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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM MARION COUNTY
Court of Common Pleas
The Honorable H. Steven DeBerry, IV

Appellate Case No. 2023-001712
Trial Court Case No. 2022CP3300183

Rebecca C. Hagood as Personal Representative
of the Estate of Frank D. Chavis, Sr.,

Respondent,

v.

Palmetto Faith Operating, LLC
d/b/a Faith Healthcare Center and
Brooks Arnette,

Appellants.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

COUNTERSTATEMENT OF ISSUES ON APPEAL...1

STATEMENT OF THE CASE...1

STATEMENT OF THE FACTS 2

STANDARD FOR REVIEW 4

ARGUMENT...4

I. APPELLANTS CANNOT SHOW A VALID AND ENFORCEABLE CONTRACT EXISTS BECAUSE MRS. HAGOOD LACKED ACTUAL AND APPARENT AUTHORITY TO EXECUTE THE ARBITRATION AGREEMENT ………...……………………………………………………………………………………..6

A. Mrs. Hagood Lacked Actual Authority………………………………………..7

B. Mrs. Hagood Lacked Apparent Authority……………………………………..8

C. Mrs. Hagood Also Lacked Authority to Sign the Readmission Agreement.…10

II. THE INDEPENDENT AND INVALID ARBITRATION AGREEMENT DOES NOT MERGE WITH THE ADMISSION AGREEMENT……………………………………..11

A. The Terms and Context Show the Parties Intended the Admission Agreement and Arbitration Agreement to Remain Separate Contracts ……………….. 11

B. The Admission Agreement and Arbitration Agreement Achieve Different Purposes……………………………..……………………………………..13

C. The Readmission Agreement Also Does Not Merge……………………...…14

III. RESPONDENT IS NOT ESTOPPED FROM OPPOSING ARBITRATION...........…..16

IV. IN THE ALTERNATIVE, THE ARBITRATION AGREEMENT DOES NOT EXTEND TO MR. CHAVIS' WRONGFUL DEATH BENEFICIARIES….…………………………..17

CONCLUSION..20

TABLE OF AUTHORITIES

CASES

Charleston, S.C. Registry v. Young Clement Rivers & Tisdale, 359 S.C. 635, 598 S.E.2d 717 (2004)………………………………………………………………………………….. 8, 9

Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539 (1928)…………………………………………18

Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 455 (2014)..……………. 11, 12

Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014)................6

Dreiling v. Peugeot Motors of Am., Inc., 539 F. Supp. 402 (D. Colo. 1982) 5

Dumais v. Am. Golf Corp., 299 F.3d 1216 (10th Cir. 2002)..5

EEOC v. Waffle House, 534 U.S. 279, 122 S.Ct. 754 (2014) 5

Est. of Solesbee v. Fundamental Clinical & Operational Servs., LLC, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023) ...……………………………………………………4-7, 11-13, 15-17

Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 473 S.E.2d 865 (Ct. App. 1996)... 7, 9

Graves v. Serbin Farms, Inc., 306 S.C. 60, 409 S.E.2d 769 (1991)………………………………9

Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d 485 (2005) ………………... 19

Hinson-Barr, Inc. v. Pinckard, 292 S.C. 267, 356 S.E.2d 115 (1987) 5

Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018) ……………………………………………………………………………… 10-12

Klutts Resort Realty, Inc. v. Down 'Round Dev. Corp., 268 S.C. 80, 232 S.E.2d 24 (1977) …..…15

Leasing Serv. Corp. v. Crane, 804 F.2d 828 (4th Cir. 1986)..5

Orphan Aid Society v. Jenkins, 294 S.C. 106, 362 S.E.2d 885 (Ct. App. 1987)……………………7

Palmetto State Sav. Bank of S.C. v. Barr, 293 S.C. 252, 359 S.E.2d 531 (Ct. App. 1987)…..……13

Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd., 636 F.2d 51 (3d Cir. 1980).........................6

Pearson v. Hilton Head Hosp., 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012) …………………16

Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 130 S.Ct. 2772 (2010)...5

Riley Mfg. Co., Inc. v. Anchor Glass Container Corp., 157 F.3d 775 (10th Cir.1998)..................5

Scott v. Porter, 340 S.C. 158, 530 S.E.2d 389 (Ct. App. 2000) ……………..……………………18, 19

Smith v. D.R. Horton, Inc., 417 S.C. 42, 790 S.E.2d (2016) 4

Stott v. White Oak Manor, Inc., 426 S.C. 568, 828 S.E.2d 82 (Ct. App. 2019) ……………….8, 10

Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d 302 (4th Cir. 2001)..5

Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016) ...…………11, 12, 17, 19

Watson v. Underwood, 407 S.C. 443, 756 S.E.2d 155 (Ct. App. 2014)……………………………8

Wilson v. Willis, 426 S.C. 326, 827 S.E.2d 167 (2019)...……………………………………..16, 17

York v. Dodgeland, 406 S.C. 67, 749 S.E.2d 1139 (2013) 5

Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001)...................................5, 6

STATUTES

S.C. Code Ann. § 15-5-90…………………………………………………………………18

S.C. Code Ann. § 15-51-10………………………………………………………………18

S.C. Code Ann. § 62-5-501...10

S.C. Code Ann. § 62-8-102……………………………………………………………...7

S.C. Code Ann. § 62-8-109……………………………………………………………...8

9 U.S.C. § 4...5

COUNTERSTATEMENT OF ISSUES ON APPEAL

I. WHETHER THE CIRCUIT COURT CORRECTLY HELD THAT APPELLANTS FAILED TO SET FORTH CREDIBLE EVIDENCE TO ESTABLISH THE EXISTENCE OF A VALID AND ENFORCEABLE ARBITRATION AGREEMENT.

