THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BAMBERG
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2015-CP-05-00124
Appellate Case No. 2015-002493

Polly McGill and Mary Broxton, as Co- Personal Representatives of the Estate of Virginia Butler, deceased, Plaintiffs

Of Whom Polly McGill, as Personal Representative of the Estate of Virginia Butler is the ..... Respondent,

v.

The Regional Medical Center Foundation d/b/a The Regional Medical Center and Pruitt Health-Bamberg, LLC d/b/a Uni-Health Post Acute Care of Bamberg, LLC, Defendants,

Of Whom Pruitt Health-Bamberg, LLC d/b/a Uni-Health Post Acute Care of Bamberg, LLC is the ..... Appellant.

FINAL BRIEF OF APPELLANT

Monteith P. Todd
J. Michael Montgomery
Alexander E. Davis
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, SC 29211
(803) 929-0300

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BAMBERG
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2015-CP-05-00124
Appellate Case No. 2015-002493

Polly McGill and Mary Broxton, as Co- Personal Representatives of the Estate of Virginia Butler, deceased, Plaintiffs

Of Whom Polly McGill, as Personal Representative of the Estate of Virginia Butler is the ..... Respondent,

v.

The Regional Medical Center Foundation d/b/a The Regional Medical Center and Pruitt Health-Bamberg, LLC d/b/a Uni-Health Post Acute Care of Bamberg, LLC, Defendants,

Of Whom Pruitt Health-Bamberg, LLC d/b/a Uni-Health Post Acute Care of Bamberg, LLC is the ..... Appellant.

FINAL BRIEF OF APPELLANT

Monteith P. Todd
J. Michael Montgomery
Alexander E. Davis
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, SC 29211
(803) 929-0300

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ISSUES ON APPEAL

II. Did the trial court err in denying the Defendants' Motion to Compel Arbitration?

a. The trial court erred in concluding that the Respondents cannot be bound by the arbitration agreement under the Adult Health Care Consent Act.

b. The trial court erred in finding that the Respondents are not bound by the agreement under the common law doctrines of equitable estoppel and third-party beneficiary.

STATEMENT OF THE CASE

This appeal arises out of a wrongful death and survival lawsuit filed on June 15, 2015 by Polly McGill and Mary Broxton (hereinafter "Respondents"), as Co-Personal Representatives of the Estate of Virginia Butler. (R. pp. 32-38). Respondents sued The Regional Medical Center Foundation d/b/a The Regional Medical Center (hereinafter "TRMC") and Pruitt Health-Bamberg, LLC d/b/a Unihealth Post-Acute Care of Bamberg, LLC (hereinafter "UPAC-Bamberg" or "the facility").

As alleged in the Complaint, the Decedent, Virginia Butler, was admitted to TRMC on January 17, 2014 with general weakness and was diagnosed with anemia. (R. p. 34, ¶ 9). Ms. Butler was treated at TRMC until being released home on January 22, 2014. (R. p. 34, ¶ 9). Three days later, on January 25, 2014, Ms. Butler suffered a fall and was readmitted to TRMC, where she was diagnosed with a fractured femur. (R. p. 34, ¶ 10). Ms. Butler remained at TRMC until January 31, 2014, but no surgery was performed during this time as she was determined to be a poor candidate. (R. p. 34, ¶ 11; R. p. 35, ¶ 15). Respondents allege that during this stay at TRMC, decedent developed a stage III pressure ulcer on her right lower leg, which progressed to a stage 4 pressure ulcer. (R. p. 34, ¶ 13). The Respondents allege the development/progression of this sore was the result of negligence on the part of defendant TRMC. *Id.*

Upon discharge from TRMC, Ms. Butler was admitted to UPAC-Bamberg. (R. p. 35, ¶ 15). On February 7, 2014, Ms. Butler was sent to Colleton Medical Center (hereinafter "CMC") for wound treatment, before returning to UPAC-Bamberg that same day. (R. p. 35, ¶ 16). On February 14, 2014, Ms. Butler returned to the Wound Clinic at CMC. (R. p. 35, ¶ 20). After being examined in the Wound Clinic, she was admitted to CMC, where she passed away on February 17, 2014. (R. p. 35, ¶¶ 21-22). The Respondents allege that UPAC-Bamberg allowed the

decedent's "pressure ulcers [to] progress[] to [a] stage 4 category due to the failure of the nurses and employees of PruittHealth-Bamberg to comply with the nationally recognizable standard of care." (R. p. 35, ¶ 18). They allege these failures caused Ms. Butler's death.

