–70, 813 S.E.2d at 306 ("*[A] health care power of attorney granted for medical decisions does not confer authority to sign an arbitration agreement waiving legal rights*." (emphasis added)); *Thompson*, 416 S.C. at 55, 784 S.E.2d at 686 ("[T]he authority conveyed by a principal to an agent to handle finances or make health care decisions *does not encompass executing an agreement to resolve legal claims by arbitration*, thereby waiving the principal's right of access to the courts and to a jury trial." (emphasis added)).

Accordingly, the power to bind Ms. White to the Arbitration Agreement was outside the scope of Ms. Nunnally's authority to make health care decisions on her behalf.

Such power was similarly outside the scope of the remaining authority granted by the White HPOA, a conclusion compelled by *Arredondo*.[10] In *Arredondo*, the Supreme Court held a health care power of attorney vesting the agent with authority to (1) take any action necessary to making, documenting, or implementing a health care decision, (2) grant any waiver required by a health care provider, or (3) pursue legal action on behalf of the principal to enforce compliance with the principal's wishes, did not authorize the agent to bind the principal to an arbitration agreement. 433 S.C. at 80–85, 856 S.E.2d at 556–559.

Addressing the "necessary" clause, the Court explained "the characterization of an arbitration agreement as either a mandatory condition to admission or an optional, collateral agreement often determines the authority issue when the agent holds a power of attorney empowering her to make necessary health care decisions." *Id*. at 82, 856 S.E.2d at 557. Thus, because "[t]he only health care decision in play when Arredondo signed the arbitration agreement was Arredondo's decision to seek Whaley's admission into the facility[,]" the Court had to "determine whether signing the arbitration agreement was 'necessary' to Arredondo making, documenting, and assuring implementation of that decision." *Id*. at 81, 856 S.E.2d at 557. The Court noted "[t]he plain, ordinary, and popular meaning of the word 'necessary' is 'absolutely needed' or 'required.'" *Id*. (citation omitted). Thus, because the evidence demonstrated that the arbitration agreement was not a prerequisite to admission and the principal was already admitted

[10] 433 S.C. at 69, 856 S.E.2d at 550. Notably, while before the circuit court, Calhoun relied heavily on this Court's unpublished opinion in *Arredondo v. SNH SE Ashley River Tenant*, Op. No. 2019-UP-293 (S.C. Ct. App. filed August 14, 2019), both in its briefs and during oral argument, for the proposition that a health care power of attorney includes the authority to bind a principal to arbitration.

at the time it was signed, the Court held "Arredondo's signature on the arbitration agreement was not 'absolutely needed' or 'required' to ensure Whaley's admission into the facility." *Id.*

As to the waiver provision, the Court noted the health care power of attorney granted "the authority to sign only those waivers 'required by [a] . . . health care provider.'" *Id.* at 84, 856 S.E.2d at 558 (alteration in original). Thus, because "Arredondo was not required to sign the arbitration agreement, it logically follows that any waivers contained in the agreement were not required by the facility." *Id.* Accordingly, the Court concluded that the health care power of attorney "did not give Arredondo the authority to grant the waivers recited in the arbitration agreement." *Id.*

Finally, in analyzing the legal action clause, the Court noted that the parties overlooked the context in which the provision appeared, as it "authorized Arredondo to pursue legal action only to 'force compliance with [Whaley's] wishes as determined by [Whaley's] agent, or to seek actual or punitive damages for the failure to comply.'" *Id.* at 84, 856 S.E.2d at 558–59 (alterations in original). "For that reason alone, [the Court] h[e]ld this provision of the HCPOA [wa]s of no significance in th[e] case." *Id.* at 84, 856 S.E.2d at 559. The Court further explained that "even if this provision authorized Arredondo to pursue legal action unrelated to forcing compliance with Whaley's health care wishes, this provision still did not authorize Arredondo to sign a pre-dispute arbitration agreement." *Id.* Citing the Supreme Court of Kentucky, our Supreme Court explained the power to institute or defend suits to enforce compliance with the principal's health care decisions "would necessarily encompass the power to make litigation-related decisions within the context of a suit so instituted, *including the decision to submit the pending dispute to mediation or arbitration*[,]' but "the act of executing a pre-dispute arbitration agreement upon admission to a nursing home ha[s] nothing at all to do with . . . institut[ing] legal proceedings." *Id.* at 85, 856

S.E.2d at 559 (second and third alterations in original) (quoting *Kindred Nursing Ctrs. Ltd. P'ship v. Wellner*, 533 S.W.3d 189, 193–94 (Ky. 2017)). Ultimately, because Arredondo did not execute the arbitration agreement in connection with an existing claim the principal had against the facility, the Court determined his execution of the pre-dispute arbitration agreement did not constitute pursuit of legal action. *Id*.