II. WHETHER THE CIRCUIT COURT CORRECTLY RELIED UPON *EST. OF SOLESBEE V. FUNDAMENTAL CLINICAL & OPERATIONAL SERVS.* IN HOLDING THE ARBITRATION AGREEMENT WAS SEPARATE AND DISTINCT AND DID NOT MERGE.

III. WHETHER A NURSING HOME RESIDENT RECEIVED A "DIRECT BENEFIT" REQUIRED TO SUPPORT EQUITABLE ESTOPPEL FROM AN ARBITRATION CONTRACT HE NEVER SAW AND WHICH PURPORTED TO TAKE HIS RIGHT TO A JURY A TRIAL.

IV. IN THE ALTERNATIVE, WHETHER A PERSON LACKING REQUISITE AUTHORITY CAN EXECUTE AN ARBITRATION AGREEMENT WHICH NEGOTIATES THE WRONGFUL DEATH CLAIMS OF NON-SIGNATORY STATUTORY BENEFICIARIES.

STATEMENT OF THE CASE

This is an appeal from an order denying a motion to dismiss and compel arbitration filed by Appellants Palmetto Faith Operating, LLC d/b/a Faith Healthcare Center and Brooks Arnette (collectively "Appellants"). (Order.) The case involves an admission agreement ("Admission Agreement") and arbitration agreement ("Arbitration Agreement") signed by Rebecca C. Hagood a/k/a Rebecca Stokes ("Mrs. Hagood"), after her father, Frank D. Chavis, Sr. ("Mr. Chavis"), entered Faith Healthcare Center, a skilled nursing facility, located at 617 W. Marion Street in Florence, South Carolina (the "Facility"). During his short residency at the Facility, Mr. Chavis suffered a devastating fall resulting in cervical fractures, among other injuries, and his wrongful death.

On April 4, 2022, Mrs. Hagood, as Personal Representative of the Estate of Mr. Chavis ("Respondent"), commenced her wrongful death and survival action asserting claims of professional and ordinary negligence. (Cmplt.) On May 20, 2022, Respondent filed and served an

Amended Complaint. (Am. Cmplt.) On June 8, 2022, Appellants answered the Amended Complaint. On July 13, 2022, Appellants filed their Motions to Compel Arbitration (collectively as "Motion"). (Mots.). As exhibits in support of their Motion, Appellants submitted for the Circuit Court's review the Facility's Arbitration Agreement. (Mot., Exh. A.)

On July 20, 2022, Respondent requested limited discovery regarding concerns of enforceability of the arbitration provisions in the Arbitration Agreement. Appellants agreed to targeted deposition testimony so long as it did not create any waiver issue as to their arbitration rights. On October 4, 2022, Respondent deposed Appellants' Admissions Director, Kelly E. Dials. That same day, Appellants deposed Respondent.

On August 18, 2023, Respondent filed her response in opposition to Appellants' Motion. (Resp. Memo in Opp. to Mot.) Appellants also filed their memorandum in support of the Motion that same day. (App. Memo in Supp. of Mot.) On August 21, 2023, the Honorable H. Steven DeBerry, IV held a hearing on the Motion. On September 8, 2023, the Circuit Court issued an Order Denying Appellants' Motion. (Order Denying Mot.) On September 18, 2023, Appellants filed a motion to alter, amend, and/or reconsider. (Mot. to Alter.) On October 2, 2023, Judge DeBerry issued an Order denying Appellants' motion to alter. (Order Denying Mot. to Alter.) On November 1, 2023, Appellants filed their Notice of Appeal. (Not.)

STATEMENT OF THE FACTS

Respondent is the surviving daughter of the decedent, Mr. Chavis. (Am. Cmplt. at ¶ 1.) Mr. Chavis was initially admitted to the Facility on March 14, 2019, for skilled nursing and rehabilitative care after a hospitalization at McLeod Regional Medical Center. (Cmplt., Exh. C pp. 1-2, Aff. of Karen Coleman, RN.) His medical history included, but was not limited to, orthostatic hypotension, diabetes with chronic kidney disease, and other comorbidities. (Am.

Cmplt. ¶ 14-15; *See also* Cmplt., Exh. C pp. 1-2, Aff. of Karen Coleman, RN.) Mr. Chavis had cognitive deficits, including confusion, long and short-term memory problems, and impaired decision-making. *Id*. He also was a risk for falls and elopement. *Id*.