Ms. Butler entered UPAC-Bamberg rehabilitation facility on or about January 31, 2014.[1] Prior to her admission, Mary Robinson, as Ms. Butler's niece and representative, executed various documents related to her admission to UPAC-Bamberg, including an Admission Packet containing an arbitration agreement. (R. pp. 61-78). Although Ms. Butler had no power of attorney, these documents were executed by Ms. Robinson as the representative of Ms. Butler. During her stay at the facility, Ms. Butler accepted the benefits of the contracts entered into on her behalf by her representative, Mr. Butler, including her admission to the facility and the receipt of skilled nursing care. At the time of her admission, Ms. Butler was suffering from dementia. (R. pp. 80-91).

Respondents McGill and Broxton, as Co-Personal Representative of the Estate of Virginia, commenced this action by filing a Notice of Intent to Sue on April 6, 2015 (R. pp. 11-31). Respondents filed their Summons and Complaint against the Defendants on June 15, 2015. (R. pp. 32-46). On July 15, 2015, UPAC-Bamberg filed a Motion to Dismiss and Compel Arbitration. (R. pp. 47-48). By Order dated September 30, 2015 and filed October 5, 2015, the trial court denied the Defendant's Motion to Compel Arbitration for the reasons addressed within this appeal. (R. pp. 1-9). The Appellant timely filed a Motion to Reconsider the denial of the motion. (R. pp. 117-125). By Order dated November 4, 2015 and filed November 9, 2015, the trial court denied

[1] Ms. Butler was previously a resident of the facility in September 2012, but there are no allegations in the Respondents' Complaint regarding that stay. However, the admissions documents completed in both instances included arbitration agreements, and the agreement for Ms. Butler's September 2012 admission was signed by Respondent Polly McGill.

the Motion to Reconsider and affirmed its denial of the Motion to Compel Arbitration.[2] (R. p. 10). The Appellant filed its Notice of Appeal with the Court of Appeals on December 4, 2015 and with the Bamberg County Circuit Court on December 7, 2015. The Appellant served the Notice of Appeal on all counsel in this action on December 4, 2015. This appeal followed.

[2] The trial court reconsidered and abandoned Footnote 2 of its original Order, but otherwise denied UPAC-Bamberg's Motion to Reconsider in its entirety.

STANDARD OF REVIEW

The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). This determination is subject to de novo review. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007); *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012). Both federal and state policy favor arbitrating disputes. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995) ("The policy of the United States and this State is to favor arbitration of disputes."); *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 464, 556 S.E.2d 397, 399 (Ct. App. 2001) ("There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration."). Therefore, all doubts regarding the scope of arbitrable issues must be resolved in favor of arbitration. *Carolina Care Plan, Inc. v. United Healthcare Servs., Inc.*, 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004).

LAW/ARGUMENT

I. The trial court erred in denying the Defendants' Motion to Compel Arbitration.

Appellant, UPAC-Bamberg, asserts that the trial court erred in denying its Motion to Compel Arbitration. The Appellant notes the recent decision by the Court of Appeals, *Thompson v. Pruitt Corp.*, Op. No. 5384 (S.C. Ct. App. filed Mar. 2, 2016), would be adverse precedent with regard to most of the issues in this appeal. At the time of this filing, however, a Petition for Rehearing of the *Thompson* decision is currently pending before the Court of Appeals.

a. The trial court erred in concluding that the Respondents cannot be bound by the arbitration agreement under the Adult Health Care Consent Act.

