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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case Nos.: 2014-CP-05-17 and 19
Appellate Case No. 2015-001183

Camille Hodge, Jr., as Personal Representative of the Estate of Mable Hodge, ...Respondent,

v.

UniHealth Post-Acute Care of Bamberg, LLC f/k/a Bamberg County Nursing Center; United Health Services of South Carolina, Inc.; United Health Services, Inc.; UHS-Pruitt Holdings, Inc. a/k/a UHS–Pruitt Corp.; R. Dale Padgett, MD, PA; and Dr. Herbert A. Moskow,

of Whom UniHealth Post-Acute Care of Bamberg, LLC f/k/a Bamberg County Nursing Center; United Health Services of South Carolina, Inc.; United Health Services, Inc.; UHS-Pruitt Holdings, Inc. a/k/a UHS–Pruitt Corp. are.....Appellants.

Camille Hodge, Sr., ...Respondent,

v.

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FINAL BRIEF OF RESPONDENTS

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FINAL BRIEF OF RESPONDENTS

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II. Did the trial court err in holding that a nursing home that chooses to obtain a competent patient's signature on some of its documents – but not on its arbitration agreement – may not then enforce that arbitration agreement against the patient who never signed by arguing merger and estoppel?

III. Did the trial court abuse its discretion in determining that a deposition would not alter its decision regarding agency?

IV. May appellant argue on appeal that Mr. Hodge, Sr.'s claim for lack of consortium should be treated differently from the estate's claims after it elected not to raise that issue with the circuit court and explicitly represented to the circuit court that the issues were the same?

STATEMENT OF THE CASE

Mr. Camille Hodge, Jr., acting as Personal Representative of his mother, Mrs. Mable Hodge, filed this action against UniHealth Post-Acute Care of Bamberg ("UPAC") and Doctors Padgett and Moskow, after his mother became a paraplegic following a three week stay for "rehabilitation" at UPAC's Bamberg facility. Mr. Camille Hodge, Sr. filed a separate action for loss of consortium. UPAC moved to compel arbitration of both cases. Doctors Padgett and Moskow did not move to compel arbitration and acknowledge that the case against them will proceed to a jury trial. (See Order Denying Defendants' Motion to Dismiss or, Alternatively, to Compel Arbitration and Stay Proceedings, R. p. 3, n. 2; Transcript, R. p. 389, lines 2-4)

UPAC argued to the circuit court that South Carolina courts lack jurisdiction over this case and that respondents should be ordered to comply with an arbitration agreement that Mrs. Hodge never signed, that Mr. Hodge, Jr. never signed, and that neither Doctor Moscow nor Doctor Padgett ever signed. After full briefing and oral arguments, the circuit court disagreed with UPAC and denied its motions to compel arbitration and to compel the deposition of Mr. Hodge. UPAC appeals those Orders.

STATEMENT OF THE FACTS

The relevant facts are largely uncontested. On August 31, 2010, Mrs. Mable Hodge, a resident of Bamberg County, and a patient of Defendant Dr. Moskow, entered UPAC's Bamberg facility for rehabilitation following a hospital stay. Dr. Moskow's records indicate that Mrs. Hodge was functioning very well when she was admitted to UPAC. Dr. Moskow's September 1, 2010, initial history and physical of Mrs. Hodge states: "Physical examination reveals a well developed and well nourished female in no

real distress . . . Extremities: full range of motion." (Plaintiff's Memorandum in Opposition to Defendant UPAC's Motion to Compel Arbitration, Exhibit 1, R. p. 234)

Three weeks later, Mrs. Hodge was discharged, by ambulance, from UPAC to Palmetto Health Richland as a paraplegic who would never walk again. For days prior to her discharge, Mrs. Hodge cried out in pain and then lost the use of her legs. The Palmetto Health Richland doctor's notes on September 24 say "it is doubtful that surgery this far after onset of her leg symptoms would be of any benefit. . . . She is paraplegic . . . Unfortunately, there is no role for open surgery in a patient paraplegic for one week." On September 27, another Palmetto Health Richland doctor reviews the facts leading up to Mrs. Hodge's paralysis and draws this inevitable conclusion, "this is a disaster." (Plaintiff's Memorandum in Opposition to Defendant UPAC's Motion to Compel Arbitration, p. 2, R. p. 225)