During the initial admissions process, Appellants met with Respondent. Though she did not have power of attorney for her father, Appellants requested that Respondent sign the Admission Agreement and purported Arbitration Agreement. (Resp. Memo in Opp. to Mot., Exh. 3, R. Hagood Dep. 9:11-19 (Oct. 4, 2022).) Testimony from Appellants' representatives confirmed the Facility made no attempt to ascertain whether Mrs. Hagood had authority. (Resp. Memo in Opp. to Mot., Exh. 6, K. Dials Dep. 23:12-16 (Oct. 4, 2022).) The Facility also failed to present any to Mr. Chavis which might grant authority to his daughter. *Id*., K. Dials Dep. 38:12-39:5. Appellants also did not interact with Mr. Chavis at any point during the admission process; thus, Mr. Chavis never conveyed or manifested authority to his family for Appellants. *Id*., K. Dials Dep. 24:18-19:1, 25:2-5. Despite a no query into the existence or scope of Mrs. Hagood's authority, Appellants requested she sign away Mr. Chavis' right to a jury trial.

On April 5, 2019, Mr. Chavis was discharged home from the Facility with his son, terminating his initial residency. (Resp. Memo in Opp. to Mot., Exh. 4; *See also* Resp. Memo in Opp. to Mot., Exh. 6, K. Dials Dep. 63:24-64:8.) On April 12, 2019, Mr. Chavis was hospitalized and remained for five (5) days. (Cmplt., Exh. C, p 4.) On April 17, 2019, Mr. Chavis was readmitted to the Facility. (Am. Cmplt. at ¶ 14; *See also* Cmplt., Exh. C, p. 5.) After his readmission on April 17th, Appellants asked Mrs. Hagood to sign a Readmission Agreement. (Resp. Memo in Opp. to Mot., Exh. 5.) This document was signed on April 23, 2019, approximately seven (7) days later. *Id*. No additional arbitration agreement was offered or executed at that time. (*See generally*, Resp. Memo in Opp. to Mot.)

During his short residency, Mr. Chavis suffered numerous injuries, including, but not limited to: (a) an unwitnessed, catastrophic fall; (b) extremity numbness, headache, neck stiffness, and pain in the chest; (c) cervical spinal fractures involving C1-C3 vertebrae; (d) emergency transport and hospitalization; (e) mental and physical decline; (f) medical bills and other expenses; and (g) premature death. (Am. Cmplt. ¶ 39; *See also* Cmplt., Exh. C, pp. 6-7.) Litigation then ensued and this appeal followed.

STANDARD FOR REVIEW

"Arbitrability determinations are subject to de novo review." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 47, 790 S.E.2d 1, 3 (2016). "However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.* at 48.

ARGUMENT

This case arises out of Appellants' negligent care of Mr. Chavis that resulted in his death. His daughter and personal representative, Respondent, initiated this action in Circuit Court seeking survival and wrongful death damages for Mr. Chavis' injuries and death. Appellants seek to enforce arbitration of those claims based on an Admission Agreement and Arbitration Agreement executed by Respondent, even though she lacked requisite authority, after Mr. Chavis' admission to the Facility. As briefed to the Circuit Court, argued at the hearing, and as explained below, the arbitration provisions of the Admission Agreement and Arbitration Agreement are invalid and unenforceable because Respondent lacked authority, actual or apparent, to execute the subject Arbitration Agreement. Moreover, the Admission Agreement and Arbitration Agreement were separate and distinct and do not merge. Importantly, this Court previously ruled against the "same form documents" at issue in this case. *Est. of Solesbee v. Fundamental Clinical & Operational Servs., LLC*, 438 S.C. 638, 648-49, 885 S.E.2d 144, 149 (Ct. App. 2023) (cert. denied April 16,

2024). Since that opinion, the South Carolina Supreme Court declined a petition for writ of certiorari by the *Solesbee* appellants affirming this Court's holding.

While there is a presumption in favor of arbitration agreements, including those contracts governed by the Federal Arbitration Act (FAA), this presumption only applies where a valid arbitration agreement exists. *EEOC v. Waffle House*, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764 (4th Cir. 2014). If the existence of a valid agreement or clause is disputed, the "presumption disappears." *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1220 (10th Cir. 2002); *Riley Mfg. Co., Inc. v. Anchor Glass Container Corp.,* 157 F.3d 775, 779 (10th Cir.1998) ("[W]hen the dispute is whether there is a valid and enforceable arbitration agreement in the first place, the presumption of arbitrability falls away."). Appellants then bear the burden of establishing the existence of a valid contract, *Hinson-Barr, Inc. v. Pinckard*, 292 S.C. 267, 268, 356 S.E.2d 115, 116 (1987), and to prove that waiver of Respondent's fundamental right to a jury trial was knowing, voluntary, and intentional. *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986); *Dreiling v. Peugeot Motors of Am., Inc.*, 539 F. Supp. 402, 403 (D. Colo. 1982).

"Congress did not intend for the FAA to force parties who [have] not agreed to arbitrate into a non-judicial forum." *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 305 (4th Cir. 2001); 9 U.S.C. § 4. "The FAA thereby places arbitration agreements on an equal footing with other contracts," which "may be invalidated by generally applicable contract defenses." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67-68, 130 S. Ct. 2772, 2776 (2010). Under the FAA, contract formation remains "a matter of judicial determination," and the trial court must "consider general [state-law] contract defenses to ensure a meeting of the minds to arbitrate existed, and that such an agreement was not the result of fraud, duress, [or] unconscionability." *York v. Dodgeland*, 406 S.C. 67, 78, 749 S.E.2d 1139, 145 (2013) (*citing Zabinski v. Bright Acres Assocs.*, 346 S.C.

