THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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SC Court of Appeals

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

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STATEMENT OF ISSUE ON APPEAL

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

STATEMENT OF THE CASE

Respondents Polly McGill and Mary Broxton brought wrongful death and survival claims against Appellant[1] Pruitt Health-Bamberg, LLC d/b/a Uni-Health Post Acute Care of Bamberg, LLC for their inadequate care of Virginia Butler, who had been a resident in Appellant's nursing home. In their capacity as Ms. Butler's co-personal representatives, Respondents filed suit in June 2015. Citing a document entitled "Arbitration Agreement" signed by Ms. Butler's niece Mary Robinson shortly before admission, Appellant moved to compel arbitration on July 10, 2015. Following a hearing, the Honorable G. Thomas Cooper, Jr. denied Appellant's motion. The circuit court held: (1) Ms. Robinson was not authorized to enter the Arbitration Agreement on Ms. Butler's behalf under the South Carolina Adult Health Care Consent Act or the common law doctrine of merger; and (2) Respondents were not estopped from denying enforcement of the Arbitration Agreement because Appellant failed to meet its burden to establish all elements of equitable estoppel. (R. pp. 2-9). Appellant filed a Motion to Reconsider, which the circuit court denied. (R. p. 10). Appellants filed and served a Notice of Appeal on December 4, 2015.

STATEMENT OF THE FACTS

Virginia Butler was a resident at Appellant's Bamberg nursing home in January-February 2014. (R. p. 16 ¶ 15). As all times relevant to this action, Ms. Butler's medical records indicated that she suffered from dementia. Ms. Butler was transferred to Appellant's facility from The Regional Medical Center ("TRMC") where she had received treatment for anemia and a broken leg suffered in a fall. (R. p. 15 ¶ 9-10). While at Appellant's facility, Ms. Butler had a pressure ulcer to her right lower leg that progressed to stage 4. (R. p. 16 ¶ 18). A stage 4 pressure ulcer is a severe medical condition characterized by a wound deep enough to expose a person's muscle,

[1] The Complaint also named The Regional Medical Center Foundation d/b/a The Regional Medical Center but TRMC is not a party to this appeal.

tendon or bone. Ms. Butler also developed new pressure ulcers to her left heel, right heel, and sacrum. (R. p. 16 ¶ 16). Ms. Butler's pressure ulcers became infected and she died on February 17, 2014. (R. p. 16 ¶ 21-22). Plaintiffs' Complaint alleges Appellant and TRMC breached their duties in caring for Ms. Butler's pressure ulcers causing Ms. Butler's pain, suffering, and death. (R. pp. 15-16 ¶ 14, 19).

When Ms. Butler arrived at the nursing home, Appellant's staff approached Ms. Butler's family members with several documents. Mary Robinson, Ms. Butler's niece, was approached by Appellant's representative from Appellant while Ms. Robinson was at work. (Supp. R. p. 18 ¶ 4). Ms. Robinson was not Ms. Butler's guardian, conservator, or attorney in fact. (Supp. R. p. 18 ¶ 5). The documents included an Admission Agreement and a separate and independent Arbitration Agreement. By its express terms, "the signing of th[e] [Arbitration] Agreement [was] not a precondition to admission, expedited admission, or the furnishing of services" to Ms. Butler. (R. p. 78). Plaintiff filed the current action in the Bamberg County Court of Common Pleas on June 11, 2015. On July 10, 2015, Appellant filed a Motion to Dismiss and Compel Arbitration. The circuit court denied Appellant's motion finding no valid arbitration contract because Ms. Butler did not assent to the Arbitration Agreement and Ms. Robinson lacked any legal authority to enter the Arbitration Agreement on Ms. Butler' behalf. The Court also rejected Appellant's argument that Respondent was equitably estopped from opposing arbitration. The circuit court subsequently denied Appellant's motion for reconsideration. This appeal followed.

STANDARD OF REVIEW

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

ARGUMENT

This appeal turns on whether the estate of a mentally compromised nursing home resident may be required to arbitrate personal injury claims against the nursing home when the resident did not assent to arbitration or authorize anyone else to assent on her behalf. Appellant argues that a relative's signature on an Arbitration Agreement binds the estate under the South Carolina Adult Health Care Consent Act or the contract doctrine of equitable estoppel. In a unanimous opinion issued earlier this year, this Court rejected these same arguments in an appeal brought by Appellant's sister facility on precisely the same Arbitration Agreement. Thompson v. Pruitt Corp., Op. No. 5384 (S.C. Ct. App. filed March 2, 2016) (Shearouse Adv. Sh. No. 9 at 34). The Court held that Appellant's Arbitration Agreement "did not require the type of decision for which the Act confers authority on a surrogate." Id. at 41. Also, "the doctrine of equitable

estoppel does not apply to [the decedent's] estate under either South Carolina law or federal substantive law." Id. at 45.

Appellant's brief acknowledges Thompson as adverse precedent (Appellant's Br. at 6) and does not offer any reason why the Court should reverse course so quickly on functionally identical facts. In fact, most of Appellant's brief simply recycles arguments the Court recently rejected. Rather than attempting to distinguish Thompson, Appellant simply notes that it petitioned the Court to rehear the case. Appellant's Br. at 6. That petition has now been denied,[2] this appeal is fully consumed by Thompson, and the circuit court's ruling should be affirmed.