The day prior to Mrs. Hodge's admission to UPAC, her husband, Camille Hodge, Sr. was asked by UPAC to sign various documents in order to facilitate her admission and to secure her a room at the facility. Mr. Hodge, Sr. had no power of attorney from his wife or any other type of legal appointment (e.g., as guardian or personal representative) to act on her behalf. Among the documents presented to Mr. Hodge was a twelve-page Admission Agreement and a separate five-page Arbitration Agreement. (Plaintiff's Memorandum in Opposition to Defendant UPAC's Motion to Compel Arbitration, Exhibits 2 and 3, respectively, R. pp. 236-253) Both agreements, drafted solely by UPAC, have separate signature lines for (1) "Patient/Resident's Signature" and (2) "Patient/Resident Representative's Signature." UPAC concedes that Mrs. Hodge was perfectly competent at the time of her admission to their facility. (Transcript, R. p. 391,

lines 1-3). Despite her competency, UPAC failed to ever obtain Mrs. Hodge's signature on its Arbitration Agreement and now asks this Court to hold that Mr. Hodge waived his wife's right to a jury trial even though UPAC's own guidelines mandate that they must obtain the signature of a competent resident on their Arbitration Agreements.

The trial court was presented with and considered UPAC's internal "Arbitration Checklist." (Plaintiff's Memorandum in Opposition to Defendant UPAC's Motion to Compel Arbitration, Exhibit 4, R. p. 255) The very first line of that document mandates that UPAC must first "Determine competency of patient/resident." UPAC employees are then directed to "Secure appropriate signatures" (emphasis in original). UPAC unequivocally instructs its employees that if the patient/resident is "***Competent, capable of signature*** – Patient/resident **must** initial each page in lower right hand corner and sign and date the final page in the presence of Admissions Coordinator and one witness." In the instant case, there is no dispute that Mrs. Hodge was competent at the time of her admission (Transcript, R. p. 369, lines 19-20 "no disagreement from any of the parties that she was competent" and Transcript, R. p. 391, lines 1-3) and that UPAC failed to follow its own directives to have her sign the document that they drafted.

On February 20, 2015, Judge Clifton Newman heard oral arguments and later denied UPAC's motion to compel arbitration after finding the following facts to be uncontested:

1) "The Arbitration Agreement was signed only by UPAC and Camille Hodge, Sr.
2) The Arbitration Agreement was not signed by Mable Hodge, by her personal representative Camille Hodge, Jr., by Dr. Moskow, or by Dr. Padgett.

3) Mable Hodge was competent at the time she was admitted to UPAC on August 31, 2010, and at the time the Arbitration Agreement was signed by Mr. Hodge, Sr. on August 30, 2010.

4) Mable Hodge had not executed a general power of attorney or health care power of attorney (or any other document giving authority to her husband or any other family member to make contractual commitments or waivers on her behalf) at the time she was admitted to UPAC or at the time the Arbitration Agreement was signed by Mr. Hodge, Sr.

5) Mable Hodge was a patient at Providence Hospital in Columbia on August 30, 2010, when Mr. Hodge, Sr. signed the Arbitration Agreement with UPAC in Bamberg.

6) UPAC presented Mable Hodge with other documents to sign at the time of her admission, and Mable Hodge signed those documents, but not the Arbitration Agreement." (Order Denying Defendants' Motion to Dismiss or, Alternatively, to Compel Arbitration and Stay Proceedings, R. pp. 3-4)

UPAC does not contest any of those factual findings. Instead, UPAC challenges Judge Newman's decision that, based on these findings, UPAC cannot enforce an Arbitration Agreement that its patient never signed. Coincidentally, on the same day that Judge Newman heard these arguments, the South Carolina Supreme Court denied a petition for certiorari and let stand a decision by this Court that is directly on point on this very same issue that was raised by the same appellant who is before the Court today, and represented by the same lawyer who is before the Court today.

ARGUMENT

The South Carolina Supreme Court and this Court have recently decided the precise issues that are before the Court today. In fact, the appellant who is before the Court today recently argued this same issue to this same Court through arguments by the same lawyer who represents them today. This Court rejected those arguments in the other case and should do so here as well.