580, 593, 553 S.E.2d 110, 116 (2001)); *See also Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 388, 759 S.E.2d 727, 736 n. 13 (2014) (The court "must engage in a full inquiry . . . prior to any attempt to enforce the [a]greement," including "whether there was a meeting of the minds between the parties."). When faced with a motion to compel arbitration that is opposed based on enforceability of the contract, the opposing party is given "the benefit of all reasonable doubts and inferences that may arise." *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51, 54 (3d Cir. 1980).

The Facility's Motion sought to deny Respondent the constitutionally guaranteed right to a jury trial based upon an invalid arbitration contract. Arbitration may be favored by Federal law but only when the parties voluntarily agree to it. Here, Mr. Chavis was not present at the Facility when Appellants' employee presented the Arbitration Agreement for signature, and Appellants concede Mr. Chavis never conveyed his authority to any Facility representative that Respondent was permitted to bind he (his estate or wrongful death beneficiaries) to arbitration. Evidence also shows that Mrs. Hagood was not appointed power of attorney at that time.

Additionally, South Carolina appellate courts have repeatedly rejected nearly all of the legal and equitable theories the Appellants now propose to manufacture a binding contract. In fact, Appellants concede this Court "affirmed the denial of a motion to compel arbitration" in *Solesbee* regarding the "same form documents" at issue. Consequently, the Appellants have failed to meet their burden to show a valid arbitration agreement exists and no merger applies.

I. Appellants Cannot Show a Valid and Enforceable Contract Exists because Mrs. Hagood Lacked Actual and Apparent Authority to Execute the Arbitration Agreement.

Appellants contend Mr. Chavis' estate and statutory beneficiaries must arbitrate their claims against Appellants, but Mr. Chavis never agreed to do so. In arguing merger, Appellants

attempt to circumvent the threshold issue of authority. Mr. Chavis never signed or otherwise assented to the Arbitration Agreement on which the Appellants rely to support their Motion. Mrs. Hagood's signature on the Arbitration Agreement is ineffective because she did not have authority to bind Mr. Chavis to the arbitration contract. Like *Solesbee*, the Appellants cannot establish agency, either actual or apparent, because there was no power of attorney and the Facility's representative did not ask Mrs. Hagood for proof of authority to act on Mr. Chavis' behalf. *Solesbee*, 438 S.C. 643 n. 4. Therefore, the Appellants cannot establish that a valid and enforceable contract exists.

A. Mrs. Hagood Lacked Actual Authority.

Actual authority is that which is "expressly conferred upon the agent by the principal." *Charleston, S.C. Registry v. Young Clement Rivers & Tisdale*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (2004). "A party asserting agency as a basis of liability must prove the existence of the agency, and the agency must be clearly established by the facts." *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996) (*quoting Orphan Aid Society v. Jenkins*, 294 S.C. 106, 109, 362 S.E.2d 885, 887 (Ct. App. 1987)). "It is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority." *Id*.

In South Carolina, a power of attorney is generally recognized to provide such "actual authority." Power of attorney means a "writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term 'power of attorney' is used." S.C. Code Ann. § 62-8-102(7) (emphasis added). The "principal" is "an individual with contractual capacity who grants authority to an agent in a power of attorney." S.C. Code Ann. § 62-8-102(9). The "agent" is a "person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise." S.C. Code Ann. § 62-8-102(1).

As set forth in *Stott*, the power of attorney is an instrument that confers upon the agent "authority to perform certain specified acts or kinds of acts on behalf of the principal." *Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 573, 828 S.E.2d 82, 85 (Ct. App. 2019) (*quoting Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014)). "The written authorization itself is the power of attorney." *Id*. Moreover, the power of attorney must be recorded as a deed to become effective. *Id*. at 574; *See also* S.C. Code Ann. § 62-8-109(c).

Here, Mrs. Hagood did not have power of attorney for her father at the time the Arbitration Agreement was executed. (Resp. Memo in Opp. to Mot., Exh. 3, R. Hagood Dep. 9:11-19.) She later acquired a healthcare power of attorney, but it was not properly recorded. *Id*., R. Hagood Dep. 10:13-11:6. Importantly, the Appellants' representative, Kelly Dials, made no attempt to ascertain the scope of Mrs. Hagood's supposed actual authority. (Resp. Memo in Opp. to Mot., Exh. 6, K. Dials Dep. 23:12-16.) Moreover, the Appellants' representative tasked with admitting new residents stated she does not decide the scope of an agent's authority. *Id*., K. Dials Dep. 37:1-4. She also presented no form to authorize a family member to sign the arbitration agreement without a power of attorney. *Id*., K. Dials Dep. 38:21-39:5. As a result, the Arbitration Agreement is unenforceable for lack of actual authority.

