THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Circuit Court Judge

Case No. 2013-CP-46-2930
Appellate Case No. 2014-001624

RECEIVED
DEC 19 2014
SC Court of Appeals

Mae Ruth Davis Thompson
Individually and as the Personal
Representative of the Estate of
Eula Mae Davis, Deceased .... Respondent,

v.

Pruitt Corporation d/b/a UHS-Pruitt
Corporation; UHS-Pruitt Holdings, Inc.;
UHS of South Carolina-East, LLC;
United Health Services of South Carolina,
Inc.; United Clinical Services, Inc.,
United Rehab, Inc.; Rock Hill Healthcare
Properties, Inc.; Uni-Health Post Acute
Care-Rock Hill, LLC d/b/a UniHealth
Post Acute-Care Rock Hill .... Appellants.

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STATEMENT OF ISSUE ON APPEAL

1. Whether the circuit court correctly denied Appellants' Motion to Compel Arbitration.

STATEMENT OF THE CASE

Respondent Mae Ruth Davis Thompson brought claims of negligence, negligence per se, and negligent misrepresentations against Appellants[1] for their inadequate care of her mother Eula Mae Davis ("Mother"), who had been a resident in Appellants's nursing home. Following an unsuccessful pre-suit mediation, Respondent filed suit in her individual capacity and on behalf of Mother's estate in September 2013. Citing a document entitled "Arbitration Agreement" signed by Andrew Davis ("Son") shortly before admission, Appellants moved to compel arbitration on February 4, 2014. Following a hearing on the motion, the Honorable S. Jackson Kimball denied Appellants's motion on April 4, 2014. Appellants filed a Motion to Reconsider, which the circuit court denied by order dated July 1, 2014. The circuit court held: (1) Appellants failed to meet their burden to establish an agency relationship between Mother and Son; (2) Mother was not a third-party beneficiary to the Arbitration Agreement; and (3) Respondent was not estopped from denying enforcement of the Arbitration Agreement because Appellants failed to meet their burden to establish all elements of equitable estoppel. Order Denying Mot. to Reconsider at 2-3. Appellants filed and served a Notice of Appeal on July 25, 2014.

STATEMENT OF THE FACTS

On January 11, 2011, Respondent and Son accompanied Mother to Uni-Health Post Acute Care-Rock Hill to admit Mother for rehabilitation care. (Compl. ¶ 20). At the

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[1] Appellants include Pruitt Corporation d/b/a UHS-Pruitt Corporation; UHS-Pruitt Holdings, Inc.; UHS of South Carolina-East, LLC; United Health Services of South Carolina, Inc.; United Clinical Services, Inc., United Rehab, Inc.; Rock Hill Healthcare Properties, Inc.; and Uni-Health Post Acute Care-Rock Hill, LLC d/b/a UniHealth Post Acute-Care Rock Hill ("UPAC-Rock Hill").

time of her admission, all parties agree Mother suffered from dementia, altered mental status, and organic brain syndrome. Defs. Mem. in Supp. of Mot. to Compel Arb. at 7-8. As Mother was en route from the hospital to UPAC-Rock Hill, Son met with representatives from UPAC-Rock Hill and spent approximately one hour completing a variety of forms associated with the admission process. A. Davis Dep. 72:4-13.

Son was handed a stack of documents including a twelve-page Admission Agreement. Son was also presented with a separate five-page Arbitration Agreement. By its terms, the Admission Agreement could not be enforced by or against a third-party. Admission Agreement at 10. The Arbitration Agreement applied only to "disputes that may arise in the future between the parties" and signing the Arbitration Agreement was "not a precondition to admission . . . or the furnishing of services" to Mother. Arbitration Agreement at 5. Unlike the Admission Agreement, the Arbitration Agreement permitted the parties to revoke its terms within thirty days of signing. Id.

Son signed the Admission Agreement and the Arbitration Agreement on lines designated for "Patient/Resident Representative." Admission Agreement at 12; Arbitration Agreement at 5. UPAC-Rock Hill's administrator stated by affidavit that Son signed the Admission Agreement and Arbitration Agreement "as the representative of Mother." K. Johnson Aff. ¶¶ 5-6. The signature block for "Patient/Resident" was left blank. Id. Mother never gave Son power-of-attorney to complete these documents. A. Davis Dep. 17:12-13. While Son would sign some documents for his mother, she managed other business affairs on her own. A. Davis Dep. 17:1-13.

Within hours of her UPAC-Rock Hill admission, Mother was discovered face down on the floor in her room. Compl. ¶ 23. Respondent alleges UPAC-Rock Hill failed

to provide proper preventative measures to avoid falls. Compl ¶ 21. Mother was unresponsive when discovered by UPAC-Rock Hill staff and she died a short time later from a neck fracture suffered in the fall. Compl. ¶¶ 24-26.

Respondent filed negligence claims alleging Mother's death was caused by Appellants's improper nursing home care. After a period of discovery, Appellants moved to dismiss the Complaint and compel arbitration. While acknowledging Mother did not sign the Admission Agreement or Arbitration Agreement, Appellants argued Respondent must arbitrate her claims because (1) Son was empowered by the South Carolina Adult Health Care Consent Act (S.C. Code Ann. § 44-66-10 to -80) to bind Mother to arbitration; (2) Mother conferred actual or apparent authority on Son to sign the Arbitration Agreement; (3) Mother was a third-party beneficiary to Son's agreement with Appellants; and (4) Respondent is equitably estopped from denying enforcement of the Arbitration Agreement.