1. A Nursing Home May Not Bind a Competent Patient to an Arbitration Agreement When the Nursing Home, in Violation of its Own Policy, Chooses Not to Obtain the Patient's Signature to the Agreement and Instead Chooses to Obtain Only the Signature of a Family Member Who Has No Power of Attorney.

Appellant correctly states that federal and state policy tend to favor the arbitration of disputes. (Initial Brief of Appellants, p. 6) Appellants fail, however, to mention to this Court two other controlling principles that govern this case. The first principle is that "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). The second governing principle is that arbitration "is a matter of consent, not coercion." Volt Information Sciences, Inc, v. Board. of Trustees of the Leland Stanford Junior University, 489 U.S. 468, 479 (1989).

Moreover, South Carolina's appellate courts have recently ruled on the specific question before the Court today – whether a nursing home may enforce an arbitration agreement against one of its patients when the nursing home has obtained the signature of the patient's relative but has failed to obtain the signature of the patient herself. South Carolina's appellate courts have twice ruled the answer to that question is "no."

On March 12, 2014, the South Carolina Supreme Court issued an opinion in Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014). In Coleman, the circuit court denied the nursing home's motion to compel arbitration because the arbitration agreement was signed by the patient's relative but not by the patient. The nursing home appealed, and the South Carolina Supreme Court affirmed the circuit court's denial. In that case, the Supreme Court ruled that even thought the patient was incompetent at the time of her admission to the nursing home, and even though the patient's sister had statutory authority to make health care decisions for her sister under the Adult Health Care Consent Act, see S.C. Code Ann. § 44-66-10 *et seq.*, she could not waive her sister's right to a jury trial by entering into an arbitration agreement with the nursing home that would be binding on her sister. The Court held that "decision making by the surrogate is a last resort. For example, S.C. Code Ann. § 44-66-30(E) states that no one may consent to 'health care decisions' if the patient's inability to consent is temporary and that waiting for the patient to regain competency will not result in significant detriment to the patient's health." Coleman, 407 S.C. at 353, 755 S.E.2d at 454. That is, even if the patient is incompetent and there is no one else to make the decision, a family member cannot waive the patient's right to a jury trial and bind that patient to an arbitration agreement (except as a "last resort" when the incompetency is not temporary and significant harm to the patient is imminent).

Even more recently, this Court faced the same question – in an appeal brought by the same defendant and represented by the same lawyer – as are before the Court today. Just last year, this Court decided the case of Scott v. Heritage Healthcare of Estill, LLC., Opinion No. 2014–UP–317, 2014 WL 3845113 (Ct. App. Aug. 6, 2014), cert. denied,

S.C. Sup. Ct. dated February 20, 2015 (Shearouse Adv.Sh. No. 8, at 14), in which this same appellant appealed an Order by Judge Carmen Mullen denying its motion to compel arbitration where the appellant had, once again, failed to obtain the resident's signature on its arbitration agreement and, instead, had obtained the signature of a family member only. This Court affirmed Judge Mullen's Order, and the Supreme Court denied appellant's petition for certiorari. Id. Now, the same appellant represented by the same lawyer raises the same issue in yet another appeal and hopes for a different result.

Appellant repeatedly asserts that the trial court erred in relying on a "test" established by Scott. (See e.g., Initial Brief of Appellant, p. 10 ("the test relied on by the trial court ....") That representation is simply not accurate. First, the trial court made clear in its Order that it was not relying on this Court's decision in Scott but that it did find the Court's reasoning to be persuasive. (Order Denying Defendants' Motion to Dismiss or, Alternatively, Compel Arbitration and Stay Proceedings, R. p. 5, n. 3) Moreover, the trial court never once spoke of Scott as having established a "test." That language comes from the appellant only. The trial court did note, however, that the facts presented in the instant case are very nearly identical to the facts presented only months earlier in the Scott case and that the reasoning of Judge Mullen and of this Court in refusing to enforce the nursing home's arbitration agreement were "persuasive."