B. Mrs. Hagood Lacked Apparent Authority.

"[A]pparent authority is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which the principal holds the agent out as possessing." *Young Clement Rivers*, 359 S.C. at 642. The existence of apparent authority depends upon "manifestations by the principal to the third party and the reasonable belief by the third party that the agent is authorized to bind the principal." *Id.* The "proper focus" in analyzing a claim of apparent authority is the relationship "between the principal and the third party." *Id*. at 642-43. Further, "an agency

may not be established solely by the declarations and conduct of an alleged agent." *Id.* at 643; *citing Frasier,* 323 S.C. at 245.

To show apparent authority, Appellants must establish: "(1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." *Graves v. Serbin Farms, Inc*., 306 S.C. 60, 63, 409 S.E.2d 769, 771 (1991). "Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him." *Frasier*, 323 S.C. 244-45. "[I]t is not enough simply to prove that the purported principal by either affirmative conduct or conscious and voluntary inaction has represented another to be his agent or servant." *Id*. at 245.

Here, there is no evidence Mr. Chavis, as principal, either consciously or impliedly, represented that Mrs. Hagood was his agent. There is also no evidence he created any apparent authority by written or spoken word to the Facility. To the contrary, Ms. Dials testified she relied solely upon representations of the hospital and confirmed Mr. Chavis never communicated or conveyed any authority to her with respect to his family before the subject agreement was signed. (Resp. Memo in Opp. to Mot., Exh. 6, K. Dials Dep. 22:24-25:1.) In fact, Ms. Dials confirmed she did not interact with Mr. Chavis at any point prior to his admission to the Facility or execution of the purported Arbitration Agreement. *Id*., K. Dials Dep. 25:2-5.

Moreover, Mrs. Hagood testified that her father was not present during the admissions process. (Resp. Memo in Opp. to Mot., Exh. 3, R. Hagood Dep. 14:24-15:1.) Mrs. Hagood also confirmed that she never discussed the admissions paperwork, including the purported Arbitration Agreement, with her father. *Id*., R. Hagood Dep. 16:12-14. Because Mr. Chavis never interacted

with the Facility prior to the execution of the purported Arbitration Agreement and was not present when it was signed, no apparent authority was conveyed or could have been conveyed; therefore, the Arbitration Agreement is unenforceable.

C. Mrs. Hagood Also Lacked Authority to Sign the Readmission Agreement.

At the time the Readmission Agreement was signed, Mrs. Hagood still lacked a valid power of attorney to waive Mr. Chavis' Constitutional right to a jury trial. First, there is no record evidence of a valid power of attorney existed which authorized Mrs. Hagood to act to waive Mr. Chavis' rights. There is no record evidence that any durable power of attorney was properly recorded as prescribed by S.C. Code Ann. §§ 62-5-501(C) or 62-8-109(c). *Stott*, 426 S.C. at 574. There is also no record evidence a healthcare power of attorney existed which was in substantially the same form as S.C. Code Ann. § 62-5-504(D) or that authorized a jury trial waiver. *Stott*, 426 S.C. at 576. Therefore, Mrs. Hagood lacked actual authority to act on Mr. Chavis' behalf. *See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 573-74, 813 S.E.2d 292, 307 (Ct. App. 2018).

Mrs. Hagood also lacked apparent authority. There is no indication that Mr. Chavis was present for the readmission process to the Facility. Mr. Chavis also never conveyed to the Facility by words or conduct that he consented to Mrs. Hagood acting on his behalf. To the contrary, evidence shows that Mr. Chavis was capable of making his own decisions. *Hodge*, 422 S.C. at 574.

On March 15, 2019, the Facility's record states Mr. Chavis was "able to communicate his thoughts and wants to staff" and expressed "his desires to notify his son of his plans." (Resp. Memo in Opp. to Mot., Exh. 7.) When Mrs. Hagood tried to intervene, the Facility "explained to [Mrs. Hagood] the resident has rights to communicate with others if he shall desire." *Id*. This is consistent

with the Facility reliance upon Mr. Chavis to sign other forms upon his admission, including a Medicare form on March 15, 2019. (Resp. Memo in Opp. to Mot., Exh. 8.) Consequently, Mrs. Hagood lacked actual or apparent authority to sign the Readmission Agreement.

II. The Independent and Invalid Arbitration Agreement Does Not Merge with the Admission Agreement.

Despite arguments to the contrary, Mr. Chavis' presence at the Facility does not estop the estate from contesting arbitration under South Carolina or Federal equitable estoppel principles. The Admission Agreement and Arbitration are clearly separate contracts with distinct provisions that serve different purposes. Appellants' appeal regurgitates failed arguments of merger that have been consistently decided by this Court and our Supreme Court.

Here, the Circuit Court properly relied upon clear and binding precedent in denying the underlying Motion. *Est. of Solesbee v. Fundamental Clinical & Operational Servs., LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023) (cert. denied April 16, 2024). In fact, in their brief, Appellants argue the *Solesbee* merger analysis was erroneous; however, since that time, our Supreme Court declined the *Solesbee* petition for writ of certiorari. Therefore, the Appellants' argument is mooted, and the Circuit Court's findings should be affirmed.

A. The Terms and Context Show the Parties Intended the Admission Agreement and Arbitration Agreement to Remain Separate Contracts.