The trial court ruled that the Respondents could not be bound by the arbitration agreement under the Adult Health Care Consent Act (S.C. Code Ann. § 44-66-10 *et. seq.* (2002)) ("the Act"). In reaching this decision, the court relied on the Supreme Court opinion in *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014). Because this decision does not preclude a party from establishing the validity of an arbitration agreement under the Act through common law principles, the trial court erred in denying the Defendants' Motion to Compel Arbitration.

Under the Act, where an adult is "unable to appreciate the nature and implications of [her] condition and proposed health care, to make a reasoned decision concerning the proposed health care, or to communicate that decision in an unambiguous manner," certain individuals, including the patient's adult children, may consent on behalf of an incapacitated patient. S.C. Code Ann. §§ 44-66-20(8); 44-66-30(A) (2002). *See also Coleman*, 407 S.C. at 351, 755 S.E.2d at 453. In the instant case, the evidence revealed that Ms. Butler suffered from dementia prior to her death. (R. pp. 80-89).

Because Ms. Butler lacked a power of attorney, was unmarried, and had no children or siblings, it is uncontroverted that no individual had greater statutory authority under the Act than Ms. Robinson for making decisions on Ms. Butler's behalf. *See* S.C. Code Ann. § 44-66-30(A) (2002). The Act sets forth a hierarchy of individuals who "may make healthcare decisions for [a] patient who is unable to consent." *Id.* One of the individuals authorized to make healthcare decisions under this portion of the Act is "any other relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship with the plaintiff." *Id.* In the instant case, Ms. Butler was unmarried at the time of her treatment and lacked an attorney-in-fact or guardian to make decisions on her behalf. (R. p. 91) (showing that decedent had no surviving spouse). As is clear through her admissions documents and her other medical records, Ms. Butler's nieces were the relatives with whom she had the closest personal relationship. (R. pp. 80-89; R. p. 93) (listing all nieces as "responsible parties"). Therefore, Ms. Robinson was empowered under the Act to make decisions on behalf of Ms. Butler. S.C. Code Ann. § 44-66-30(A) (2002). Thus, the Act conferred authority on Ms. Robinson to make decisions concerning Ms. Butler's healthcare.

The trial court held that Ms. Robinson could not bind Ms. Butler pursuant to the arbitration agreement because under the Adult Healthcare Consent Act the arbitration agreement is not a healthcare document. (R. pp. 1-9) (citing *Coleman*, 407 S.C. 346, 755 S.E.2d 450). Under the common law doctrine of merger,[3] however:

---

[3] In *Coleman*, the Supreme Court discusses the doctrine of merger under the heading "Estoppel." 407 S.C. at 355, 755 S.E.2d at 455. Presumably this is because the appellants in that case titled their merger argument as such. As the Court in *Coleman* implicitly recognized in discussing the "common law doctrine of merger" and enumerating its requirements, merger is a legal doctrine separate from estoppel. *See also* 17A Am. Jur. 2d *Contracts* § 379 (2004) (noting that merger of documents means that they are considered "in the eyes of the law, one contract or instrument" and are "transaction[s] constituting a contract"). Arbitration agreements must be construed in

> The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that *the instruments are effectively one instrument or contract*.

Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (citing *Klutts Resort Realty, Inc. v. Down Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)) (emphasis added).

In *Coleman*, the Supreme Court refused to construe the admissions agreement and arbitration agreement as a single document. The Supreme Court specifically held that the documents were "executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction." *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455. However, the Court also found that an anti-merger clause in the admission agreement demonstrated an intention by the parties that the documents not merge. *Id.* Therefore, the documents were to be construed separately and the arbitration agreement could not fall within the Act. *Id.*; *Klutts*, 268 S.C. at 88, 232 S.E.2d at 24 (holding that documents executed at the same time by the same parties for the same purpose and in the course of the same transaction merge but only "in the absence of anything indicating a contrary intention").

