THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Appellate Case No. 2015-001183

Opinion No. 5541 (S.C. Ct. App. filed Mar. 7, 2018)

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.; and UHS-Pruitt Holdings, Inc. a/k/a UHS-Pruitt Corp. are . . . . . Petitioners.

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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Pursuant to Rule 242, SCACR, petitioners 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.; and UHS-Pruitt Holdings, Inc. a/k/a UHS-Pruitt Corp. (collectively "petitioners") seek a writ of certiorari from this Court to review the court of appeals' decision. See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, Op. No. 5541 (S.C. Ct. App. filed Mar. 7, 2018) (Shearouse Adv. Sh. No. 10 at 55–87). For the reasons set forth below, the Court should grant certiorari, and reverse and remand.

CERTIFICATE OF COUNSEL

Counsel for petitioners certify that the petition for rehearing was made and finally ruled upon by the court of appeals on May 2, 2018. (App'x p. 571).

QUESTIONS PRESENTED

I. Did the court of appeals err in failing to identify and apply the proper standard for reviewing the circuit court's ruling on the motion to compel arbitration?

II. Did the court of appeals err in affirming as to the agency issue because the circuit court abused its discretion by refusing to allow the petitioners to present evidence on this fact-intensive question and its ruling was based upon an error of law?

III. Did the court of appeals err in departing from U.S. Supreme Court precedent by treating nursing home arbitration agreements differently than other contracts?

STATEMENT OF THE CASE

This appeal arises out of two medical malpractice actions filed by respondents Camille Hodge, Jr., as personal representative of the estate of Mable Hodge, and Camille Hodge, Sr. (collectively "respondents") against petitioners as well as R. Dale Padgett, MD, PA and Dr. Herbert A. Moskow. (App'x pp. 71, 81). The decedent, Mable Hodge, entered UniHealth Post-Acute Care of Bamberg (the Facility) on August 31, 2010. (App'x p. 76). Prior to her admission, the decedent's husband, Camille Hodge, Sr., executed various documents on her behalf, including

admissions paperwork containing an arbitration agreement (the Arbitration Agreement). (App'x p. 167–213). Indeed, this arrangement was not unusual because Mr. Hodge had executed numerous medical documents on behalf of the decedent on other occasions as well. (App'x pp. 262, 265–80 & 371). The decedent stayed at the Facility for over three weeks without objecting to her admission or any documents executed on her behalf when she was admitted.

According to respondents, around September 20, 2010, the decedent complained to staff at the Facility that her back was hurting, and she was unable to stand or move her legs. This condition allegedly worsened over the next four days. By the morning of September 24, 2010, the decedent could not feel her legs or arms, nor was she able to stand. The decedent was then transported to Richland Memorial Hospital with paralysis from the waist down. (App'x pp. 77–78). Respondents allege that petitioners' failure to evaluate, test, diagnose, and treat the decedent's conditions caused her paralysis and other complications. (App'x p. 78). After filing a notice of intent, respondents filed their respective summonses and complaints. (App'x pp. 17, 71 & 81). Petitioners then filed answers to both actions with contemporaneous motions to compel arbitration. (App'x pp. 91, 98, 104, 110, 141, 116, 123, 129, 135 & 146).

Thereafter, petitioners requested that respondents make Camille Hodge, Sr. available for a deposition regarding topics solely related to the arbitration issue. Respondents objected to this request, and petitioners filed a motion to compel his deposition. (App'x p. 215). The parties appeared for a hearing on all outstanding motions before the Honorable Clifton Newman. Following a hearing, the circuit court entered orders denying petitioners' motion to compel Mr. Hodge's deposition and denying their motion to compel arbitration. (App'x pp. 1, 13). Petitioners filed a timely motion to alter or amend the order denying their motions, and the circuit court issued an order denying their Rule 59(e), SCRCP, motion. (App'x pp. 282, 304 & 15).