In Scott, Judge Mullen denied UPAC's motion to compel arbitration when – as here – UPAC obtained the signature of the patient's relative (Ellen Jenkins) but failed to obtain the patient's (Elizabeth Jones) own signature on its arbitration agreement. UPAC appealed the denial to this Court and this Court affirmed Judge Mullen's Order. This Court ruled as follows:

> "We affirm as to whether Ellen Jenkins had authority to sign the arbitration agreement on [her sister] Elizabeth Jones' behalf when Jones was competent at the time she was admitted to Heritage, and Jenkins did not possess a health care power of attorney to sign either contract on Jones' behalf. We find the evidence reasonably supports the trial court's findings that Jenkins lacked authority to enter into the Arbitration Agreement on Jones' behalf because Jones was competent at the time of her admission, and Sally Dobson, the admissions director for Heritage, agreed it would have been more appropriate for Jones to sign the contract herself because she was competent, and Dobson did not know if Jenkins had a power of attorney. Therefore, we find the Arbitration Agreement is not enforceable against Respondent."

Scott, 2014 WL 3845113, at *1 (emphasis added). The South Carolina Supreme Court then denied appellant's petition for certiorari on the same day that Judge Newman heard arguments in the case at hand.

In Scott, this Court focused on three issues that resulted in a finding that the Arbitration Agreement was unenforceable: 1) the patient was competent at the time her family member signed the Arbitration Agreement, and UPAC failed to obtain the signature of the competent patient; 2) the family member had no health care power of attorney vesting her with authority to sign on the patient's behalf; and 3) UPAC acknowledged that it should have obtained the patient's signature on the arbitration agreement. All three of those factors are present in the case at hand and, as in Scott and as in Coleman, prevent UPAC from enforcing an arbitration agreement against a patient who never signed the agreement.

First, Mrs. Hodge was clearly competent at the time of her admission, yet UPAC did not have her sign the Arbitration Agreement. Among the documents presented to the trial judge was the History and Physical of Mrs. Hodge that was taken at the time of her admission to UPAC. The History and Physical reflects that Mrs. Hodge was "a well developed and well nourished female in no real distress" and that Mrs. Hodge had a "full

range of motion" of her extremities. At the hearing on this matter, counsel for UPAC conceded to the court that "[t]he evidence is she was competent." (Transcript, R. p. 391, line 3)

Moreover, UPAC elected to have Mrs. Hodge personally sign certain documents – but not the Arbitration Agreement – at the time of her admission. The trial judge was presented with and considered a UPAC document titled "Inventory of Personal Effect" that was dated September 1, 2010 – the day after Mrs. Hodge was admitted to UPAC – that UPAC presented to Mrs. Hodge and that was signed by Mrs. Hodge. (Plaintiff's Memorandum in Opposition to Defendant UPAC's Motion to Compel Arbitration, Exhibit 6, R. p. 260) When UPAC wanted Mrs. Hodge to sign documents, they knew how to have her do so. She was competent and could have signed the Arbitration Agreement but did not do so.

Second, at the time of her admission to UPAC, Mrs. Hodge had vested no one with a health care power of attorney or other power of attorney to make decisions on her behalf. The trial court was presented with and considered a form that was completed just days prior to Mrs. Hodge's admission to UPAC while she was still a patient at Providence Hospital. The form clearly indicates that Mrs. Hodge has not executed a Health Care Power of Attorney. (Plaintiff's Memorandum in Opposition to Defendant UPAC's Motion to Compel Arbitration, Exhibit 7, R. p. 262) This form was in Mrs. Hodge's medical record and easily accessible by UPAC if they chose to inquire.

Third, as in Scott, the trial court was presented with uncontradicted evidence that UPAC knows that it must obtain a patient's signature on its Arbitration Agreements if the patient is competent. The trial judge received and considered UPAC's own "Arbitration

Checklist" that appellant has created and distributed to its employees with instructions on how to obtain an enforceable arbitration agreement with its residents. The very first line of that checklist instructs UPAC employees to "Determine competency of patient/resident." Then, UPAC instructs its employees to "Secure appropriate signatures:" (emphasis in original). According to its own document, UPAC acknowledges that when a patient is "**Competent, capable of signature – Patient/resident must** initial each page in lower right hand corner and sign and date the final page in the presence of Admissions Coordinator and one witness." (emphasis added) That is, UPAC knows beyond dispute, that what it did in the Scott case and what it did in the instant case is not acceptable and does not create an enforceable arbitration agreement. That is why it has instructed its employees – in writing – that they "**must**" obtain the signature of a competent patient. Now UPAC asks this Court to excuse it from acting as it has recognized it must act when a resident is competent and has not provided a power of attorney to someone else.

