STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF MARION	)	TWELFTH JUDICIAL CIRCUIT
	)	
Rebecca C. Hagood as Personal Representative of the Estate of Frank D. Chavis, Sr.,	)	C/A No. 2022-CP-33-00183
Plaintiff,	)	**ORDER DENYING DEFENDANTS' MOTIONS TO COMPEL ARBITRATION**
vs.	)	
Palmetto Faith Operating, LLC d/b/a Faith Healthcare Center and Brooks Arnette,	)	
Defendants.	)	

Hearing Date:	August 21, 2023
Hearing Judge:	H. Steven DeBerry, IV
Counsel for Plaintiff:	A. Keith McAlister, Jr.
Counsel for Defendants:	Russell G. Hines

This matter came before the Court on August 21, 2023, via WebEx, on Defendants Palmetto Faith Operating, LLC d/b/a Faith Healthcare Center and Brooks Arnette's Motions to Compel Arbitration (collectively as "Motion"). Present during the hearing were attorney A. Keith McAlister, Jr., of Hawk Law Group for the Plaintiff, and attorney Russell G. Hines, of Clement Rivers, LLP for the Defendants. After review of the record, consideration of the parties' memoranda, and having heard oral arguments from counsel, the Court hereby DENIES the Defendants' Motion:

PROCEDURAL BACKGROUND

On April 4, 2022, Plaintiff Rebecca C. Hagood ("Plaintiff" or "Mrs. Hagood"), as Personal Representative of the Estate of Frank D. Chavis, Sr., commenced this wrongful death and survival action by filing a Summons and Complaint in the Court of Common Pleas of Marion County, South Carolina. Defendants were timely served. On May 20, 2022, an Amended Complaint was

filed. On June 8, 2022, Defendants Answered the Amended Complaint. On July 13, 2022, Defendants filed the instant Motion. On August 18, 2023, Plaintiff filed her Response in Opposition to Defendants' Motion ("Plaintiff's Resp."). Defendants filed a Memorandum in Support of their Motion ("Defendants' Memo.") later that day. The parties appeared before this Court for the Motion hearing on August 21, 2023.

FACTUAL BACKGROUND

This matter arises out of a wrongful death and survival action brought by Plaintiff. In part, Plaintiff alleges Frank D. Chavis, Sr. ("Mr. Chavis" or the "Resident") was negligently cared for and treated while a resident at Palmetto Faith Operating, LLC d/b/a Faith Healthcare Center (the "Facility") in Florence, South Carolina. On March 14, 2019, Mr. Chavis was initially admitted to the Facility. Medical records maintained by the Facility for Mr. Chavis dated March 15, 2019, indicate he was "a 74 year old man being admitted to the facility for rehabilitation therapy." *Plaintiff's Resp.*, Exhibit 7. The Facility's records also state Mr. Chavis "is able to communicate his thoughts and wants to staff." *Id*. That same day, Facility records also purportedly show Mr. Chavis signing a financial document on his own behalf. *Plaintiff's Resp*., Exhibit 8.

During the admissions process, Mrs. Hagood[1], as daughter of Mr. Chavis, met with the Facility's Admissions Director, Kelly Dials, who presented an Admission Agreement and Arbitration Agreement to her. Despite having no power of attorney, Mrs. Hagood signed both documents on her father's behalf on March 14, 2019. *Plaintiff's Resp.*, Exhibit 3; R. Hagood Dep. 9:11-19 (Oct. 4, 2022). In relevant part, the Arbitration Agreement was signed by Mrs. Hagood as "Resident/Representative" of Mr. Chavis, and Kelly Dials signed as "Authorized Agent of

[1] At this time, Mrs. Hagood was known as Rebecca "Becky" Stokes.

Facility." *Plaintiff's Resp.*, Exhibit 2. Plaintiff contends that the Arbitration Agreement is unenforceable under state contract law.

LAW AND ANALYSIS

The party seeking to force arbitration has the burden of establishing the existence of a valid arbitration agreement. *See Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). It is well established in South Carolina that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place[,]" and "[i]f no agreement is found to exist, the court must deny any application to arbitrate." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663, 667 (2007) (internal citation omitted). Whether a valid arbitration agreement exists is a matter for judicial determination. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013).