In the instant case, the agreements exhibit no such anti-merger clause. In *Coleman*, the anti-merger clause noted by the Supreme Court read:

> This Agreement, including all Exhibits hereto, *and the Arbitration Agreement* between the Facility and the Resident, if the parties sign one, supersede all other agreements, either oral or in writing between the parties, and contain all of the promises and agreements between the parties. Each party to this Agreement acknowledges that no representations, inducements, or promises have been made

---

accordance with the general principals of contract law and agency law that would apply to any other contract. *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010), *vacated sub nom. Sonic Automotive, Inc.*, 563 U.S. 971, 131 S.Ct. 2872, 179 L. Ed. 2d 1184 (2011), *reinstated,* 395 S.C. 461, 719 S.E.2d 640 (2011). To the extent the Court disagrees with this interpretation, the Appellant would incorporate the arguments in this section in its argument on estoppel, *infra*, by reference.

> by any party or anyone acting on behalf of any party, that are not contained in this Agreement *or in the Arbitration Agreement*. This Agreement may be amended only by a written agreement signed on behalf of [...]

407 S.C. at 355, 755 S.E.2d at 455 (emphasis added). The Court noted that this clause demonstrated the "separatedness" of the documents on its face. *Id.* The documents executed by Ms. Robinson not only lack an anti-merger clause, but affirmatively indicate an intention that all the documents, including the arbitration agreement, be construed as one.

In the instant case, there is no anti-merger clause as in *Coleman*, and the admissions agreement indicates no intention that the arbitration agreement be treated separately from the other documents which are part of the admissions packet. In fact, the documents to be signed by the patient or representative entering UPAC-Bamberg are all labeled "Admission Packet-South Carolina Healthcare Centers" at the bottom of each page, demonstrating that the parties consider all documents signed by the patient or representative to be part of the same agreement. (R. pp. 61-78; R. pp. 126-131).

Similarly, the admission agreement for the facility contains the following language:

> I. This Agreement shall be construed, governed and enforced under the laws of the State of South Carolina. This Agreement *together with all exhibits* is the exclusive statement of the terms and conditions between the parties with respect to the matters set forth herein, and supersedes all prior agreements, negotiations, representations, tender documents, and proposals, written and oral with respect to the subject matter hereof. Variance from, or additions to, the terms and conditions of this Agreement in any written notification from Patient/Resident shall be of no effect.

(R. p. 69) (emphasis added). By its plain language, the admission agreement treats the other signed documents as exhibits which are part of the admission contract, and this language is reinforced by the language on each page stating the documents are all part of the Admission Packet for UPAC-Bamberg.

Because all these documents were executed at the same time (January 31, 2014), by the same parties (UPAC-Bamberg and Mary Robinson on behalf of Virginia Butler), for the same purpose (for her admission and care at the facility), and during the course of the same transaction, the documents merged and the arbitration agreement is valid as a part of the Admission Packet, which Ms. Robinson had the authority to sign on behalf of her aunt under the Act. Unlike in *Coleman*, there is no anti-merger clause in this case. Therefore, the arbitration agreement joined with the other portions of the Admission Packet to form a single contract, and the trial court erred in denying the defendant's Motion to Compel Arbitration.

The trial court held that in addition to the language in the Admission Packet, that the agreements also evidenced an intent not to merge because the arbitration agreement portion of the packet was voluntary and included a thirty (30) day revocability period. The trial court focused on the *Coleman* court's brief mention of the arbitration agreement's thirty (30) day disclaimer. However, the "anti-merger" language that the Supreme Court found compelling in *Coleman* is not present in this case. Prior to the one sentence discussion of the disclaimer, the Supreme Court already noted that the admission agreement "[o]n its face . . . recognizes the 'separatedness' of the AA and the admission agreement." *Id.* at 355, 755 S.E.2d at 455. The disclaimer language is merely presented as additional evidence, where the intent of the parties was already evident. Thus, the mere existence of language allowing a party to disclaim an arbitration agreement within thirty (30) days of execution is not, standing on its own, sufficient evidence of contrary intent to defeat merger.