Subsequently, petitioners filed a notice of appeal. (App'x pp. 326, 346). After the matter was fully briefed, the case was called for oral argument in the court of appeals on May 2, 2017. (App'x pp. 448, 478 & 505). The court of appeals issued a published opinion on March 7, 2018, affirming the circuit court's orders. See Hodge, Op. No. 5541 (Shearouse Adv. Sh. No. 10 at 55–87). Petitioners filed a timely petition for rehearing, which the court of appeals denied in an order dated May 2, 2018. (App'x pp. 552, 571). This petition for a writ of certiorari followed.

ARGUMENT

This Court should grant certiorari to review the court of appeals' decision, and reverse and remand. The court of appeals erred affirming the circuit court's orders denying petitioners' motion to compel arbitration and their motion to compel the deposition of Camille Hodge, Sr. because the court of appeals (1) did not identify or apply the proper standard of review, (2) erred in concluding the circuit court did not abuse its discretion when the circuit court refused to allow petitioners to present evidence to rebut a fact-intensive defense asserted by respondents, and (3) departed from U.S. Supreme Court precedent by treating nursing home arbitration agreements differently than other contracts.

I. The court of appeals failed to identify and apply the proper standard of review.

In reviewing the circuit court's order denying petitioners' motion to compel arbitration, the court of appeals failed to identify and apply the proper standard of review.

Noticeably absent from the court of appeals' opinion was the familiar proposition that "[i]t is the policy of this state and federal law to favor arbitration[,] and 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" Landers v. Fed. Deposit Ins. Co., 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (quoting Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 92 (4th Cir. 1996)). Likewise, the court of appeals failed to

recognize that "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." Hall v. Green Tree Servicing, LLC, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015) (quoting Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014)).

The court of appeals did not identify or apply the correct standard of review in this case, and this error controlled its analysis of the issues. No doubts were resolved in favor of arbitration, as is required, and respondents put forth no evidence—aside from arguments of counsel—to demonstrate the claims were not suitable for arbitration. See Shinn v. Kreul, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (Ct. App. 1993) ("A court cannot consider facts appearing only in argument of counsel."); 15 S.C. JUR. Appeal and Error § 79 at n.1 (2018) ("The argument of counsel is not evidence and, standing alone, provides no support for a finding of fact."). Indeed, the court of appeals ignored the appropriate lens through which a motion to compel arbitration must be considered and shifted the burden to the nursing home facility to prove the Arbitration Agreement was enforceable based upon respondents' bare assertions that Camille Hodge, Sr. was not the decedent's agent and the decedent allegedly received no benefit from the Arbitration Agreement. Further, the court of appeals placed the burden on petitioners to demonstrate why a patient, or the patient's representative, benefited from the agreement and intended to waive their right to a jury trial.

Although respondents contended "there is no question [the decedent] received no 'benefit' from the Arbitration Agreement" in their brief, (App'x pp. 494–95), they cited nothing in support of this conclusory assertion. If no question existed, then the parties would not be arguing these issues on appeal. To the contrary, respondents did benefit from the Arbitration Agreement for the same reasons any other party would benefit from arbitrating disputes. As our appellate courts have

long recognized, "[t]he fundamental premise upon which" the state policy favoring arbitration "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. Coll. v. Lucas & Stubbs, Ltd., 286 S.C. 98, 104, 333 S.E.2d 781, 785 (1985)).

In any event, the court of appeals appeared to accept as fact that Mable received no benefit from the Arbitration Agreement and extrapolated on that notion to find Mable did not even benefit from being admitted into the facility. According to the court of appeals, "[t]he only agreement from which Respondents even arguably received a benefit was the Admission Agreement because Mable was admitted to the Facility as a result of it. However, because the Facility allegedly caused Mable's injuries that later led to her death, we find it difficult to find she benefited even from being admitted." Hodge, Op. No. 5541 (Shearouse Adv. Sh. No. 10 at 70–71). The petitioners take exception to the court of appeals questioning whether a patient "benefited even from being admitted" to their facility. But the court of appeals' sua sponte findings as to the care provided and medical causation are even more problematic because these were not argued and are not supported by any facts in the record on appeal. See Rule 210(h), SCACR (stating "the appellate court will not consider any fact which does not appear in the Record on Appeal"); Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