The circuit court denied the motion and concluded the Act did not apply to the Arbitration Agreement, a contract unrelated to nursing home care or payment for nursing home services. The circuit found Appellants failed to meet their burden of establishing an agency relationship between Mother and Son and Mother was not a third-party beneficiary because there was no valid underlying contract. Finally, the circuit court held that Appellants failed to meet its burden to establish all equitable estoppel elements. The circuit court denied Appellants's Motion to Reconsider on the same grounds. Appellants filed and served a timely Notice of Appeal.

STANDARD OF REVIEW

A circuit court's order denying arbitration is immediately appealable. Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 121, 747 S.E.2d 461, 464 (2013). Arbitrability determinations are subject to *de novo* review. Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014) (citing Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012)). However, the circuit court's factual findings may not be reversed on appeal if "any evidence reasonably supports the findings." Id. While both federal and South Carolina policy favors arbitration of disputes, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Int'l Paper Co. v. Scwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416 (4th Cir. 2000). Ultimately, arbitration "is a matter of consent, not coercion." Volt Information Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY REFUSED APPELLANTS'S MOTION TO COMPEL ARBITRATION.

The circuit court's ruling should be affirmed for four reasons. First, the Adult Health Care Consent Act ("the Act") is narrowly tailored to address health care decisions and related financial matters. The Act does not apply to the decision to arbitrate disputes when located in a separate, independent document. Second, Mother did not confer actual or apparent authority on Son to enter the Arbitration Agreement on her behalf. Third, Mother is not a third-party beneficiary to any purported contract between Son and Appellants. Finally, Respondent is not equitably estopped from refusing to arbitrate based on the alleged behavior of Son during Mother's admission to Appellants's facility.

A. The Adult Health Care Consent Act does not apply to the Arbitration Agreement.

The Adult Health Care Consent Act (" the Act") does not apply to a free-standing nursing home arbitration contract and the circuit court properly concluded that Respondent is not bound to the Arbitration Agreement under the Act's provisions. The Act's primary purpose is to identify and authorize individuals to make "decisions concerning . . . health care" on behalf of a person "unable to consent" S.C. Code Ann. § 44-66-30(A). The Act intends "to insure that the patient's wishes **concerning her medical treatment** are honored whenever possible." Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 353, 755 S.E.2d 450, 454 (2014) (emphasis added). The Act establishes the order of priority for those individuals authorized to make health care decisions. The first level of decision-making priority, pursuant to the Act, is granted to a legally-appointed guardian and an attorney-in-fact empowered pursuant to a duly executed durable power of attorney. S.C. Code Ann. § 44-66-30(A). An incapacitated individual's adult children, such as Respondent and Son, are fifth in priority. Id.

The Act expressly limits the decision-making power of any individual to only "health care" decisions. S.C. Code Ann. § 44-66-30(A). "Health care" is defined in the Act and the South Carolina Supreme Court recently construed the definition to limit an individual's decision-making authority to: (1) "provision or withholding of medical care including placement in a facility which provides such care;" and (2) "certain financial decisions . . . to pay for services rendered." Coleman, 407 S.C. at 352, 755 S.E.2d at 453. An individual's power under the Act applies "primarily to traditional health care decisions" and only "secondarily" to financial matters related to those decisions. Id. at 353, 755 S.E.2d at 454.

The Act grants only limited decision-making power related to nursing home admission. An individual authorized by the Act may enter an agreement to admit a resident to a nursing home and may enter a contract agreeing to pay for nursing home services. Coleman, 407 S.C. at 353-54, 755 S.E.2d at 454. A potential resident or her family are typically presented with multiple contracts and other documents when the family contemplates admitting their loved one to a nursing home. Coleman demonstrates that the Act does not apply to all documents associated with nursing home admission. Specifically, the Act does not apply if a document "was not required for [the resident's] admission, contained no provision for medical, nursing, or health care services to be provided for [the resident], and did not require any financial commitment to pay for such services. Id. at 353, 755 S.E.2d at 454.

Based on the Coleman standard, the Act does not apply to the Arbitration Agreement. The Arbitration Agreement does not contain any provision for medical, nursing, or health care services. The bolded and underlined language in Section I of the Arbitration Agreement indicates that its provisions are intended only for dispute resolution. Arbitration Agreement at 1. The Arbitration Agreement does not contain any provisions relating to payment for medical, nursing, or health care services. Only the scope of arbitrable disputes and procedures for an arbitration hearing are included in the Arbitration Agreement.

Appellants argue the Arbitration Agreement's terms were required for Mother's admission to UPAC-Rock Hill because the Arbitration Agreement merges with the Admission Agreement, a contract that covers "health care" decisions. Initial Br. of Appellants at 8-9. The Coleman Court acknowledged South Carolina law indicating that

contracts signed at the same time by the same parties and for the same purpose will be construed together "in the absence of anything indicating a contrary intention." 407 S.C. at 355, 755 S.E.2d at 455 (quoting Klutts Resort Realty, Inc. v. Down'round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)). Coleman refused to apply the merger doctrine because the admission agreement contained language "indicating a contrary intention." The Court found that language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." 407 S.C. at 355, 755 S.E.2d at 455. For example, a term in the arbitration agreement permitted the resident to disclaim arbitration within thirty days while no such term existed in the admission agreement. 407 S.C. at 355, 755 S.E.2d at 455. This incongruity indicated the parties' intent to keep the two agreements separate. Id.