In this case, the language and circumstances show the parties intended the Admission Agreement and Arbitration Agreement be construed as separate contracts. As explained by our Supreme Court in *Coleman*, the merger doctrine is not applicable when language in the contracts "recognized the 'separateness' of the admission and arbitration agreements." *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355, 755 S.E.2d 455, 455 (2014). Moreover, our appellate courts in *Thompson* and *Hodge*, applying *Coleman*, provided further clarification with factors

demonstrating "separateness", which prevent merger. *Thompson v. Pruitt Corp.*, 416 S.C. 43, 52, 784 S.E.2d 679, 684 (Ct. App. 2016); *Hodge*, 422 S.C. at 563.

For example, an admission contract with an "Entirety of Agreement" provision is separate "on its face" from an arbitration contract especially where the provision identifies the two contracts distinctly – i.e. "this Admission Agreement or in the Arbitration Agreement." *Coleman*, 407 S.C. at 355. Likewise, when the arbitration and admission contracts have different pagination with different signature pages and the arbitration contract has "Arbitration Agreement" atop its first page, these factors further "'indicate the parties' intent for it to stand by itself as an independent contract." *Thompson*, 416 S.C. at 53 n. 1; *Hodge*, 422 S.C. at 562-63. Separateness is further demonstrated when the nursing home makes clear that agreeing to arbitrate is not required to gain admission to the home. *Thompson*, 416 S.C. at 53. Moreover, if the "Entirety" clause creates ambiguity, "the law is clear that any ambiguity in such a clause is construed against the drafter" – Appellants in this instance. *Coleman*, 407 S.C. at 355-56.

Moreover, this Court recently analyzed the "same form documents" in *Solesbee*. In that case, this Court found the Admission Agreement contained "an 'Entire Agreement' section indicating the twelve pages of the Agreement constitute[d] 'the entire agreement and understanding between the parties.'" *Solesbee*, 438 S.C. at 643. This Court also held "[t]he Admission Agreement does not mention the Arbitration Agreement" and contained a separate signature line for the "representative". *Id*. To the contrary, the subject arbitration agreement was "one-page", was entitled "Arbitration Agreement", and included a distinct signature line labeled "Resident/Representative Signature." *Id*. at 643-44.

In *Solesbee*, this Court also found the "Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law." *Id*. at

648. Further, the arbitration agreement indicated it "shall survive any termination or breach of this Agreement or the Admission Agreement." *Id*. at 649. Finally, the arbitration agreement was silent as to revocation while the Admission Agreement allowed for termination. *Id*. "When an agreement is reduced to writing, there is a strong implication the whole intention of the parties has been expressed and there is no agreement or intention contrary to that expressed." *Palmetto State Sav. Bank of S.C. v. Barr*, 293 S.C. 252, 254, 359 S.E.2d 531, 532 (Ct. App. 1987).

Here, the "same form documents" are at issue. There is no agency or authority. The Admission Agreement contains an "Entire Agreement" provision, which states:

> 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.

(Resp. Memo in Opp. to Mot., Exh. 1, Admission Agreement at p. 12.) The agreement referenced is "THIS ADMISSION AGREEMENT." *Id*., Admission Agreement at 1. An arbitration contract does not merge with an admission contract in which the nursing home and a resident agree upon an "entire agreement" clause limiting its parameters and excluding or superseding all other understandings or agreements. The Admission Agreement and Arbitration Agreement also contain separate and distinct titles, page numbers, signature lines, and conflicting choice of law provisions, amongst other differences. As confirmed in *Solesbee*, which tracked *Coleman* and its progeny, there is "no merger in this case and [Appellants'] equitable estoppel argument" was "properly denied" by the Circuit Court. *Solesbee*, 438 S.C. at 649.

B. The Admission Agreement and Arbitration Agreement Achieve Different Purposes.

Evidence clearly shows that the Admission Agreement and Arbitration Agreement were not executed for the same purpose. The Admission Agreement was formed because "the parties

wish[ed] to admit [Mr. Chavis] to [the] Facility." (Resp. Memo in Opp. to Mot., Exh. 1, Admission Agreement at 1.) Its twelve (12) pages set forth the terms of the agreement, including but not limited to the Facility's agreement: to "[f]urnish room, routine meals, nursing care, personal care, or custodial care to [Mr. Chavis]"; and to "provide assistance in daily living and restorative nursing care". *Id.*, Admission Agreement at p. 2. In turn, Mr. Chavis agreed to "[p]ay all fees and charges" for his care. *Id.*, Admission Agreement at p. 3. The Admission Agreement also refers to compliance with Facility policies and procedures, grievance procedures, Medicaid and Medicare eligibility, and release of information, among other provisions. *See generally*, *Id*. It makes no reference to arbitration.

Alternatively, the Arbitration Agreement distinctly covers dispute resolution. It addresses the parties' right to seek judicial relief, waiver of Mr. Chavis' Constitutional right to a jury trial, and the selection of an arbitrator. (Resp. Memo in Opp. to Mot., Exh. 2, Arbitration Agreement at p. 1.) Moreover, Appellants' admission director admitted the Arbitration Agreement is not a condition to admission to the Facility. (Resp. Memo in Opp. to Mot., Exh. 6, K. Dials Dep. 21:13-17.) This is also conceded by Appellants' brief. (App. Initial Br. at p. 11.) Consequently, the agreements cannot have the same purpose.