In making this improper comment, the court of appeals exceeded the scope of review permitted in deciding motions to compel arbitration by veering off course into the merits of the underlying medical malpractice action. See, e.g., Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 708 (2007) (noting that "factual findings" on motions to compel arbitration

are reviewed under the "any evidence" standard). The merits of the underlying lawsuit are not relevant to the issues on appeal and were not before the court of appeals—the only legal questions before the court pertained to the enforceability of an arbitration agreement and what evidence may be used to demonstrate the arbitrability of respondents' claims. Because the court of appeals' findings could prejudice petitioners' defense once the appellate process runs its course and the underlying medical malpractice action is either tried or arbitrated, the Court should reverse and remand.

The court of appeals improperly applied the standard of review, and this error controlled its analysis throughout the opinion. Therefore, the Court should grant certiorari to review the court of appeals' decision, and reverse and remand for a reconsideration of the issues in the motion to compel arbitration applying the proper standard of review.

II. The court of appeals erred in affirming as to the agency issue because the circuit court abused its discretion by refusing to allow the petitioners to present evidence on this fact-intensive question and its ruling was based upon an error of law.

Next, the court of appeals erred in affirming as to the agency issue because the circuit court abused its discretion by refusing to allow the petitioners to present evidence on this fact-intensive question and its ruling was based upon an error of law.

At the outset, the question of whether the circuit court erred in denying the motion to compel the deposition of Camille Hodge, Sr. is properly before the Court because that motion has a sufficient nexus to the denial of petitioners' motion to compel arbitration. See, e.g., Brown v. Cty. of Berkeley, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005) (stating that "[c]ourts have made a practice of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when those appeals are companion to issues that are reviewable" and the issues must have "a sufficient nexus or companionship to justify this Court's exercise of immediate

appellate review"). Indeed, the issues have an inextricable link because petitioners' purported lack of evidence—which, incidentally, neither the circuit court nor the court of appeals would allow petitioners to procure via deposition—controlled both courts' analysis of the agency issue and led to the denial of the motion to compel arbitration. Because the two issues are so intertwined, the Court should review these motions together. See Brown, 366 S.C. at 362 n.5, 622 S.E.2d at 538 n.5.

Turning to the merits, the court of appeals erred in finding no abuse of discretion in the circuit court's denial of petitioners' motion to compel the deposition of Camille Hodge, Sr. because (1) the requested deposition was well within the scope of discovery allowed in Rule 26(a), SCRCP; (2) respondents had no legitimate objection for not allowing petitioners to depose him; (3) Mr. Hodge's testimony was important to shed light on questions regarding the scope of his agency given that Ms. Hodge is deceased; (4) agency is a fact-intensive inquiry; and (5) Mr. Hodge's testimony was not the sole evidence offered to prove an agency relationship. The court of appeals' error in affirming the denial of access to Mr. Hodge via deposition controlled its analysis and ultimate conclusion that the petitioners failed to establish the scope of his agency in this case.

Although the court of appeals correctly noted the appropriate scope of discovery outlined in Rule 26, SCRCP, the court ignored the fact that Mr. Hodge's deposition fell comfortably within that scope. Rule 26 plainly states that "[p]arties may obtain discovery by . . . depositions upon oral examination." Rule 26, SCRCP. The rule instructs circuit courts to only limit the "frequency or intent of use of discovery" in one of three circumstances, none of which are present in this case. See Rule 26(a)(i)–(iii), SCRCP. Petitioners merely sought to take the deposition of one of the parties who brought this lawsuit and agreed to limit the scope of the deposition to issues relating

to the motion to compel arbitration. Aside from written discovery, a deposition is arguably the most basic discovery tool used in the course of litigation.