This is especially true in the instant case. As an initial matter, to say that the revocability of the arbitration agreement in the admissions documents makes it fundamentally different than, and therefore separate from, the admissions agreement and its exhibits is logically inaccurate. The

admissions agreement portion of the Admission Packet is just as capable of revocation, as Ms. Butler could have left the facility at any time or been moved to a different facility by Ms. Robinson, as her representative. Further, a patient being admitted to the facility is able to make a number of elections regarding her care at the facility as part of her admissions paperwork. See, e.g., (R. pp. 126-131) (containing a small portion of the elections a new patient or her representative make upon admission to the facility). This is no different from the ability of the patient to opt in or out of arbitration as part of the Admission Packet.

Additionally, just as the arbitration agreement was capable of revocation within 30 days, this same right was provided to Ms. Butler with regard to other portions of the Admission Packet. (R. p. 69). The admissions agreement portion of the Admission Packet expressly includes the right of the facility and the patient/patient's representative to modify the terms of the agreement. This can be done by the consent of the parties, and the patient/representative also maintains the ability to reject within thirty (30) days any changes to the admissions agreement offered by the facility. *Id.* In fact, this thirty (30) day time period for changes to the agreement is utilized throughout the admission agreement. *Id.* Thus, nothing about the voluntariness of the arbitration agreement or the thirty (30) day time period for revocation sets the arbitration agreement it apart or distinguishes it from the remaining provisions of the Admissions Packet.

There is no material difference between the arbitration agreement and the other documents executed as part of Ms. Butler's admission to the facility. Therefore, there is nothing in the Admission Packet that evidences an intent that the arbitration agreement be separate from the other agreements, and the trial court erred in denying the defendant's Motion to Compel Arbitration.

Finally, the trial court found that there could be no merger because the agreements were not between the same parties and for the same purpose. This was error. While the court held that the admission agreement was only between Ms. Butler and UPAC-Bamberg, while the arbitration agreement was between Ms. Butler, the UPAC-Bamberg, and Ms. Robinson, this conclusion is not borne out by the language of the contracts. On the first page, the admission agreement states that it is "made and entered into this 31st day of January, year 2014, by and between UniHealth PAC Bamberg (Healthcare Center), Virginia Butler (Patient/Resident), *and certain other undersigned parties*." (R. p. 61) (emphasis added). The agreement goes on to make it clear that these undersigned parties are the patient's representative(s) who sign the agreement. (R. pp. 62-63) (setting forth the responsibilities of the patient and/or her representative). Ms. Robinson signed this agreement and, therefore, is bound by the agreement. Thus, both agreements involve the same parties.

The trial court also found that the agreements are not for the same purpose. However, this holding cannot stand under *Coleman*. In examining the arbitration agreement in *Coleman*, the Supreme Court explicitly held that the arbitration agreement and admissions agreement in that case "were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction." 407 S.C. at 355, 755 S.E.2d at 455. *See also McCutcheon v. THI of S.C. at Charleston, LLC*, 2011 WL 6318575 at * 3 (D.S.C. Dec. 15, 2011) (holding that "the Arbitration Agreement and Admissions Agreement, while separate documents, were executed by the same parties, at the same time, and regarding the same transaction; therefore, they constitute the entire agreement between the parties") (citing *Klutts*, 268 S.C. 80 232 S.E.2d 20). There is nothing in this case that distinguishes the *purpose* of the arbitration agreement at issue from the one at issue

in *Coleman*. Therefore, the Court is bound by the decision in *Coleman* with regard to the purpose of the arbitration agreement, and any holding to the contrary is error.

b. The trial court erred in finding that the Respondents are not bound by the agreement under the common law doctrines of equitable estoppel and third-party beneficiary.

The trial court ruled that the Decedent could not be bound to the arbitration agreement under the doctrines of equitable estoppel and third-party beneficiary. This was error.