Here, Calhoun readily conceded to the circuit court that the Arbitration Agreement was not a prerequisite for admission to its facility. (R. 85, l. 25–R. 86, l. 2; R. 158, 160). Additionally, the evidence in the record reveals that Ms. White was admitted to Calhoun on June 1, 2017, but Ms. Nunnally did not sign the Arbitration Agreement until June 3, 2017. (R. 75, ll. 8–14; R. 118). Thus, pursuant to *Arredondo*, the Arbitration Agreement was not required for Ms. White's admission to the facility, nor were any waivers of liability. *See id*. at 84, 856 S.E.2d at 558 ("[Because] Arredondo was not required to sign the arbitration agreement, *it logically follows that any waivers contained in the agreement were not required by the facility*." (emphasis added)). Therefore, the power to bind Ms. White to arbitration was outside the scope of authority granted by the necessary acts provision and the waiver provision of the White HPOA. Moreover, Ms. White did not have any pending litigation or disputes with Calhoun regarding implementation of her health care decisions at the time Ms. Nunnally signed the Arbitration Agreement. *See id*. at 85, 856 S.E.2d at 559 ("[T]he act of executing a pre-dispute arbitration agreement upon admission to a nursing home ha[s] nothing at all to do with . . . institut[ing] legal proceedings." (second and third alterations in original) (quoting *Wellner*, 533 S.W.3d at 193–94)). Thus, the power to bind Ms. White to the Arbitration Agreement was not included in the authority granted by the legal action provision of the White HPOA.

Accordingly, because binding Ms. White to the Arbitration Agreement was outside the scope of authority vested in Ms. Nunnally by the White HPOA, the circuit court's refusal to compel arbitration should be affirmed.

c. The South Carolina Supreme Court's decision in *Arredondo* is consistent with the FAA.

Calhoun suggests the Supreme Court's ruling in *Arrendondo* violates the FAA's "equal footing" rule. To the contrary, the Supreme Court's ruling does not establish a defense unique to arbitration agreements.

"The purpose of the FAA is 'to make arbitration agreements as enforceable as other contracts, *but not more so*.'" *Wilson*, 426 S.C. at 336, 827 S.E.2d at 173 (emphasis added) (quoting *Prima Paint Corp.*, 388 U.S. at 404 n. 12). Accordingly, "[a] court may invalidate an arbitration agreement based on 'generally applicable contract defenses,' . . . but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)).

Calhoun's reliance on the "equal footing" rule misapprehends the legal theory upon which *Arredondo* was decided. As in *Arredondo*, Calhoun's argument that a nonsignatory to an arbitration agreement may nevertheless be bound by a health care power of attorney is grounded in principles of agency. So too is the defense that such action is outside the scope of authority provided by a health care power of attorney. Fundamentally, a contract is only binding within its scope. As such, rather than creating a defense unique to arbitration agreements, the ruling in *Arredondo* is based on general contract defenses, specifically, the lack of authority granted to an agent.

Furthermore, the mere fact that the issue before the *Arrendondo* Court involved an arbitration agreement does not limit its application to arbitration agreements. Rather, the Supreme Court specifically addressed whether the powers enumerated in a health care power of attorney provide an agent with authority to bind a principal to a non-mandatory, pre-dispute arbitration agreement. The Court determined that an agent does not possess this authority because signing a non-mandatory, pre-dispute arbitration agreement is not a health care decision, necessary to implement a health care decision, or legal action taken to enforce a health care decision. This logic is similarly applicable to a myriad of other contracts.[11] *See Wilson*, 426 S.C. at 336, 827 S.E.2d at 173 ("The purpose of the FAA is 'to make arbitration agreements as enforceable as other contracts, *but not more so*.'" (emphasis added) (quoting *Prima Paint Corp.*, 388 U.S. at 404 n. 12)). Thus, rather than creating a rule relating to arbitration, *Arredondo* established limits on the scope of authority provided by a health care power of attorney.

Moreover, *Arredondo* does not stand for the proposition that the holder of a health care power of attorney can never bind a principal to an arbitration agreement. To the contrary, the Court acknowledged scenarios in which such an agent could bind a principal to an arbitration agreement, including when it is required for admission to a skilled nursing facility. *See Arredondo*, 433 S.C. at 82, 856 S.E.2d at 557 ("[T]he characterization of an arbitration agreement as either a mandatory condition to admission or an optional, collateral agreement often determines the authority issue when the agent holds a power of attorney empowering her to make necessary health care decisions.").

[11] For example, the holder of a health care power of attorney could not bind a principal to a contract for the purchase of property, or a contract waiving the principal's right to a jury trial through a liquidated damages clause, unless it was necessary to implement a health care decision. Similarly, such an agent would not be permitted to sign an agreement settling car accident litigation on behalf of the principal.

Ultimately, the holding in *Arredondo* does not violate the FAA because it (1) is grounded in principles of agency and contract law, (2) is not unique to arbitration agreements, and (3) does not preclude the holder of a health care power of attorney from binding a principal to arbitration in all scenarios.

CONCLUSION

Based on the foregoing, the circuit court's orders refusing to compel arbitration should be affirmed.

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April 1, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CALHOUN COUNTY
In the Court of Common Pleas

The Honorable Maite Murphy, Circuit Court Judge

Appellate Case No. 2021-000700

Jeffery White, individually and as Personal Representative of the Estate of Lizzie White . . . . . Respondent

v.

St. Matthews Healthcare, LLC, d/b/a Calhoun Convalescent Center . . . . . Appellant

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CERTIFICATE OF COUNSEL

The undersigned certifies that Respondent's Final Brief complied with Rule 211(b), SCACR.

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