As the court of appeals noted, respondents' only objection to Mr. Hodge's deposition was that "the law in South Carolina does not allow a relative to waive a party's right to a jury trial." Not only is that an incorrect statement of the law, but it is also not a legitimate discovery objection under Rule 26. A review of the rule reveals respondents had no basis for withholding this evidence. Mr. Hodge's deposition was not "unreasonably cumulative or duplicative." Cf. Rule 26(a)(i), SCRCP. It was not "obtainable from some other source that is more convenient, less burdensome, or less expensive" because Ms. Hodge is deceased. Id. Petitioners certainly did not have "ample opportunity by discovery in the action to obtain the information sought" because these motions were argued during the pleadings stage, and respondents refused to make Mr. Hodge available for a deposition. Cf. Rule 26(a)(ii), SCRCP. Finally, it would be disingenuous for respondents to argue that a party's deposition would be "unreasonably burdensome or expensive." Cf. Rule 26(a)(iii), SCRCP.

More importantly, the court of appeals failed to recognize the utility of Mr. Hodge's testimony in ascertaining the scope of his agency in this case. Agency requires a fact-intensive inquiry. See R&G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 434, 540 S.E.2d 113, 118 (Ct. App. 2000) ("Generally, agency is a question of fact."). "[A]gency may be implied or inferred and may be circumstantially proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal." Fernander v. Thigpen, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982). "Questions of agency ordinarily should not be resolved by summary judgment whe[n] . . . any facts giv[e] rise to an inference of an agency relationship." Reid v. Kelly, 274 S.C. 171, 174, 262 S.E.2d 24, 26 (1980).

This Court has long recognized "that the declarations of an agent alone as to his agency are insufficient to prove agency, but if . . . other corroborating facts [exist], agency then becomes a question for the jury." City of Greenville v. Wash. Am. League Baseball Club, 205 S.C. 495, 504, 32 S.E.2d 777, 780 (1945) (emphasis added). To be sure, the agent's "statements are admissible and competent as circumstances in connection with other competent evidence to prove the legal relationship of the principal and agent." Id. (emphasis added). "The relationship of agency need not depend upon express appointment and acceptance, but may be, and frequently is, implied from the words and conduct of the parties and the circumstances of the particular case." Id. at 505, 32 S.E.2d at 781 (emphasis added).

> The existence of agency is a fact, and like other facts, may be proved by any evidence, traceable to the alleged principal, and having a legal tendency[] to establish it. The agency may be shown by conduct, by the relations and situation of the parties, by acts and declarations, by matters of omission as well as of commission, and, generally, by any fact or circumstance with which the alleged principal can be connected and having a legitimate tendency to establish that the person in question was his agent[] for the performance of the act in controversy.

Id. (quoting 1 MECHEM ON AGENCY § 261, at 185). As the court of appeals recognized in its opinion, "[a]n agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties." Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 145–46, 425 S.E.2d 764, 773 (Ct. App. 1992).

Here, the court of appeals erred in its agency analysis because petitioners were not seeking to use the statements of Mr. Hodge, standing alone, to prove agency in this case.[1] Cf. Wash. Am.

[1] Because petitioners were not seeking to use Mr. Hodge's testimony alone to prove the scope of his agency, the present case is distinguishable from Dickerson v. Longoria, 995 A.2d 721 (Md. 2010), and Klippel v.