The Respondent is also bound under the common law doctrines of third-party beneficiary and estoppel. As an initial matter, Appellants assert that Virginia Butler was clearly the third-party beneficiary of the admissions agreements in question, as Ms. Butler's care was the essential purpose of all the agreements in the Admission Packet, including the arbitration agreement, and as a third-party beneficiary, she (and her estate) are bound by the arbitration agreement. *See THI of S.C. at Columbia, LLC v. Wiggins*, 2011 WL 4089435 (D.S.C. Sept. 13, 2011) (rejecting argument that family member did not have authority to bind resident to arbitration); *Cook v. GGNSC Ripley, LLC*, 786 F. Supp. 2d 1166, 1171-72 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care was enforceable against third-party beneficiary and her estate under third-party beneficiary principles); *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983 (Ala. 2004) (same); *Trinity Mission Health & Rehab. v. Scott*, 19 So. 3d 735 (Miss. Ct. App. 2008) (same).

Even assuming, *arguendo*, that the arbitration agreement is separate from the admissions agreement, however, the decedent was the third-party beneficiary of that agreement as well. The fact that Ms. Robinson was not authorized to execute the arbitration agreement on Ms. Butler's behalf (which Appellants deny) does not mean that she cannot be the third-party beneficiary of that agreement. Such an outcome is contrary to federal court interpretations of arbitration agreements in this context under the FAA. *See THI of S.C. at Magnolia Manor-Inman, LLC v.*

Gilbert 2015 WL 1268185 (D.S.C. Mar. 19, 2015) adopting report and recommendation, *THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, 2014 WL 6863550 (D.S.C. Oct. 31, 2014); *McCutcheon v. THI of S.C. at Charleston, LLC*, 2011 WL 6318575 (D.S.C. Dec. 15, 2011); *THI of S.C. at Columbia, LLC v. Wiggins*, 2011 WL 4089435 at (D.S.C. Sept. 13, 2011).

As the FAA is a federal statute, South Carolina Courts must apply federal law and not the law of South Carolina or other state courts in determine the arbitrability of claims. *See, e.g., Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 289, 733 S.E.2d 597, 601 (Ct. App. 2012) ("Because the determination of whether a nonsignatory is bound by a contract presents no state law question of contract formation or validity, the court looks to the federal substantive law of arbitrability."); *Davis v. Tripp*, 338 S.C. 226, 525 S.E.2d 528 (Ct. App. 1999) (holding that state courts must interpret federal law when deciding issues under the Federal Employers' Liability Act); *State v. George*, 119 S.C. 120, 111 S.E. 880 (1921) (noting that "state courts are not bound to follow the federal decisions, *except in cases involving a federal question*") (emphasis added). Even under South Carolina law, however, non-signatories can be bound by an arbitration provision within a contract executed by other parties. *E.g., Pearson*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012); *Wilson v. Willis,* Op. No. 5387 (S.C. Ct. App. filed Mar. 2, 2016). The capacity of the non-signatory is of no moment in determining whether she is bound as a third-party beneficiary of an agreement. *THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert* 2015 WL 1268185 at *1-2. Thus, because Ms. Butler's care at the facility was the essential purpose of both the admission and arbitration portions of the agreement, the arbitration agreement is binding on her estate as a third-party beneficiary on the basis of her admission and care at the facility. *McCutcheon v. THI of S.C. at Charleston*, 2011 WL 6318575 at *3. This is true regardless of whether the court considers the agreements to be separate documents. *Id.*

Even assuming she cannot be bound on this basis, Ms. Butler was still bound as the third-party beneficiary of the arbitration agreement itself, which confers its own benefits, as she was the third-party beneficiary of all the allegedly separate agreements in the Admission Packet. As South Carolina appellate courts have noted, the reason for the statewide policy favoring arbitration is that "[t]he fundamental premise upon which this policy is grounded is the laudable goal of providing a relatively quick and inexpensive resolution of contractual disputes by avoiding the expense and delay of extended court proceedings." *Batten v. Howell*, 300 S.C. 545, 547, 389 S.E.2d 170, 171 (Ct. App. 1990) (quoting *Trident Tech. College v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 104, 333 S.E.2d 781, 785 (1985)) (internal quotation marks omitted). These benefits are concrete, as can be seen by the reference made to them by both the South Carolina Court of Appeals and the South Carolina Supreme Court. Additionally, the arbitration agreement provides for payment of certain fees and expenses by the facility, another added benefit of arbitration. (R. p. 76). In fact, federal courts have specifically held that arbitration is favored because of "Congress' view that arbitration constitutes a more efficient dispute resolution process than litigation." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (4th Cir. 2002). Thus, Ms. Butler was a third-party beneficiary of the arbitration agreement itself, and Respondents are bound to the agreement.