Appellants argue that the Admission Agreement and Arbitration Agreement merge and rely on the Admission Agreement's incorporation of its "exhibits" to assert that the Arbitration Agreement is an "exhibit" of the Admission Agreement. Initial Br. of Appellants at 9. However, the Admission Agreement never defines "exhibits" and nothing in the Arbitration Agreement indicates that it is intended to be the Admission Agreement's exhibit.[2] In fact, "exhibit" appears just once in the Admission Agreement and does not appear at all in the Arbitration Agreement. The Coleman admission agreement included similar "exhibit" language that did not detract from the "separateness" of the admission and arbitration agreements. 407 S.C. at 355, 755 S.E.2d at 455.

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[2] Any ambiguity as to merger must be construed against Appellants since they were the agreements' exclusive drafters. Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455 (citing Davis v. KB Home of S.C., Inc., 394 S.C. 116, 129, 713 S.E.2d 799, 805 n. 4 (Ct. App. 2011)).

In fact, there are multiple terms in the Arbitration Agreement demonstrating the parties' intent that the Admission and Arbitration Agreements are not to be considered a single contract. Like Coleman, the Arbitration Agreement in this case contains a thirty-day revocability period that is not present in the Admission Agreement. Arbitration Agreement at 5. Also, the Arbitration Agreement acknowledges that agreeing to its terms is "voluntary," i.e. not a prerequisite to admission. Arbitration Agreement at 1. This same sentiment is expressly stated later in the Arbitration Agreement. Signing the Arbitration Agreement "is not a precondition to admission, expedited admission, or the furnishing of services to the Patient/Resident by the Healthcare Center." Arbitration Agreement at 5. The Arbitration Agreement was intended to be a separate contract from the Admission Agreement and, just as in Coleman, the merger rule from Klutts is overcome by the contracts' contrary intent. Klutts Resort Realty, Inc., 268 S.C. at 88, 232 S.E.2d at 24.

Appellants's merger argument suffers from other flaws. Klutts indicates that merger only applies to instruments executed "at the same time, by the same parties, for the same purpose, and in the course of the same transaction." Even if Appellants's positions were taken as true and two valid contracts existed, the Agreements would not merge under the Klutts test. Even under Appellants' theory of the case, the two contracts are not between the same parties. Appellants argue that the Arbitration Agreement includes Son as a party. He is not listed as a party to the Admission Agreement and Appellants do not argue otherwise. Additionally, the two Agreements were not executed for the same purpose. The Admission Agreement purports to cover a bed hold policy, pharmacy selection, and other activities incident to nursing home services. In contrast, the Arbitration Agreement's stated purpose is to establish the procedures "to submit for

resolution by arbitration any disputes that may arise." Arbitration Agreement at 1. The Adult Health Care Consent Act does not apply to the Arbitration Agreement, and the circuit court correctly rejected Appellants's motion on this basis.

B. Mother did not grant Son actual or apparent authority to enter the Arbitration Agreement on her behalf.

Appellants argue that the circuit court erred in finding Son lacked actual or apparent authority to enter the Arbitration Agreement on Mother's behalf. Appellants bear the burden of establishing all required elements to prove an agency relationship. Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996). In this case, Appellants must show that all necessary elements of an agency relationship are "clearly established" by the facts. Id. A party dealing with an agent has a duty to use due care to ascertain the scope of the agent's authority to act. Id.

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. Savs. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 145, 425 S.E.2d 764, 773 (Ct. App. 1992) (citing Restatement (Second) of Agency § 1 (1958)). An agency relationship may be established with clear evidence of actual or apparent authority conferred by the purported principal on the purported agent. Cowburn v. Leventis, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). Actual authority is "expressly conferred upon the agent by the principal." Richardson v. PV, Inc., 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009). Appellants do not appear to argue that Son had actual authority to bind Mother to the Arbitration Agreement. Appellants cannot point to any statutory power Son had to act for Mother. As he testified during his deposition, Son

was never designated as Mother's attorney-in-fact for any reason. A. Davis Dep. 17:12-13.

Apparent authority is based on "representations made by the principal to the third party and reliance by the third party on those representations." Young v. S.C. Dep't of Disabilities & Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). To prove apparent authority, a party must show (1) the purported principal consciously or impliedly represented another to be his agent; (2) reliance on the representation by a third-party; and (3) a change in position by third-party in reliance on the representation. Cowburn, 366 S.C. at 39-40, 619 S.E.2d at 448. South Carolina law states that an agency relationship cannot be established solely by the words and actions of the purported agent. Id. None of the authorities cited in Appellants's brief dispute this principle. In fact, many of them expressly acknowledge that the focus of an apparent authority analysis must be the purported principal's conduct.[3]

Appellants rely primarily on R & G Construction, Inc. v. Lowcountry Regional Transportation Authority, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000). R & G Construction, presented a very different set of facts than the current case. In R & G Construction, the designated executive director of a regional transportation company entered a contract with a construction contractor for work on premises operated by the transportation company. 343 S.C. at 434, 540 S.E.2d at 118-19. The circuit court found there was some evidence that the executive director had apparent authority to enter into