League Baseball Club, 205 S.C. at 504, 32 S.E.2d at 780 (stating "that the declarations of an agent alone as to his agency are insufficient to prove agency"). Nor were petitioners relying upon the fact of marriage, in and of itself, to prove an agency relationship. Cf. Stiltner v. USAA Cas. Ins. Co., 395 S.C. 183, 189, 717 S.E.2d 74, 77 (Ct. App. 2011) (asserting that "no presumption" of agency "arises from the mere fact of the marital relationship" (quoting Bankers Tr. of S.C. v. Bruce, 283 S.C. 408, 423, 323 S.E.2d 523, 532 (Ct. App. 1984))). Because Ms. Hodge is deceased, however, Mr. Hodge's testimony—coupled with his longstanding marriage to her and the course of conduct in which he engaged on her behalf leading up to Ms. Hodge's admission to petitioners' facility—was relevant and admissible to demonstrate, via circumstantial evidence, the scope of his agency. See Wash. Am. League Baseball Club, 205 S.C. at 504, 32 S.E.2d at 780 (asserting that an agent's "statements are admissible and competent as circumstances in connection with other competent evidence to prove the legal relationship of the principal and agent," and agency "becomes a question for the jury" when "other corroborating facts" exist).

Petitioners, of course, are not trying to send this case to a jury. At issue here is a motion to compel arbitration, and our courts have not passed upon how the burden of proof for agency in this context is affected by the reality that arbitrability questions typically arise during the pleadings stage when very little discovery has been exchanged. See Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007) (stating that "a party may waive its right to compel arbitration if a substantial length of time transpires between the commencement of the action and the commencement of the motion to compel arbitration"). For this reason alone, the Court should grant certiorari to clarify the interplay of the standards of proof, and who carries the burden of proof, for the benefit of the bench and bar. As it stands, all a plaintiff must do to

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Mid-Carolina Oil, Inc., 303 S.C. 127, 399 S.E.2d 163 (Ct. App. 1990), and the court of appeals erred in relying upon these authorities.

defeat a motion to compel arbitration is assert agency as a defense and prevent the defendant from deposing the agent. This is wrong.

To illustrate the murkiness of this issue, petitioners would note that the court of appeals, for example, failed to harmonize the principle that "[q]uestions of agency ordinarily should not be resolved by summary judgment whe[n] . . . any facts giv[e] rise to an inference of an agency relationship," Reid, 274 S.C. at 174, 262 S.E.2d at 26, with the longstanding recognition that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," Landers, 402 S.C. at 109, 739 S.E.2d at 213 (quoting Am. Recovery Corp., 96 F.3d at 92), and the notion that the parties' intentions "are [to be] generously construed as to issues of arbitrability," Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 813 (4th Cir. 1989). These principles, when properly reconciled, mandate a finding that the circuit court and court of appeals erred. Petitioners presented "facts giving rise to an inference of an agency relationship," and to the extent the issue was a close one, the law mandated that the scales tip in favor of compelling these claims to arbitration as intended in the unrevoked Arbitration Agreement Mr. Hodge signed on the decedent's behalf upon admission to the Facility. To the extent petitioners did not meet their burden of proving agency, this was because the circuit court did not allow them to depose Mr. Hodge to present more facts.

Respondents argued, and the circuit court and court of appeals agreed, petitioners failed to establish that signing the Arbitration Agreement was within the scope of Mr. Hodge's agency, while simultaneously not allowing petitioners to obtain and present relevant evidence to meet their burden of proving the scope of his agency. This is fundamentally wrong. In essence, the courts are requiring petitioners to fight with their hands tied behind their backs. Respondents did not file these lawsuits until after Ms. Hodge's death. Because Ms. Hodge is deceased, the only source

from which petitioners could obtain further information—in addition to the records produced in discovery demonstrating a course of conduct—regarding the scope of Mr. Hodge's agency was Mr. Hodge. Respondents cannot assert a burden-shifting defense to petitioners' motion to compel arbitration and then withhold relevant and admissible evidence petitioners need to meet their burden. The court of appeals' decision is allowing them to do just that. This sets a dangerous precedent.

In the end, the circuit court and the court of appeals found that petitioners would not be able to prove agency via Mr. Hodge's testimony, even though both courts had no indication as to what he might have said. The courts merely assumed that Mr. Hodge would not provide any testimony that would help determine the scope of his agency. Indeed, the courts took it a step further and said that, regardless of his testimony, Mr. Hodge could not have had authority to enter into the Arbitration Agreement based upon the court of appeals' decision in Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), which—as explained below—is preempted by the FAA and U.S. Supreme Court precedent.