The party seeking judicial enforcement of a contract bears the burden of persuasion. *Hinson-Barr, Inc. v. Pinckard*, 292 S.C. 267, 268, 356 S.E.2d 115, 116 (1986). Defendants must prove a valid and enforceable arbitration agreement was signed in a "knowing, voluntary and intentional" capacity. In interpreting a jury trial waiver narrowly, some courts have also emphasized "the basic principle that ambiguities in a contract are construed against the drafting party." *Nat'l Acceptance Co. v. Myca Products, Inc.*, 381 F. Supp. 269, 271 (W.D. Pa. 1974). When faced with a motion to compel arbitration that is opposed based on whether an agreement to arbitrate has been made between the parties, the court must provide the opposing party with the benefit of all reasonable doubts and inferences that may arise. *See Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51, 54 (3d Cir. 1980).

Here, the Arbitration Agreement states it shall be governed by and enforced under Federal law, specifically, the Federal Arbitration Act (9 U.S.C. §§ 1-16) ("FAA"), as opposed to state arbitration law, unless "contrary to state law". It further provides it is not subject to the South Carolina Uniform Arbitration Act. Under the FAA, however, the Court must look to South Carolina law to decide the threshold questions of contract formation. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360, 364 (2001); *Towles v. United Healthcare Corp*., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'").

Further, arbitration agreements are subject to the same defenses applicable to all other contracts. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68, 130 S.Ct. 2772, 2776, 177 L.Ed.2d 403 (2010) (*quoting Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). In determining whether an arbitration agreement even exists, "trial courts consider 'general 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 Zabinksi v. Bright Acres Assocs*., 346 S.C. 580, 593, 553 S.E.2d 110, 116 (2001)). The judicial inquiry may include examination of contractual defects such as mutual assent and want of consideration as well as other equitable grounds. *Sydnor v. Conseco Fin. Servicing Corp*., 252 F.3d.302, 205 (4th Cir. 2001). The validity of an arbitration agreement must be determined in accordance with the general principles of contract law. *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2011); *Grant v. Magnolia Manor-Greenwood, Inc*., 387 S.C. 125, 130, 678 S.E.2d 435, 438 (2009).

1. **Mrs. Hagood, as daughter of Mr. Chavis, did not have Actual or Apparent Authority to sign the Arbitration Agreement**

The legal consequences of an agent's actions can only be attributed to the principal when the agent has actual or apparent authority. *Charleston, S.C. Registry v. Young Clement Rivers & Tisdale*, 359 S.C. 635, 642 (2004) (citations omitted). "An agency relationship may be established by evidence of actual or apparent authority." *Id*. "[T]he agency must be clearly established by the facts." *Orphan Aid Society v. Jenkins*, 294 S.C. 106, 109, 362 S.E.2d 885, 887 (Ct. App. 1987) (quoting *McCall v. Finley*, 294 S.C. 1, 362 S.E.2d 26 (Ct. App. 1987)). Further, "the 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. *Thompson v. Pruitt Corp.*, 416 S.C. 43, 57, 784 S.E.2d 679, 687 (Ct. App. 2016); *See Dickerson v. Longoria*, 414 Md. 419, 995 A.2d 721 (Ct. App. 2009). When a facility knows a resident is competent at the time of admission and is allowed to sign other forms, the resident should sign the arbitration agreement. *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 574, 813 S.E.2d 292, 308 (Ct. App. 2018). Here, the facts do not support a finding of actual or apparent authority on behalf of Mrs. Hagood.

A. <u>No Actual Authority</u>

Actual authority is that which is "expressly conferred upon the agent by the principal." *Young Clement*, 359 S.C. at 642. "It is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority." *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*, 294 S.C. at 109). In South Carolina, a power of attorney is generally recognized to provide 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). 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).

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* S.C. Code Ann. § 62-8-109(c). Thus, if a resident's representative does not have a valid power of attorney, which conveys the right to waive the resident's Constitutional right to a jury trial, the resident's representative lacks actual authority to bind the resident to arbitration. *See Arredondo v. SNH SE Ashley River Tenant, LLC*, 433 S.C. 69, 856 S.E.2d 550 (2021).

Mrs. Hagood testified she did not have any power of attorney at the time the Arbitration Agreement was signed. *Plaintiff's Resp*., Exhibit 3; R. Hagood Dep. 9:11-19. The Facility's Admission's Director, Ms. Dials, testified she had no duty to ascertain whether a family member had authority to sign documents on a resident's behalf. *Plaintiff's Resp*., Exhibit 6; K. Dials Dep. 39:16-20 (Oct. 4, 2022). Ms. Dials also testified she did not determine whether Mrs. Hagood had power of attorney to sign the Arbitration Agreement. *Plaintiff's Resp*., Exhibit 6; K. Dials Dep. 22:24-24:17, 33:10-35:21, 38:14-39:20. Ms. Dials further testified she was not aware of any instance in which Mr. Chavis, without a power of attorney, gave permission for Mrs. Hagood to sign on his behalf. *Plaintiff's Resp*., Exhibit 6; K. Dials Dep. 38:14-39:5. Because no power of attorney existed nor other written authorization granting Mrs. Hagood permission to waive her father's Constitutional rights, the Arbitration Agreement is unenforceable for lack of actual authority.