[3] See, e.g. ZIV Television Programs, Inc. v. Associated Grocers, Inc., of S.C., 236 S.C. 448, 453, 114 S.E.2d 826, 828 (1960) (finding apparent authority requires "a representation by the principal"); Pee Dee Nursing Home, Inc. v. Florence Gen. Hosp., 309 S.C. 80, 84, 419 S.E.2d 834, 837 (Ct. App. 1992) (noting apparent authority "depends upon manifestations by the principal").

contracts on the transportation company's behalf. Id. Unlike Appellants's arguments, the R & G Construction court found that the transportation company (i.e. the purported principal) "represented to others that [purported agent] had the authority to enter into the contract." Id. at 435, 540 S.E.2d at 119. The transportation company conceded that it expressly named the purported agent as the company's executive director and the transportation company's employee confirmed the executive director's position to the third party. Id.

Appellants also cite language from R & G Construction indicating that apparent authority may be conferred "where the principal passively permits the agent to appear" to have authority. 343 S.C. at 434, 540 S.E.2d at 118. This language is taken from Genovese v. Bergeron, 327 S.C. 567, 490 S.E.2d 608 (Ct. App. 1997), which is also distinguishable from the present case. In Genovese, a tenant who failed to pay her rent argued that a property manager, acting with authority granted by the landlord, agreed to permit the tenant to terminate her lease without penalty. Id. at 571, 490 S.E.2d at 610. This Court found evidence of apparent authority since the parties agreed that the property manager was the landlord's agent. Id. Apparent authority based on passive conduct or inaction does not permit a nursing home to bind an unaware nursing home resident with diminished mental capacity to an arbitration agreement signed by a non-agent family member.[4]

[4] Other jurisdictions have reached this same conclusion. See e.g., Munn v. Haymount Rehab. & Nursing Ctr., Inc., 704 S.E.2d 290, 296 (N.C. App. 2010) (concluding home resident could not make representations sufficient to confer apparent authority since she was "not responsive" and unable "to speak or communicate" when agreement was signed); Forest Hill Nursing Ctr., Inc. v. McFarlan, 995 So.2d 775, 782 (Miss. App. 2008) (citing fact that resident "was not present at the time of signing" as support for concluding nursing failed to establish apparent agency to support arbitration agreement);

Even this Court in R & G Construction acknowledged apparent authority is limited to instances where a purported principal "intend[s] to cause the third person to believe the agent is authorized to act for him, or he should realize his conduct is likely to create such belief."[5] However, Appellants's argument based on R & Construction relies exclusively on alleged representations made by Son. See Initial Br. of Appellants at 10 ("he represented he was authorized" and Appellants "relied upon Son' representations"). R & G Construction offers no support for Appellants's position, and Appellants make no effort to comply with the apparent authority requirements outlined in R & G Construction.

To the extent Appellants's reference Mother in their agency argument, they rely on Mother's failure to act as a basis for conferring apparent authority. Appellants allege Mother failed to object to Son's actions and "allowed, passively or otherwise" for the son to sign the admission paperwork. Initial Br. of Appellants at 11. Appellants seem to suggest Mother had a duty to speak or otherwise act to prevent Son from signing admission documents or to advise Appellants that Son was neither Mother's conservator,

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Ashburn Health Care Ctr., Inc. v. Poole, 648 S.E.2d 430, 433 (Ga. App. 2007) (finding no apparent authority in resident's husband where nursing home failed to prove resident "knew about the arbitration agreement [or] authorized her husband to sign the document").

[5] R & G Construction makes this point several times. For example, apparent authority "focuses on the principal's manifestation to a third party that the agent has certain authority." 343 S.C. at 432, 540 S.E.2d at 117 (citing Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 468 S.E.2d 292 (1996)). Also, the "concept of apparent authority depends upon manifestations by the principal to a third party." R & G Construction, 343 S.C. at 432, 540 S.E.2d at 118. Additionally, "[a]pparent authority must be established upon manifestations by the principal, not the agent." Id. (citing Shropshire v. Prahalis, 309 S.C. 70, 419 S.E.2d 829 (Ct. App. 1992)). Finally, "[t]he proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent, but on that between the principal and third party." R & G Construction, 343 S.C. at 432-33, 540 S.E.2d at 118 (citing Vereen v. Liberty Life Ins. Co., 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991)).

guardian, nor attorney in fact. Appellants's argument suffers from at least two fatal flaws. First, there is no evidence that Mother was present when Son signed admission paperwork or was even aware of the signing process as it happened. Son's deposition indicates that Mother was being transported to the nursing home while he was signing documents, and he visited her in her room after the signing process was over. A. Davis Dep. 72:4-22; 73:6-20.

Second, Appellants's agency argument is at odds with their position on the South Carolina Adult Health Care Consent Act. Appellants' agency argument faults Mother for failing to recognize the likely appearance of Son signing the admission paperwork and in failing to advise Appellants that Son had no legal authority. However, in an effort to apply the Act to Respondent's claim, Appellants argued Mother met the Act's definition of a person "unable to consent." Initial Br. of Appellants at 6-7. As indicated in the Act and as quoted in Appellants's brief, a person is only unable to consent if she is "unable to appreciate the nature and implications of the patient's condition and proposed health care, to make a reasoned decision concerning the proposed health care, or to communicate that decision in an unambiguous manner." Initial Br. of Appellants at 6 (quoting S.C. Code Ann. § 44-66-20(8)). Thus, at one point, Appellants argue Mother could not understand her surroundings, make reasoned decisions, or communicate her desires clearly. Just a few pages later, Appellants argue Mother conferred apparent authority on Son by failing to do the very things Appellants acknowledge she was incapable of doing.