Respondents cannot assert a defense that purports to shift the burden of proof to petitioners and then deny petitioners access to evidence that is relevant, admissible, and critical to carrying that burden. Without this evidence, the circuit court concluded petitioners failed to prove that signing the Arbitration Agreement was within the scope of Mr. Hodge's agency. Accordingly, the circuit court's denial of petitioners' motion to compel Mr. Hodge's deposition was controlled by an error of law, "resulted in prejudice to the right of [petitioners]," and amounted to a "clear abuse of discretion." Dunn v. Dunn, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989). Because these issues are so intertwined and dependent upon each other, the Court should grant certiorari, reverse the court of appeals' decision affirming both of the circuit court's orders, and remand with

instructions for Mr. Hodge's deposition to go forward prior to any reconsideration of the agency issue raised in the motion to compel arbitration.

III. The court of appeals departed from U.S. Supreme Court precedent by treating nursing home arbitration contracts differently than other contracts.

Finally, the court of appeals erred in treating nursing home arbitration agreements differently than any other contract in direct contravention of U.S. Supreme Court precedent.

The U.S. Supreme Court has repeatedly recognized that arbitration agreements under the Federal Arbitration Act[2] (the FAA) are to be treated the same as any other contract. See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (noting that the purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements on the same footing as other contracts"); Coleman, 407 S.C. at 358, 755 S.E.2d at 457 (Toal, C.J., dissenting) ("The Supreme Court has repeatedly emphasized that arbitration agreements must be placed on the same footing as all other contracts."). Indeed, placing arbitration agreements on equal footing with other contracts is consistent with the liberal judicial policy favoring arbitration. AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740, 1745–46 (2011). As the U.S. Court of Appeals for the Fourth Circuit has observed, the FAA "requires that states place no greater restrictions upon arbitration provisions than they place upon other contractual terms" and, "with few limitations, if a state law singles out arbitration agreements and limits their enforceability, it is preempted." Saturn Distrib. Co. v. Williams, 905 F.2d 719, 722 (4th Cir. 1990).

According to the U.S. Supreme Court, courts may not "invalidate arbitration agreements under state laws applicable only to arbitration provisions." Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996). "[S]tate law, whether of legislative or judicial origin, is applicable if

[2] 9 U.S.C. §§ 1–16 (2012).

that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987). To the contrary, "[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2 [of the FAA]." Id.; see also Stephen J. Ware, Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto, 31 WAKE FOREST L. REV. 1001, 1012 (1996) ("Any law that singles out arbitration agreements by making them less enforceable than other contracts is preempted by the FAA."). As recently as last Term, the U.S. Supreme Court held that a state supreme court's rule that an agent "must possess specific authority to 'waive his principal's fundamental constitutional rights to access the courts [and] to trial by jury'" violated the FAA because it "singles out arbitration agreements for disfavored treatment." Kindred Nursing Ctrs., Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1425 (2017) (first alteration in original) (quoting Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306, 327 (Ky. 2015)).

Here, the court of appeals' burden-shifting double standard contravened the longstanding principle in this state that "when a man places his signature to a written contract it is a serious matter, and the law presumes that he knows what he is doing," New v. Collins, 126 S.C. 294, 296, 119 S.E. 835, 835 (1923), and the Fourth Circuit's direction that the parties' intentions "are [to be] generously construed as to issues of arbitrability," Peoples Sec. Life Ins. Co., 867 F.2d at 813. It also ignores the fact that courts have long recognized the benefits of arbitration. See, e.g., Batten, 300 S.C. at 547, 389 S.E.2d at 171 (observing that "[t]he fundamental premise upon which" the state policy favoring arbitration "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" (quoting Trident Tech. Coll., 286 S.C. at 104, 333 S.E.2d at 785)); see also Coleman, 407 S.C. at 357–58, 755 S.E.2d at 456 (Toal, C.J., dissenting) (recognizing in the context