Finally, the Respondents should be estopped from repudiating the arbitration agreement. The South Carolina Court of Appeals has held that a nonsignatory can be bound by an arbitration provision within a contract executed by other parties. *Pearson*, 400 S.C. at 288-89, 733 S.E.2d at 600-01 ("Well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.") (citing *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000)). *See also Am. Bankers Ins. Grp. v. Long*, 453 F.3d 623 (4th Cir.

2006); *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187 (3d Cir. 2001); *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349 (2d Cir. 1999). These common law principles of contract and agency law include estoppel, among others. *Pearson*, 400 S.C. at 289-90, 733 S.E.2d at 601.

"Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." *Int'l Paper*, 206 F.3d at 417-18 (citation and internal quotation marks omitted). "A nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause.'" *Id.* (quoting *Tencara Shipyard*, 170 F.3d at 353).

"Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract." *E.I. DuPont*, 269 F.3d at 200 (citing *Tencara Shipyard*, 170 F.3d at 353 (finding non-signatory derived benefit from contract and could not avoid the arbitration clause contained therein)). As noted by the Federal District Court in *Jackson v. Iris.com*:

> [A] party may not rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage. . . . [W]here . . . a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine estops the non-signatory from claiming that he is not bound to the arbitration agreement when he receives a direct benefit from a contract containing an arbitration clause.

524 F. Supp. 2d 742, 749-50 (E.D. Va. 2007) (citing *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bldg. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981); *Int'l Paper*, 206 F.3d at 418; *Am. Bankers Ins. Grp. v. Long*, 453 F.3d 623, 628 (4th Cir. 2006); *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157, 162 (4th Cir. 2004); *Tencara Shipyard*, 170 F.3d at 353 (holding nonsignatory was estopped from denying applicability of arbitration clause when nonsignatory

received "direct benefits" from contract including lowered insurance rates and the ability to sail under the French flag)).

In fact, federal courts interpreting the FAA have repeatedly found that estates may be bound to nursing home arbitration agreements under the doctrine of equitable estoppel. *See THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert* 2015 WL 1268185, adopting report and recommendation, *THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, 2014 WL 6863550; *McCutcheon v. THI of S.C. at Charleston, LLC*, 2011 WL 6318575; *THI of S.C. at Columbia, LLC v. Wiggins*, 2011 WL 4089435. This is true regardless of whether the arbitration agreement is contained within the admission agreement or in a separate document. *McCutcheon, 2011 WL 6318575* (holding that "[e]ven if the Arbitration Agreement and Admissions Agreement constitute two separate contracts . . . it would be inequitable . . . to allow the plaintiff to assert that [family member] had authority to sign the Admissions Agreement . . . but lacked such authority to sign the Arbitration Agreement" and holding that the plaintiff was equitably estopped from denying the arbitration agreement's enforceability). Federal law makes no distinction between the individual making the representations as to his ability to sign a contract in a representative capacity and that same individual serving as the personal representative of the decedent's estate. *See id.*

This equitable estoppel is a concept separate from the concept of estoppel discussed by *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014). The *Coleman* decision was premised entirely on the idea of the existence or non-existence of the common law doctrine of merger. However, as noted above, the common law doctrine of equitable estoppel is a separate doctrine which prevents a party from accepting the benefits of an agreement and later attempting to repudiate that agreement. The continued validity of this common law doctrine has been recognized in the arbitration context subsequent to the *Coleman* decision. *See THI of S.C. at*

Magnolia Manor-Inman, LLC v. Gilbert, 2015 WL 1268185 at *2 (holding that the "'rejection' of an estoppel argument" in *Coleman* did not prevent a finding that "the benefits of admission should operate to stop the defendant [the plaintiff was the party seeking to enforce arbitration in this case] from rejecting arbitration now," and compelling arbitration).