Beyond this strained reasoning, Appellants do not point to any representations Mother made to Appellants regarding Son or his alleged capacity to bind her to a contract. As such, Appellants failed to meet their burden of establishing an agency

relationship under a long string of South Carolina cases including R & G Construction. The circuit court properly found Appellants failed to produce evidence of representations or manifestations by Mother sufficient to confer apparent authority on Son. Order Denying Mot. to Dismiss at 4. Appellants' brief fails to cite any evidence from which apparent authority may be derived. Therefore, the circuit court's order refusing to find an agency relationship should be affirmed.

C. Mother was not a third-party beneficiary of any alleged agreement between Appellants and Son.

As a fallback position, Appellants argue Son entered an Arbitration Agreement with the nursing home and Respondent is bound to the Agreement since Mother was a third-party beneficiary. There are three reasons why this Court must affirm the circuit court's order refusing Appellants's third-party beneficiary argument: (1) there can be no third-party beneficiary in the absence of a valid contract and there is no valid contract here between Mother and Appellants or between Son and Appellants; (2) even if Son was a party to the Arbitration Agreement, Mother was not a third-party beneficiary to the Agreement because the Agreement's parties did not intend to benefit her *as a third-party*; and (3) Mother never consented to arbitration and a non-consenting person cannot be bound to arbitrate.

1. There is no valid contract to which Mother can be a third-party beneficiary.

Appellants's third-party beneficiary argument must fail because there can be no third-party beneficiary in the absence of a valid contract. Order Denying Mot. to Reconsider at 3 (citing Hardaway Concrete Co., Inc. v. Hall Contracting Co., 374 S.C. 216, 225, 647 S.E.2d 488, 492 (Ct. App. 2007) (considering a potential third-party

beneficiary only after determining the existence of a valid and enforceable contract)). Since Mother did not sign the Arbitration Agreement and Son lacked actual or apparent authority to enter the Arbitration Agreement on Mother's behalf, there was no contract to arbitrate between Mother and Appellants. The evidence also shows there was no valid contract between Son and Appellants. Appellants did not intend for Son to be a party to the Arbitration Agreement in his individual capacity. Throughout the agreement, Son is identified only as "Patient/Resident Representative," never in his individual capacity. Son signed the agreement in a signature block labeled "Patient/Resident Representative." Arbitration Agreement at 5.

The only language purporting to bind Son to the Arbitration Agreement in his individual capacity is on the final page in nondescript type below the signature block. Id. Appellants's intent to include Son only as Mother's representative is clear in Appellants' filings with the circuit court. In an affidavit attached to Appellants's Motion to Compel Arbitration, UPAC-Rock Hill's administrator indicated that Son signed admission paperwork including the Arbitration Agreement only **"as the representative"** of Mother. K. Johnson Aff. ¶ 5 (emphasis added). There is no contract, thus there can be no third-party beneficiary.

2. Appellants did not intend for Mother to benefit from the Arbitration Agreement as a third party.

Additionally, the third-party beneficiary doctrine does not apply to the Arbitration Agreement because it was not the purported parties' intent to benefit Mother as a third-party. The third-party beneficiary doctrine is an exception to the rule barring enforcement of a contract by or against a non-party. Windsor Green Owners Ass'n v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004). The exception only applies if

the contracting parties intended to create a direct benefit in a "third person." Id. The purported parties' intent is a material element of the third-party beneficiary doctrine. The parties must recognize the attempted beneficiary as a non-party and intend to benefit that person as a non-party. To determine Appellants's intent for the Arbitration Agreement, this Court must look beyond Appellants's current statements to the moment when the purported contract was formed. Laser Supply & Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009).

When the Arbitration Agreement was presented to Son on January 11, 2011, Appellants intended to make Mother a party. For the many reasons discussed above, Appellants failed to effectuate this intent by obtaining the assent of Mother or one authorized to act on her behalf. Appellants only seek to deem Mother a third-party because their efforts to label her a party do not comply with South Carolina contract law. The letter and spirit of that law would be severely undermined if Appellants succeed. Appellants's intent to make Mother a party to the contract means Appellants cannot prove a material element required to bind Respondent to the agreement as a third-party beneficiary.

The circuit court properly concluded "there was never intended to be a contract between [Appellants] and Andrew Davis upon which to premise a 'third party beneficiary' theory." Order Denying Mot. to Reconsider at 3. The circuit court's conclusion is supported not only by the South Carolina law cited above, but also by rulings from other jurisdictions. See e.g., Dickerson v. Longoria, 995 A.2d 721, 742 n. 21 (Md. 2010) (rejecting nursing home's third-party beneficiary argument when combined with home's attempt to bind resident to contract as party and finding "inconsistency

belies [home's] arguments") Barbee v. Kindred Healthcare Operating, Inc., No. W2007-00517-COA-R3-CV, 2008 WL 4615858 at *10 n. 3 (Tenn. App. Oct. 20, 2008) (rejecting nursing home's attempt to label resident's relative as party and resident as third-party beneficiary because "this argument has already been rejected by this court").