As noted by the Circuit Court, UPAC has likely instituted the rules above in order to comply with federal regulations that govern nursing homes like UPAC that accept federal funds. Those federal regulations mandate that UPAC must obtain the signature of a competent patient and may not rely on the signature of a surrogate or representative. These regulations state that "the facility may seek a health care decision (or any other decision or authorization) from a surrogate or representative only when the resident is unable to make the decision." Guidance to Surveyors for Long Term Care Facilities, Centers for Medicare & Medicaid Services, Publ. 100-7, State Operations Manual, (Interpretive Guidelines to 42 C.F.R. §483.10(a)(3) and (4)) found at

https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap_pp_guidelines_ltcf.pdf (visited August 20, 2015). (emphasis added). In short, UPAC asks this Court to allow it to continue to receive federal funds through Medicare and otherwise but to exempt it from federal guidelines that require it to obtain the signature of a competent patient. If UPAC had simply complied with its own rules and regulations, it would not be before this Court today.

In sum, Appellant now asks this Court to ignore South Carolina law, federal law, and its own guidelines by allowing a family member with no power of attorney to bind a competent individual to a nursing home arbitration agreement. That is not the law, and UPAC's own documents acknowledge that it is not the proper procedure.

2. The Nursing Home's Alternative Arguments of Merger and Estoppel Also Fail.

In the Scott case cited above, Appellant made all of the same arguments – merger, estoppels and agency – that it is making to this Court today. This Court gave short shrift to those arguments: "We decline to address Heritage's remaining arguments because we find this issue [the resident never signed the Arbitration Agreement] is dispositive." Scott, 2014 WL 3845113, at *2. That is, Appellant's failure to follow its own procedures and obtain a valid and enforceable signature to the Arbitration Agreement prevents it from arguing that the resident is somehow bound to an agreement that she never signed.

Nonetheless, Appellant argues that Mrs. Hodge should be equitably estopped from denying the Arbitration Agreement because she received the "benefit" of staying in their nursing home. Putting aside the issue of whether the stay was a benefit when she arrived in "no real distress" and was wheeled out three weeks later as a paraplegic for the remainder of her life, there is no question that she received no "benefit" from the

Arbitration Agreement that Appellant seeks to enforce against her. Equitable estoppel applies only to prevent a party from relying on one part of a contract while seeking to deny another part of the same contract. As this Court has ruled: "[i]n the arbitration context, the doctrine [of equitable estoppel applies] when [one party] has consistently maintained that other provisions of the same contract should be enforced to benefit him." Pearson v. Hilton Head Hosp., 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012) (emphasis added) (internal citations omitted). In the instant case, the respondents have made no contract claims against the Appellant. There is no attempt by Respondents to enforce any contract, much less the Arbitration Agreement at issue here. Therefore, the doctrine of equitable estoppel does not apply to this case at all.

Moreover, the Supreme Court in Coleman addressed these same merger and estoppel arguments in detail and held that the nursing home's Arbitration Agreement did not merge with the nursing home's separate Admission Agreement. The Court held that, as here, the nursing home had chosen to make the Admission Agreement and the Arbitration Agreement two separate documents and because the nursing home had drafted the documents, any ambiguity would be resolved against them. The Court then noted that, as here, the nursing home's admission agreement contains language that intentionally makes it a separate agreement from the Arbitration Agreement. Despite Appellant's protestations to the contrary, that is equally true of the case at hand. Appellant's admission agreement states on its face that the Admissions Agreement "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. . ." (Plaintiff's Memorandum in Opposition to Defendant UPAC's Motion to Compel Arbitration,

Exhibit 2, ¶ I, R. p. 244, ¶ I) The Supreme Court in Coleman also found persuasive the fact that "the AA [Arbitration Agreement] could be disclaimed within thirty days of signing while the admission agreement could not, evidencing an intention that each contract remain separate." Coleman, 407 S.C. at 355, 755 S.E. 2d at 455. Appellant's Arbitration Agreement in the case at hand contains the exact same language: "This Agreement may be revoked by written notice to the Healthcare Center from the Patient/Resident within thirty (30) days of signature." (Plaintiff's Memorandum in Opposition to Defendant UPAC's Motion to Compel Arbitration, Exhibit 3, R. p. 253) Finally, the Supreme Court in Coleman held that even if there is "an ambiguity as to merger, the law is clear that any ambiguity in such a clause is construed against the drafter." Coleman at 355-56. Each of those reasons applies with equal force to the case at hand and the Supreme Court has clearly held that, in such circumstances, the nursing home cannot prevail on a claim for merger or equitable estoppel.