In the present case, Ms. Butler received all benefits of the admissions agreements despite her non-signatory status. As is cited above, numerous courts hold that where a plaintiff receives the benefits of the contract, which Ms. Butler certainly did, the plaintiff is estopped from denying an arbitration agreement merely because she did not sign the contract under which she received all of the benefits. Further, Ms. Robinson represented in the contract itself that he was authorized to sign it. ("***If this Agreement is signed by the Patient/Representative's representative, that individual represents he or she is authorized and has no reason to believe that the Patient/Resident would not have signed this Agreement if he or she were competent and able to do so.***") (R. p. 75, ¶ C) (emphasis added). The Respondents in this action, Ms. Butler's other nieces, were present while the agreements were signed and made no effort to repudiate Ms. Robinson's representations that she was authorized to sign the agreements on Ms. Butler's behalf. (R. p. 93). Now, however, Respondents seek to repudiate these agreements on the basis that Ms. Robinson was not authorized to sign them on Ms. Butler's behalf. The Respondents should be estopped from taking this contrary position. Additionally, the very last sentence of the agreement notes that in signing the agreement, the Patient/Resident Representative binds both the Patient/Resident and the Patient/Resident Representative. Ms. Robinson, the Respondents, and the Estate should be estopped from denying that Ms. Robinson had the authority to sign the agreement, or that they are bound by it, as it is undisputed they represented she had the authority, and allowed the Decedent to benefit from all of the documents executed at admission.

Finally, in addition to be being present at the at the time Ms. Robinson signed the Admission Packet containing the arbitration agreement on behalf of Ms. Butler and making no objections to Ms. Robinson signing these agreements on behalf of Ms. Butler, one of the respondents, Ms. McGill, had previously read and signed an identical Admission Packet, including the arbitration agreement, during Ms. Butler's previous stay that the facility and was, therefore, aware of the contents on the Admission Packet. Therefore, the Respondents, who were fully aware of the content of the Admission Packet and allowed Ms. Robinson to sign the agreement as Ms. Butler's representative without objection, should not now be allowed to choose portions to repudiate and should be estopped from doing just that.

Conclusion

For the reasons set forth herein, the Court of Appeals should reverse the trial court's decision and remand the matter to the trial court for the entry of an order compelling arbitration.

Respectfully Submitted,

SOWELL GRAY STEPP & LAFFITTE, LLC

BY: _____

Monteith P. Todd
J. Michael Montgomery
Alexander E. Davis
1310 Gadsden Street
Post Office Box 11449
Columbia, SC 29211
Telephone: (803) 929-1400

Attorneys for Appellants

June 14, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BAMBERG
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2015-CP-05-00124
Appellate Case No. 2015-002493

Polly McGill and Mary Broxton, as Co- Personal Representatives of the Estate of Virginia Butler, deceased, Plaintiffs

Of Whom Polly McGill, as Personal Representative of the Estate of Virginia Butler is the ..... Respondent,

v.

The Regional Medical Center Foundation d/b/a The Regional Medical Center and Pruitt Health-Bamberg, LLC d/b/a Uni-Health Post Acute Care of Bamberg, LLC, Defendants,

Of Whom Pruitt Health-Bamberg, LLC d/b/a Uni-Health Post Acute Care of Bamberg, LLC is the ..... Appellant.

PROOF OF SERVICE

I, the undersigned legal assistant, of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Appellant, Pruitt Health-Bamberg, LLC d/b/a Uni-Health Post-Acute Care of Bamberg, LLC, do hereby certify that I have served all counsel in this action with a copy of the Final Brief of Appellant by mailing a copy of same to counsel via United States Mail, postage prepaid, at the following address(es):

W. Jones Andrews, Jr., Esquire
McGowan, Hood & Felder
1517 Hampton Street
Columbia, SC 29201

Michael C. Tanner, Esquire
Post Office Box 1061
Bamberg, SC 29003

6/14, 2016

Robin C. Owens, Legal Assistant