3. Mother never consented to arbitrate claims against Appellants.

Appellants's third-party beneficiary argument is also flawed because it would force a person to enter arbitration for claims for which she never consented to arbitrate. South Carolina contract law generally precludes enforcement of a contract's terms against a person failing to manifest assent. Laser Supply & Servs., Inc., 382 S.C. at 334, 676 S.E.2d at 143-44. South Carolina authority does indicate that a non-signatory can enforce or be bound by an arbitration provision is some limited instances. Pearson v. Hilton Head Hosp., 400 S.C. 281, 288-89, 733 S.E.2d 597, 600-01 (Ct. App. 2012) (citing Int'l Paper Co. v. Scwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416-17 (4th Cir. 2000)). Pearson relies heavily on the Fourth Circuit's reasoning in International Paper, which acknowledged that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." 206 F.3d at 416. Notwithstanding the federal and state policies favoring alternative dispute resolution, arbitration "is a matter of consent, not coercion." Volt Information Scis., Inc., 489 U.S. at 479.

While Pearson recognized that a person "can agree to submit to arbitration by means other than personally signing," none of the doctrines Pearson discussed apply to Mother. 400 S.C. at 288, 733 S.E.2d at 600 (citing Int'l Paper, 206 F.3d at 416). Alternative means of assenting to arbitration include assumption of an existing contract,

the signature of a person properly acting as another's agent, and conduct by an individual inconsistent with denying arbitration sufficient to apply the equitable doctrine of estoppel. Pearson, 400 S.C. at 289, 733 S.E.2d at 601 (citing Thompson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995)). Each of these doctrines require affirmative conduct by the person to be bound to arbitration by which the person either expressed her desire to arbitrate or attempted to enforce a portion of the contract such that avoiding the contract's arbitration requirement would be inequitable.

Mother did neither. Her diminished mental capacity precluded conduct expressing a desire to assent and neither she nor Respondent have attempted to enforce the Arbitration Agreement's terms. A person cannot be forced into arbitration by the independent conduct of others. Considering only the elements of the third-party beneficiary doctrine is an "incomplete" analysis. Drury v. Assisted Living Concepts Inc., 262 P.3d 1162, 1166 (Or. App. 2011). A court must also consider whether the alleged third-party somehow manifested assent. Id. Otherwise, "the contracting parties have waived the beneficiary's right to a jury trial without her consent." Id. at 1166 n. 5. Not even Pearson's broad scope of arbitration permits this result.[6]

The final portion of Appellants's argument in the third-party beneficiary section of their brief argues Respondent is bound to arbitrate her claims because they are "inextricably intertwined" with Son's claims. Initial Br. of Appellants at 14-15 (citing

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[6] Additionally, Respondent may not be compelled to arbitration because the purported contract terms do not include Mother's or Respondent's claims. In bold and underlined font on the Arbitration Agreement's first page, the Agreement's reach is expressly limited to "**ANY DISPUTES THAT MAY ARISE IN THE FUTURE BETWEEN THE PARTIES**." Appellants were the exclusive drafters of the Agreement's language and they chose to limit the scope of arbitration to the parties' claims. Respondent is not bound to arbitrate her claims even if Appellants' third-party beneficiary argument was accurate.

Long v. Silver, 248 F.3d 309 (4th Cir. 2001)). This argument is premised on the notion that Son entered a valid contract with Appellants in his individual capacity, which Respondent disputes. Also, the relationship among Son, Mother, and the beneficiaries of his mother's estate is not the type of relationship to which Long was intended to apply. Long discusses the parent corporation-subsidiary and corporation-shareholder relationships. 248 F.3d at 320. Specifically, Long allowed arbitration against non-signatory shareholders but only because they "control[led] all of the activities of the corporation," i.e. the party that signed the arbitration agreement. Id.

For Long to support arbitration in this case, Appellants would have to show that the other beneficiaries to Mother's estate controlled all of the activities of Son when he signed the Arbitration Agreement. Appellants have not and could not credibly attempt to make this showing. A view of Long in its entirety shows that its "inextricably intertwined" language is not an independent basis for enforcing arbitration against a non-signatory. Instead, the Fourth Circuit was applying previously recognized doctrines including agency and estoppel. Id. (citing Thompson-CSF, 64 F.3d at 776; U.S. v. Bankers Ins. Co., 245 F.3d 315, 323 (4th Cir. 2001)).[7] Respondent addresses Appellants's agency and estoppel arguments in Sections I(a) and I(d) respectively.