of nursing home arbitration agreements that "[u]sing a separate contract for arbitration agreements is conducive to greater freedom of choice" and "should be encouraged"). These benefits apply in all settings, and nursing home arbitration agreements should not be treated any differently. But the court of appeals did place the Arbitration Agreement on a different footing because—notwithstanding the recognized benefits of arbitration—the court required petitioners to demonstrate what additional benefits the decedent received from the contract. Further, the court of appeals ignored that neither respondents nor the decedent ever made any effort to repudiate the Arbitration Agreement.

More importantly, the court of appeals found the other admissions documents signed by Camille Hodge, Sr., except for the Arbitration Agreement, were enforceable. Relying upon one of its previous decisions, the court of appeals stated that "the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial." Hodge, Op. No. 5541 (Shearouse Adv. Sh. No. 10 at 80) (quoting Thompson, 416 S.C. at 55, 784 S.E.2d at 686). Because this principle "takes its meaning precisely from the fact that a contract to arbitration is at issue," the court of appeals' jurisprudence does not comport with the FAA and, therefore, is preempted. Perry, 482 U.S. at 492 n.9; Doctor's Assocs., Inc., 517 U.S. 687 (asserting courts may not "invalidate arbitration agreements under state laws applicable only to arbitration provisions"). As noted above, the Supreme Court expressly rejected the rule espoused by the court of appeals in Kindred Nursing Ctrs., 137 S. Ct. at 1425 because it singled out arbitration.

Respondents never made any effort to repudiate the Arbitration Agreement until they filed their lawsuits. The circuit court and court of appeals allowed them to do so because the agreement

at issue required arbitration, finding that—even if Mr. Hodge "had authority to handle finances or make health care decisions"—an agent cannot waive a principal's right to a jury trial. Because this principle is in direct contravention of the FAA and U.S. Supreme Court precedent, the Court should grant certiorari and reverse.

CONCLUSION

Based upon the foregoing, this Court should grant the petition for a writ of certiorari to review the court of appeals' decision. The court of appeals misapplied the standard for reviewing motions to compel arbitration, erred in finding the petitioners failed to meet their burden of proving agency while simultaneously not allowing the petitioners to present relevant evidence on that issue, and departed from U.S. Supreme Court precedent by treating nursing home arbitration agreements differently than other contracts. Simply put, respondents cannot assert a burden-shifting defense to a motion to compel arbitration and withhold relevant evidence from petitioners needed to carry their burden on an issue that requires a fact-intensive inquiry. That is bad law. Further, the rule upon which the court of appeals relied—that an agent's authority to make healthcare and financial decisions does not extend to entering into arbitration agreements—is preempted under Kindred Nursing Ctrs. and the FAA. Accordingly, the Court should grant certiorari, reverse, and remand.

(Signature page to follow)

Respectfully submitted,

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June 1, 2018

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JUN 01 2018

S.C. SUPREME COURT

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Appellate Case No. 2015-001183

Opinion No. 5541 (S.C. Ct. App. filed March 7, 2018)

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.; and UHS-Pruitt Holdings, Inc. a/k/a UHS-Pruitt Corp. are ..... Petitioners.

Camille Hodge, Sr., ..., Respondent,

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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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PROOF OF SERVICE – PETITION FOR WRIT OF CERTIORARI

I, the undersigned Legal Assistant, of the law offices of Sowell Gray Robinson Stepp & Laffitte, LLC, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the Petition for Writ of Certiorari by mailing a copy of same to counsel via United States Mail, postage prepaid, at the following address(es):

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PROOF OF SERVICE – APPENDIX VOLUMES I AND II

I, the undersigned Legal Assistant, of the law offices of Sowell Gray Robinson Stepp & Laffitte, LLC, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the Appendix Volumes I and II by mailing a copy of same to counsel via United States Mail, postage prepaid, at the following address(es):

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