C. The Readmission Agreement Also Does Not Merge.

Like the Admission Agreement, the Readmission Agreement does not merge with the Arbitration Agreement because it was separate and distinct.[1] The Readmission Agreement is entitled differently, "READMISSION AGREEMENT", and relies upon separate page numbers,

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[1] Appellants do not move to compel arbitration under the Readmission Agreement. The underlying Motion relied solely upon the terms of the Arbitration Agreement, which incorporates by reference the "Facility's Admission Agreement" only. Appellants cannot bootstrap their merger argument to the Readmission Agreement, which was purportedly signed more than a month later, with no evidence of authority. The agreement does not reference arbitration and is also separate and distinct.

signature lines, amongst other provisions. *Solesbee*, 438 S.C. at 648-49. In the Readmission Agreement, there is no reference to arbitration. (Resp. Memo in Opp. to Mot., Exh. 5.) While it suggests it incorporates by reference the Admission Agreement "along with each of its attachments", the Admission Agreement contained no attachments. Likewise, the Admission Agreement does not reference arbitration. The Readmission Agreement also states it "does not replace or super[s]ede the original Admission Agreement"; however, this provision conflicts with the Entire Agreement clause of the Admission Agreement, which provides it "represents the entire agreement and understanding between the parties." (Resp. Memo in Opp. to Mot., Exh. 1, Admission Agreement at p. 12.)

Moreover, by its own terms, the underlying Admission Agreement was terminated "immediately" when Mr. Chavis' "condition has improved sufficiently so that he/she no longer requires the services provided by the Facility." *Id.*, Admission Agreement at p. 6. As shown above, the Facility discharged Mr. Chavis on April 5, 2019. (Resp. Memo in Opp. to Mot., Exh. 6, K. Dials 63:24-64:8.) The Facility's records confirm Mr. Chavis was waiting to be discharged with "no concerns noted." (Resp. Memo in Opp. to Mot., Exh. 4.) Surely, the Facility would not discharge Mr. Chavis if his condition did not warrant such a transfer.

Further, merger of the Readmission Agreement cuts against Appellants' argument that instruments "executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction" should be construed together. (App. Initial Br. at p. 7; *citing Klutts Resort Realty, Inc. v. Down'Round Dev. Corp*. 268 S.C. 80, 88, 232 S.E.2d 24 (1977)). Here, the documents were not executed at the same time, for the same purpose, or for the same transaction. Rather, the Readmission Agreement was presented more than a month later after his underlying discharge. Moreover, as shown above, there is no record evidence Mrs. Hagood had the requisite

authority to execute the agreement. As a result, as established in *Solesbee* and confirmed by the Circuit Court, there is no merger.

III. Respondent is Not Estopped from Opposing Arbitration.

Mr. Chavis did not sign the Arbitration Agreement or authorize anyone to sign on his behalf. Mrs. Hagood was not appointed power of attorney at the time the purported Admission and Arbitration Agreements were signed. Mr. Chavis was not present when the Arbitration Agreement was presented for signature, nor did he manifest to Appellants that Mrs. Hagood could act for him. Yet, Appellants argue Mr. Chavis' estate and statutory beneficiaries are equitably estopped from opposing arbitration. Appellants Br. at 36-39.

"Equitable estoppel is . . . a theory designed to prevent injustice, and it should be used sparingly." *Wilson v. Willis*, 426 S.C. 326, 345, 827 S.E.2d 167, 177 (2019). Even though public policy may favor arbitration, litigants cannot be forced "to forego a judicial remedy when they have not agreed to do so." *Wilson*, 426 S.C. at 337. "Under direct benefits estoppel, [a] nonsignatory [may be] estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause." *Wilson*, 426 S.C. at 340 (*citing Pearson v. Hilton Head Hosp*., 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012)).

The "direct benefits" estoppel addressed in *Wilson* could only apply if Respondent has "consistently maintained that other provision of the same contract should be enforced to benefit [her]." *Wilson*, 426 S.C. at 340. In other words, the Appellants' burden is to show Respondent has "knowingly exploit[ed] the Arbitration Agreement to her benefit and "receives benefits flowing directly from the agreement." *Id.* (internal citations omitted).

Appellants' direct benefits estoppel argument is flawed. First, Appellants contend that Mr. Chavis directly benefitted from the Admission Agreement because he received room and board,

food, and other basic care. However, Appellants do not reference any direct benefit flowing from the Arbitration Agreement itself. In contrast, Respondent does not allege a breach of contract claim based on the Admission Agreement or otherwise rely on that contract to seek liability against the Facility. The simple fact that Mr. Chavis' relationship with the Facility underlying Respondent's claims was set forth in an Admission Agreement is not sufficient to invoke estoppel as to the separate and distinct Arbitration Agreement. *Wilson*, 426 S.C. 343.

Second, the argument further illustrates that the Appellants' estoppel claim is wholly dependent on a failing merger argument. (App. Initial Br. at p. 36.) As set forth above in Section II, there is no merger because the contracts are separate and distinct documents with differing page numbers, titles, and signature pages, among other separateness. The Admission Agreement also has an entirety of agreement provision, and the contracts were clearly created for different purposes.