Finally, the other nursing home cases upon which Appellants rely to support their third-party beneficiary argument are distinguishable either on their facts or because they apply legal principles at odds with South Carolina law. Owens v. Coosa Valley Health Care, Inc., 890 So.2d 983 (Ala. 2004), is distinguishable for three reasons. First, Owens is

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[7] The same is true for Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757 (11th Cir. 1993), another case Appellants cite in support of their "inextricably intertwined" argument. The "only issue" in Sunkist was equitable estoppel. Id.

not a third-party beneficiary case. Instead, the Supreme Court of Alabama enforced an arbitration agreement after concluding the non-signatory nursing home resident was a party to an arbitration agreement. Owens, 890 So.2d at 987. Second, the Owens court's basis for finding the resident to be a party does not comport with South Carolina law. Even though the resident did not sign the arbitration agreement, she was considered a party because the purported contract named her as a party and the resident did not object to her daughter signing the agreement. Id. Under South Carolina law, however, a person becomes a party to a contract only by some objective manifestation of . . . assent at the time the contract was made." Laser Supply & Services, Inc., 382 S.C. at 334, 676 S.E.2d at 143-44. In this state, a non-signatory is not grafted in to a contract as a party simply because a form contract lists her name. Finally, Owens is distinguishable on its facts since the nursing home resident in that case did not have the diminished mental capacity from which Mother suffered at the time of her admission. See Noland Health Servs., Inc. v. Wright, 971 So.2d 681, 687 (Ala. 2007) (noting "there was no issue regarding [resident's] mental capacity" in Owens). The other cases on which Appellants rely also present very different facts.[8] Neither South Carolina law nor persuasive authority cited in their brief supports Appellants's third-party beneficiary argument, and the circuit court's ruling must be affirmed.

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[8] Cook v. GGNSC Ripley, LLC, 786 F. Supp. 2d 1166 (N.D. Miss. 2011) (binding nursing home resident to arbitration agreement where resident's daughter, who held position of "health care agent" for the resident, "expressly represented herself" to nursing home as the resident's power of attorney); Trinity Mission Health & Rehab. Of Clinton v. Estate of Scott, 19 So.3d 735, 738 (Miss. App. 2008) (finding arbitration language was a provision in admission agreement rather than a separate and independent contract).

D. Respondent is not equitably estopped from denying Son had authority to enter the Arbitration Agreement on Mother's behalf.

Appellants incorrectly allege Respondent is equitably estopped from opposing enforcement of the Arbitration Agreement. Equitable estoppel is a contract defense for which the asserting party "bears the burden of establishing all the elements." Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conducted be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on conduct of the party to be estopped. Id.

The circuit court correctly found Appellants did not meet their burden to establish these elements. Order Denying Mot. to Reconsider at 3-4. Appellants do not attempt to apply or even cite these elements in their brief. The circuit court noted at least one example of how Appellants could not meet their burden. Appellants could not prove they relied on Mother's conduct as affirmation that Son had authority to enter the Arbitration Agreement on Mother's behalf. Id. Appellants could not have relied on Mother's conduct at that time because Mother was not present when the admission paperwork was presented to Son.

Appellants cannot meet their burden on other elements listed in Strickland. There is no evidence Mother acted in a way amounting to a false representation to Appellants regarding Son's status or that Mother intended for Appellants to act in reliance on her

conduct. Mother was absent from the room when the arbitration agreement was presented. Also, her diminished mental capacity prevented Mother from forming the required intent for Appellants to rely on her conduct.[9] Additionally, the evidence shows Appellants cannot meet their burden to show they lacked knowledge or the means of knowledge of the truth of the facts in question. This element requires Appellants to show they did not know Son lacked authority to sign the arbitration agreement on his mother's behalf and Appellants lacked the ability to make this determination. Equitable doctrines such as estoppel favor diligent parties who actively endeavor to protect their rights. A person cannot claim to have been misled and cannot rely on equitable estoppel if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. See Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

In this case, Appellants had the capacity to determine whether Son had authority to sign an arbitration agreement on Mother's behalf. Appellants are sophisticated business entities frequently interacting with residents and their families during the nursing home admission process. Appellants are familiar with the legal concepts of

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[9] Appellants attempt to build their estoppel argument on alleged conduct of Son and Respondent, the personal representative of Mother's estate. Initial Br. of Appellants at 17. Respondent's Complaint alleges wrongful death and survival claims. Survival claims are governed by statute and are brought by a decedent's personal representative for the benefit of the decedent's estate. S.C. Code Ann. § 15-5-90. The personal representative simply "stands in the shoes of the decedent." Carson v. CSX Transp., Inc., 400 S.C. 221, 242, 734 S.E.2d 148, 159 (2012). In determining the outcome of a survival action, it is the conduct of the decedent that matters and not the identity or conduct of the estate's beneficiaries. Id. ("a court . . . should only consider the entitlement of the estate, not the identification of its beneficiaries"). Accordingly, Appellants's focus on Son's alleged representations or the personal representative's alleged silent affirmations is misplaced.

guardianship and powers-of-attorney. Appellants had the ability to ask Son and Mother whether Son was Mother's guardian or attorney-in-fact and had the ability to request supporting documentation.

Another major flaw in Appellants's equitable estoppel argument is that it is premised on Appellants's faulty merger argument. In Coleman, the South Carolina Supreme Court rejected a nursing home's equitable estoppel argument because it was based on the home's faulty assertion that an admission agreement merged with a separate and independent arbitration agreement. 407 S.C. at 354-55, 755 S.E.2d at 455. Appellants make similar arguments in their brief. Initial Br. of Appellants at 17. Appellants argue Respondent is not free to selectively enforce portions of the Admission Agreement. Id.. However, Respondent has not chosen to "enforce" any portion of the Admission Agreement. Her Complaint alleges wrongful death and survival claims premised on common law duties owed by a nursing home to its resident. Compl. ¶¶ 28-42. For the same reason, Appellants err when they claim Respondent seeks to "repudiate" any agreement. Respondent's Complaint does not reference and is not based on any contract.