B. No 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*, 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, Defendants 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; Restatement 2d of Agency § 27 (1958). "[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.

Ms. Dials testified that she never interacted with Mr. Chavis, the principal, prior to his admission to the Facility or his daughter's execution of the Arbitration Agreement. *Plaintiff's Resp*., Exhibit 6; K. Dials Dep. 25:2-5. Mrs. Hagood also testified Mr. Chavis was not present when the agreement was signed. *Plaintiff's Resp*., Exhibit 3; R. Hagood Dep. 14:24-15:1. Because

Mr. Chavis, as principal, never interacted with the Facility's representative prior to the execution of the Arbitration Agreement and was not present when the agreement was signed, no apparent authority was conveyed by the principal or could have been conveyed, consciously or impliedly, to the Facility; therefore, the Arbitration Agreement is unenforceable for lack of apparent authority.

C. No Authority Under the Adult Health Care Consent Act

Under the Adult Health Care Consent Act (the "AHCCA"), a surrogate may make health care decisions for a patient who is unable to consent. S.C. Code Ann. § 44-66-30(A). To rely upon a surrogate, the healthcare facility must document in the patient's record its efforts to locate a decision maker who qualifies under subsection (A). S.C. Code Ann. § 44-66-30(B). Further, "[i]f persons of equal priority disagree on whether certain health care should be provided to a patient who is unable to consent, an authorized person, a health care provider involved in the care of the patient, or any other person interested in the welfare of the patient may petition the probate court for an order determining what care is to be provided or for appointment of a temporary or permanent guardian." S.C. Code Ann. § 44-66-30(C).

"[T]he [AHCCA] contemplates that the surrogate's authority extends primarily to traditional health care decisions, and only secondarily to the financial decisions necessitated by those decisions, is illustrated by other provisions of the Act". *Coleman v. Mariner Health Care, Inc*., 407 S.C. 346, 353, 755 S.E.2d 450, 454 (2014). "[T]he purpose of the Act is to insure that the patient's wishes concerning [his] medical treatment are honored whenever possible, and that decision making by the surrogate is a last resort." *Id*. (emphasis added). Importantly, the Court found a separate arbitration agreement concerns "neither health care nor payment, but instead provided an optional method for dispute resolution between [the] Facility and [the patient or

surrogate] should issues arise in the future." *Id*. at 354. Therefore, "[u]nder the Act, [the surrogate does] not have the capacity to bind [the patient] to this voluntary arbitration agreement." *Id.*

Medical records from the Facility show Mr. Chavis was able to "communicate his thoughts and wants to staff." Plaintiff's Resp., Exhibit 7. Moreover, even if Mrs. Hagood qualified as a surrogate under the AHCCA, she did not have authority according to *Coleman* to execute an Arbitration Agreement. Therefore, the Arbitration Agreement is unenforceable.

2. <u>The Admission and Arbitration Agreements Do Not Merge</u>

The merger doctrine is not applicable when language in the contracts "recognize[s] the 'separateness' of the admission and arbitration agreements." *Coleman*, 407 S.C. at 355. As set forth in *Coleman, Thompson, Hodge,* and *Solesbee*, "separateness" of the agreements may be illustrated by several factors, including different titles and pagination, distinct signature pages, differing revocation provisions, and entirety of agreement provisions, amongst other contract language. *Coleman*, 407 S.C. at 355; *Thompson*, 416 S.C. at 52-54; *Hodge*, 422 S.C. at 561-63; *Est. of Solesbee v. Fundamental Clinical & Operational Servs., LLC*, 438 S.C. 638, 648-49, 885 S.E.2d 144, 149 (Ct. App. 2023).

For instance, an admission contract with an "Entirety of Agreement" provision is separate "[o]n its face" from an arbitration contract where the two contracts are identified distinctly. *Coleman*, 407 S.C. at 355. Two contracts may also be considered distinct when they have different titles and independent pagination with different signature pages. *Thompson*, 416 S.C. at 53; *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. Such factors "'indicate the parties' intent for [the arbitration agreement] to stand by itself as an independent contract." *Thompson*, 416 S.C. at 53 n. 1; *Hodge*, 422 S.C. at 562-63.