Ultimately, the Appellants "direct benefits" analysis fails because Respondent's underlying claims do not rely in any way on the Arbitration Agreement's terms. Moreover, the Appellants' argument expressly links its estoppel claim to its fatally flawed merger argument, which has been dispelled by clear and binding precedent in *Solesbee*. As made clear in *Thompson*, to trigger estoppel, there must be some benefit to the party opposing estoppel in "the same contract that includes the arbitration provision." *Thompson*, 416 S.C. at 59. The Arbitration Agreement is not incorporated into the Admission Agreement; therefore, the "Appellants' assertion that [Mr. Chavis] received benefits under the Admission Agreement, i.e., being admitted to the facility and receiving medical care, is of no moment." *Id*. at 60. Therefore, the circuit court correctly rejected the Appellants' equitable estoppel argument.

IV. In the Alternative, the Arbitration Agreement Does Not Extend to Mr. Chavis' Wrongful Death Beneficiaries.

To the extent the circuit court's order addresses Mr. Chavis' wrongful death beneficiaries, the wrongful death beneficiaries were not parties to the Arbitration Agreement. First, neither statutory beneficiaries nor a wrongful claim existed until the death of Mr. Chavis. Second, no personal representative was appointed with authority to bring such a claim or bind statutory beneficiaries until July 7, 2021 – more than two (2) years after the purported Arbitration Agreement was signed. Third, at the time of the Arbitration Agreement's execution, Mrs. Hagood lacked actual or apparent authority; therefore, no valid contract exists.

In South Carolina, a wrongful death claim is a distinct, independent claim that benefits statutory beneficiaries. The wrongful death claim, S.C. Code Ann. § 15-51-10, "arises only upon the death of the injured person" following tortious conduct and does "not exist prior to his death." *Claussen v. Brothers*, 148 S.C. 1, 4, 145 S.E. 539, 540 (1928). The claim "in favor of the beneficiaries named in the statute" provides "for the loss sustained by them by reason of the death." *Id*. at 5. Wrongful death damages are intended to compensate the statutory beneficiaries, including pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of the use and comfort of the decedent's society, experience, knowledge, and judgment. *Scott v. Porter*, 340 S.C. 158, 168, 530 S.E.2d 389, 394 (Ct. App. 2000).

Alternatively, the estate may bring a right of survival claim, which provides a distinct legal remedy. S.C. Code Ann. § 15-5-90. "If a person is injured, but not killed, by the wrongful act of another, there exists" a cause of action for the personal injury. *Claussen*, 148 S.C. at 4. "[I]f the injured person should die . . . from other causes, this cause of action would survive, under the survival act, for the benefit of his estate." *Id*. at 4-5. "Unlike actual damages in a wrongful death action, actual damages in a survival action are awarded for the benefit of the decedent's estate

rather than for the family." *Porter*, 340 S.C. at 170. Survival damages include pre-death pain and suffering, mental distress of the deceased, and medical, surgical and hospital bills. *Id*. Ultimately, both the wrongful death and survival claims are brought by a personal representative who is appointed by the Probate Court. S.C. Code Ann. §§ 15-51-20, 15-5-90.

The facts of this case parallel *Thompson*. In *Thompson*, the nursing home defendants argued that the wrongful death beneficiaries and estate of the deceased were bound to the Arbitration Agreement as a third-party beneficiary. *Thompson*, 416 S.C. at 56-58. The court rejected that argument finding "[a] third-party beneficiary is a party that the contracting parties intend to directly benefit[,]" *Helms Realty, Inc. v. Gibson-Wall Co*., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005), and "there can be no third-party beneficiary unless a valid contract exists." *Thompson*, 416 S.C. at 57. The court further held the resident/mother could not be the third-party beneficiary of the alleged arbitration agreement because her son lacked authority to execute the contract. *Id*. As shown in Section 1 above, like *Thompson*, no valid contract exists because Mrs. Hagood lacked actual or apparent authority to sign the Arbitration Agreement on behalf of Mr. Chavis.

Moreover, "a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement." *Id.* (*citing Helms*, 363 S.C. at 340). Since the daughter was not attempting to enforce the arbitration agreement on behalf of her mother's estate – rather asserting tort claims arising out of the patient-provider relationship created by the separate admission agreement – the estate could not be bound by the agreement on that basis. *Id*. Here, Respondent does not assert claims arising from the Arbitration Agreement and is not attempting to enforce that contract.

Consequently, the wrongful death beneficiaries cannot be bound by a contract that they did

not authorize, a contract that they are not a party, and a contract for which they do not attempt to enforce. Therefore, the circuit court correctly denied the Appellants' Motion.

CONCLUSION

Based upon the arguments stated above, Respondent respectfully requests the Court affirm the Circuit Court's order denying the Appellants' Motion. Mr. Chavis never agreed to the Arbitration Agreement, and Mrs. Hagood lacked legal authority to bind him to arbitration. Moreover, the Arbitration Agreement does not merge with the Admission Agreement, and estoppel is inapplicable. Finally, the wrongful death claim is distinct and independent and belongs to the statutory beneficiaries who did not agree to arbitration.

Respectfully submitted,

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