Even if Respondent had based a claim on an alleged breach of the Admission Agreement, such conduct would not equitably estop her from opposing enforcement of the separate and independent Arbitration Agreement. Appellants's brief refers to Respondent "picking and choosing" portions of the Admission Agreement to enforce. Initial Br. of Appellants at 17. However, the Admission Agreement does not reference arbitration at all. Presumably, Appellants are arguing that the Admission Agreement and Arbitration Agreement merge, and Respondent is bound by the later by seeking to enforce the former. Yet, Respondent does not seek to enforce either agreement and, as

discussed in Section I(A), Appellants cannot meet their burden of proving merger because the agreements indicate that they are not to merge.

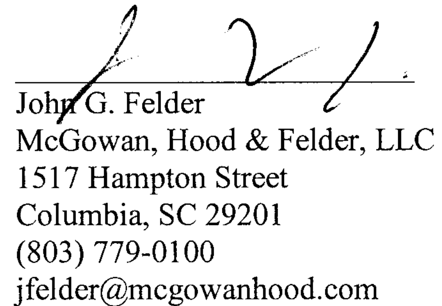
The separateness of the two contracts in this case is an important fact further distinguishing the "direct benefit" cases on which Appellants rely. Initial Br. of Appellants at 16. International Paper notes that equitable estoppel can apply to bar refusal of arbitration when the refusing party "receives a direct benefit from a contract containing an arbitration clause." 206 F.3d at 418 (quoting Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999)). The Fourth Circuit opinion does not fully list the equitable estoppel elements for South Carolina law provided in Strickland. Additionally, International Paper considered a single contract in which a party was suing to enforce some terms while seeking to avoid the same contract's arbitration provision. The same is true for Jackson v. Iris.com, 524 F. Supp. 2d 742, 749-50 (E.D. Va. 2007), which Appellants cite in further support of their estoppel argument. In Jackson, a musician was estopped from refusing a contract's mandatory arbitration provision when he sought to enforce the same contract's liquidated damages provision. Id. at 750-51. In sum, Appellants' equitable estoppel argument is only potentially viable if this Court finds the Admission Agreement and Arbitration Agreements merge. However, as in Coleman, the evidence shows the contracts are separate, and Appellants cannot meet their burden to prove merger.

CONCLUSION

Based on the arguments stated above, Respondent respectfully requests this Court affirm the circuit court's denial of Appellants's motion to compel arbitration. Appellants seek to expand the Adult Healthcare Consent Act and the common law doctrine of

apparent authority far beyond their recognized bounds in an effort to bar litigation of the claims of an elderly nursing home resident who never consented to the Arbitration Agreement. The circuit court correctly refused Appellants's motion and the circuit court's ruling should be affirmed.

Respectfully submitted,



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December 19, 2014
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

RECEIVED
DEC 1 9 2014
SC Court of Appeals

S. Jackson Kimball, Circuit Court Judge

Case No. 2013-CP-46-2930
Appellate Case No. 2014-001624

Mae Ruth Davis Thompson
Individually and as the Personal
Representative of the Estate of
Eula Mae Davis, Deceased .... Respondent,

v.

Pruitt Corporation d/b/a UHS-Pruitt
Corporation; UHS-Pruitt Holdings, Inc.;
UHS of South Carolina-East, LLC;
United Health Services of South Carolina,
Inc.; United Clinical Services, Inc.,
United Rehab, Inc.; Rock Hill Healthcare
Properties, Inc.; Uni-Health Post Acute
Care-Rock Hill, LLC d/b/a UniHealth
Post Acute-Care Rock Hill .... Appellants.

PROOF OF SERVICE

I, the undersigned Paralegal of the law offices of McGowan Hood & Felder, LLC, attorney for the Respondent, do hereby certify that I have served all counsel in this action with a copy of the Initial Brief of Respondent and Respondent's Designation of Matter to be included in the Record on Appeal by mailing a copy of the same to counsel via United States Mail, postage prepaid, at the following address:

Counsel served:

Monteith P. Todd, Esquire
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Post Office Box 11449
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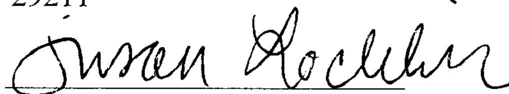

December 19, 2014

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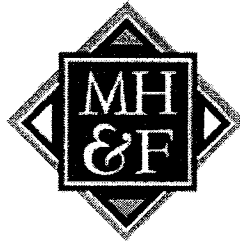

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DEC 19 2014
SC Court of Appeals

December 19, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1205 Pendleton St.
Columbia, SC 29201

Re: Mae Ruth Thompson v. Pruitt Corporation
Appellate Case no. 2014-001624

Dear Ms. Kitchings:

Enclosed for filing is the original and one copy of the Initial Brief of Respondent and Respondent's Designation of Matter to be included in the Record on Appeal.

Please file the same in your customary manner and return a copy to me.

By copy of this letter, I am serving all counsel of record.

With kind regards,

Sincerely,

John G. Felder, Jr.

JGFjr/sll
Enclosures
cc: Monteith Todd, Esquire
J. Michael Montgomery, Esquire
Alexander E. Davis, Esquire