3. The Trial Court Did Not Abuse its Discretion in Ruling that a Deposition Would Not Alter its Decision Regarding Agency.

In rejecting Appellant's agency argument, Judge Newman found that a deposition of 83-year-old Camille Hodge, Sr. would not aid the court because "the facts material to the court's decision are not contested." (Order Denying Defendants' Motion to Dismiss or, Alternatively, Compel Arbitration and Stay Proceedings, R. p. 3, n. 1) This Court and our Supreme Court have, of course, repeatedly held that a trial court's "rulings on discovery matters will not be disturbed absent a clear abuse of discretion." Dunn v. Dunn, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) (citing Hook v. Rothstein, 281 S.C. 541, 316 S.E.2d 690 (Ct. App. 1984)).

Even Appellants acknowledge that the doctrine of apparent authority turns not on any actions of Mr. Hodge but rather on the actions of the principal, Mrs. Hodge, and the beliefs of the third party, UPAC. See Initial Brief of Appellant, p. 13 ("[T]he concept of apparent authority depends upon manifestations by the principal to a third party and the reasonable belief by the third party that the agent is authorized to bind the principal."). Indeed, both this Court and the South Carolina Supreme Court have repeatedly held that

> [t]he concept of apparent authority depends upon manifestations by the principal to a third party and the reasonable belief by the third party that the agent is authorized to bind the principal. Beasley v. Kerr-McGee Chem. Corp., 273 S.C. 523, 257 S.E.2d 726 (1979); Visual Graphics Leasing Corp. v. Lucia, 311 S.C. 484, 429 S.E.2d 839 (Ct. App. 1993). *See also* Moore v. North American Van Lines, 310 S.C. 236, 423 S.E.2d 116 (1992) (basis of apparent authority is representations made by principal to third party and reliance by third party on those representations).

R & G Const., Inc. v. Lowcountry Regional Transp. Authority, 343 S.C. 424, 432, 540 S.E.2d 113, 118 (Ct. App. 2000) (emphasis added).

The circuit court found that Appellant had presented no evidence that Mrs. Hodge had ever made any representations to UPAC or had ever "held out" her husband to UPAC as having authority to bind her to agreements such as the purported arbitration agreement. (Order Denying Defendants' Motion to Dismiss or, Alternatively, Compel Arbitration and Stay Proceedings, R. p. 9) Appellant argues to this Court that because it was not allowed to depose Mr. Hodge, it could not produce any evidence of Mrs. Hodge having bestowed apparent authority on Mr. Hodge. This argument ignores both the facts of this case and the law.

This Court has repeatedly held that "an agency may not be established solely by the declarations and conduct of an alleged agent." Cowburn v. Leventis, 366 S.C. 20, 39-

40, 619 S.E.2d 437, 448 (Ct. App. 2005) (quoting Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 245, 473 S.E.2d 865, 868 (Ct. App. 1996)). Rather, "[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)). Appellant had every opportunity to present the circuit court with any evidence that Mrs. Hodge had taken any actions to manifest to UPAC that Mr. Hodge had authority to execute documents on her behalf, and had every opportunity to present evidence that UPAC had relied on those manifestations. If any UPAC employee could have asserted that Mrs. Hodge made such representations to them they certainly would have done so. Likewise, if any UPAC employee could have asserted that UPAC relied on representations made by Mrs. Hodge, they certainly would have done so.