In *Solesbee*, the Court of Appeals addressed substantially the same admission and arbitration agreements and determined they did not merge. *Defendants' Memo*. at p. 34. In that case, the Court found "Admission Agreement" was "governed by South Carolina law, and the Arbitration Agreement" was "governed by federal law." *Solesbee*, 438 S.C. at 648. The Court also found the two agreements were separate because the Arbitration Agreement survived "any termination or breach of [it] or the Admission Agreement." *Id.* at 649. The Court further held Arbitration Agreement was silent as to revocation, while the Admission Agreement allowed termination "at any time, upon written notice to the Facility." *Id*. Moreover, the Court held the agreements "were separated paginated" with "their own signature pages." *Id*. Finally, the Court held the arbitration agreement was voluntary and not necessary for the resident to be admitted to the facility. *Id*. As a result, there was no merger, and the facility's equitable estoppel argument was properly denied. *Id*.

Here, the Admission Agreement is entitled "Admission Agreement – South Carolina" and is twelve (12) total pages numbered page one (1) to twelve (12). The Arbitration Agreement has a different title: "Facility – Resident/Representative Arbitration Agreement". The Arbitration Agreement is one (1) page and is numbered page one (1) to one (1). In the opening paragraph of the Admission Agreement, "Agreement" is a defined term, which is limited to the Admission Agreement only. Within the 12-page admission contract, there are vague references to attachments and exhibits within the agreement; however, no such attachments or exhibits are attached, included or appended. Further, the term arbitration is never referenced within the Admission Agreement. Likewise, the Arbitration Agreement contains no label or language indicating it serves as an exhibit or addendum of the Admission Agreement.

The Admission Agreement also contains an entirety of agreement section, which supersedes all previous representations, understandings or agreements. The Admission Agreement further allows for termination at any time. The Arbitration Agreement does not include any revocation provision. As in *Solesbee*, there is no merger between the instant Admission[2] and Arbitration Agreements.

3. <u>Equitable Estoppel is Denied.</u>

As noted in *Hodge*, the Plaintiff, a third-party who represents the wrongful death beneficiaries and estate, is not suing under the Arbitration Agreement or attempting to invoke the Arbitration Agreement itself. *Hodge*, 422 S.C. at 574. Plaintiff also has filed no action alleging a breach of contract under the Admissions Agreement. Therefore, Plaintiff is not seeking to invoke benefit of either of the contracts executed by the daughter. *See Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167 (2019).

"A nonsignatory should be compelled to arbitrate a claim *only if* it seeks, through the claim, to derive a direct benefit from the contract containing the arbitration provision." *Wilson*, 426 S.C. at 344; *See In re Kellogg Brown & Root, Inc*., 166 S.W.3d 732, 740-41 (Tex. 2005). When the benefits to a nonsignatory are merely indirect, an Arbitration Agreement cannot be compelled. *Wilson,* 426 S.C. at 343. Further, the mere fact that the claim would not exist "but for" the contract does not invoke the theory of estoppel. *Id.* "Equitable estoppel is, ultimately, a theory designed to prevent injustice, and it should be used sparingly." Wilson, 426 S.C. at 345; *See Hirsch v. Amper Fin. Servs., LLC*, 215 N.J. 174, 71 A.3d 849, 852 (N.J. 2013) (observing equitable estoppel should

[2] Evidence also shows the underlying Admission Agreement was terminated, and Mr. Chavis was discharged from the Facility. He later returned to the Facility, and his daughter signed a Readmission Agreement. It also contained a separate title, different pagination, and different signature block. It did not reference arbitration or any such agreement. Despite his readmission, Mrs. Hagood was not presented any additional arbitration agreement for signature. Likewise, this Readmission Agreement does not merge.

be used sparingly to compel arbitration and noting it "is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration"); 28 Am. Jur. 2d *Estoppel and Waiver* § 29 (2011) (stating equitable estoppel should be used with restraint and only in exceptional circumstance). Thus, the equitable estoppel argument is denied.

CONCLUSION

After careful consideration of the pleadings, motions, and arguments of counsel, I find there is no valid Arbitration Agreement. Accordingly, Defendants' Motion to Compel Arbitration is DENIED.

IT IS SO ORDERED.

The Honorable H. Steven DeBerry, IV
Judge, Twelfth Judicial Circuit

Florence, South Carolina
Dated: _____

Marion Common Pleas

Case Caption:	Frank D Chavis Sr , plaintiff, et al VS Palmetto Faith Operating, Llc , defendant, et al
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Type:	Order/Other

H. Steven DeBerry, IV

Circuit Court Judge 2771