To the contrary, UPAC presented the circuit court with an affidavit from Deborah Rutland, its Administrator, who attested simply that Mr. Hodge "signed various documents." (Memorandum in Support of Defendants' Motion to Dismiss and Compel Arbitration or, Alternatively, Compel Arbitration and Stay Proceedings, Exhibit 1, ¶5; R. p. 164, ¶ 5). Tellingly, however, Ms. Rutland never even suggests that Mrs. Hodge took any action – in any way – to represent to UPAC that her husband had been authorized to execute documents on her behalf. That is, of course, logical since the uncontested fact as found by the circuit court is that Mrs. Hodge was not even present when the arbitration agreement was presented to her husband: "Mable Hodge was a patient at Providence Hospital in Columbia on August 30, 2010, when Mr. Hodge, Sr. signed the Arbitration

Agreement with UPAC in Bamberg." (Order Denying Defendants' Motion to Dismiss or, Alternatively, Compel Arbitration and Stay Proceedings, R. p. 4, ¶ 5). Nor did Ms. Rutland ever attest that UPAC had relied, in any way, on any representation made by Mrs. Hodge that a family member had been authorized to execute documents on her behalf. Since Mrs. Hodge is no longer alive, UPAC is in the unique position to know whether Mrs. Hodge (the principal) made any representations to UPAC (the third party) and is in the unique position to know whether UPAC relied in any way on representations made by Mrs. Hodge that a family member was authorized to bind her to contracts. UPAC presented no evidence either that Mrs. Hodge had made representations to them or that they had relied on any representations. Given that complete lack of evidence and given the uncontested facts of this case, the circuit court was certainly well within its discretion to determine that a deposition – not of the principal and not of the third party – was not necessary or helpful to its decision.

4. The Nursing Home Is Precluded from Arguing on Appeal that Mr. Hodge Sr.'s Claim for Loss of Consortium Should Be Treated Differently than the Estate's Claims Because that Issue Was Not Raised to the Circuit Court.

In its brief, UPAC argues for the first time that this Court should consider separately its demand for arbitration of the Estate's claims (represented by Camille Hodge, Jr.) and its demand for arbitration of Mr. Hodge Sr.'s loss of consortium claim. (Appellant's Brief at 19: "Even if the estate's claims are not subject to arbitration, which Defendants deny, Mr. Hodge's must still be compelled to arbitration as an individual signatory to the agreement.") Not only was this distinction not raised in the circuit court, Appellant explicitly waived it by representing to the circuit court that the arbitration issues presented by the Estate's claims and the arbitration issues presented by Mr. Hodge,

Sr.'s claim were the same: "a memo was filed in the case involving the Estate but it basically covers both cases. The issue is the same in both cases." (Transcript, R. p. 369, lines 2-4) Having expressly represented to the Court that the issues presented by the two cases are the same, UPAC may not now argue for the first time on appeal that the two cases present different issues for consideration.

CONCLUSION

For each of these reasons, Respondents respectfully request that this Court affirm the decision of the circuit court.

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October 13, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case Nos.: 2014-CP-05-17 and 19
Appellate Case No. 2015-001183

Camille Hodge, Jr., as Personal Representative of the Estate of Mable Hodge, Deceased.....Respondent,

v.

UniHealth Post-Acute Care of Bamberg, LLC f/k/a Bamberg County Nursing Center; United Health Services of South Carolina, Inc.; United Health Services, Inc.; UHS-Pruitt Holdings, Inc. a/k/a UHS–Pruitt Corp.; R. Dale Padgett, MD, PA; and Dr. Herbert A. Moskow,

of Whom UniHealth Post-Acute Care of Bamberg, LLC f/k/a Bamberg County Nursing Center; United Health Services of South Carolina, Inc.; United Health Services, Inc.; UHS-Pruitt Holdings, Inc. a/k/a UHS–Pruitt Corp. are.....Appellants.

Camille Hodge, Sr., ...Respondent,

v.

UniHealth Post-Acute Care of Bamberg, LLC f/k/a Bamberg County Nursing Center; United Health Services of South Carolina, Inc.; United Health Services, Inc.; UHS-Pruitt Holdings, Inc. a/k/a UHS–Pruitt Corp.; R. Dale Padgett, MD, PA; and Dr. Herbert A. Moskow,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that that the Final Brief of Respondents complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served a copy of the Final Brief of Respondents on all counsel of record by depositing copies of same in United States Mail, postage prepaid, on October 13, 2015, at the following addresses,

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