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

The circuit court's ruling should be affirmed for three reasons. First, the Adult Health Care Consent Act ("the Act") is narrowly tailored to address health care decisions and related financial matters. The Act does not apply to dispute resolution matters governed by a separate, independent document. Second, the Court should not consider Appellant's third-party beneficiary argument because it was not raised to or ruled on by the circuit court. Plus, on the merits, Ms. Butler is not a third-party beneficiary to any purported contract between Ms. Robinson and Appellant. Third, Respondent is not equitably estopped from refusing to arbitrate under either South Carolina or federal law.

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

The Act does not apply to a free-standing nursing home arbitration contract and the circuit court properly concluded Respondents are not bound to the Arbitration Agreement under the Act's provisions. The Act's primary purpose is to identify and authorize individuals to make

[2] Thompson v. Pruitt Corp., S.C. Ct. App. Order dated Apr. 21, 2016.

"decisions concerning . . . health care" on behalf of a person "unable to consent" S.C. Code Ann. § 44-66-30(A). The Act intends "to insure that the patient's wishes **concerning her medical treatment** are honored whenever possible." Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 353, 755 S.E.2d 450, 454 (2014) (emphasis added). The Act establishes the order of priority for those individuals authorized to make health care decisions. The first level of decision-making priority, pursuant to the Act, is granted to a legally-appointed guardian and an attorney-in-fact empowered pursuant to a duly executed durable power of attorney. S.C. Code Ann. § 44-66-30(A). An incapacitated individual's nieces, such as Ms. Robinson, are seventh in priority. Id.

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

The Act grants only limited decision-making power related to nursing home admission. An individual authorized by the Act may enter an agreement to admit a resident to a nursing home and may enter a contract agreeing to pay for nursing home services. Coleman, 407 S.C. at 353-54, 755 S.E.2d at 454. A potential resident or her family are typically presented with multiple contracts and other documents when the family contemplates admitting their loved one to a nursing home. Coleman demonstrates that the Act does not apply to all documents associated with nursing home admission. Specifically, the Act does not apply if a document "was

not required for [the resident's] admission, contained no provision for medical, nursing, or health care services to be provided for [the resident], and did not require any financial commitment to pay for such services." Id. at 353, 755 S.E.2d at 454. Based on the Coleman standard, the Act does not apply to the Arbitration Agreement. The Arbitration Agreement does not contain any provision for medical, nursing, or health care services. The bolded and underlined language in Section I indicates that its provisions are intended only for dispute resolution. (R. p. 74). Only the scope of arbitrable disputes and procedures for an arbitration hearing are included in the Arbitration Agreement. See Thompson, Op. No. 5384 (Shearouse Adv. Sh. No. 9 at 39) (holding that since "the Arbitration Agreement does not deal with healthcare decisions, the provisions of the Act do not apply").

Appellant argues the Arbitration Agreement is governed by the Act because the Arbitration Agreement merges with the Admission Agreement, a contract that covers "health care" decisions. Appellants' Br. at 7-9. The Coleman Court acknowledged South Carolina law indicating contracts signed at the same time by the same parties and for the same purpose may be construed together "in the absence of anything indicating a contrary intention." 407 S.C. at 355, 755 S.E.2d at 455 (quoting Klutts Resort Realty, Inc. v. Down'round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)). Coleman refused to apply the merger doctrine because the admission agreement contained language "indicating a contrary intention." The Court found that language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." 407 S.C. at 355, 755 S.E.2d at 455.

The Arbitration Agreement Appellant drafted includes one of the exact provisions cited in Coleman—i.e. provision granting Ms. Butler a thirty-day period to unilaterally disclaim arbitration without affecting her residency status. (R. p. 78). Appellants' brief does not deny their

Arbitration Agreement includes the precise provision identified in Coleman. Instead, Appellant argues the disclaimer provision was inessential to the holding in Coleman and should not have been considered for the merger issue here. Appellants misinterpret Coleman. The merger "theory" is disproved by "anything indicating a contrary intention." Coleman, 407 S.C. at 355, 755 S.E.2d at 455. A disclaimer provision like the one Appellant drafted and Coleman discussed "evidenc[ed] an intention that each contract remain separate." Id. Thus, on its own, the disclaimer provision is sufficient to defeat Appellants' merger argument.[4]

Plus, there are multiple terms in the Arbitration Agreement demonstrating the parties' intent that the Admission Agreement and Arbitration Agreements are not to be considered a single contract. In addition to the thirty-day disclaimer provision cited in Coleman and Thompson, the Arbitration Agreement acknowledges that agreeing to its terms is "voluntary," i.e. not a prerequisite to admission. (R. p. 74). This same sentiment is expressly stated later in the Arbitration Agreement. Signing the Arbitration Agreement "is not a precondition to admission, expedited admission, or the furnishing of services to the Patient/Resident by the Healthcare Center." (R. p. 78 subsection (B)). The Arbitration Agreement was intended to be a separate contract from the Admission Agreement and, just as in Coleman and Thompson, the presumption of merger is overcome by the contracts' contrary intent. Klutts Resort Realty, Inc., 268 S.C. at 88, 232 S.E.2d at 24.

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[4] Along with its efforts to minimize the disclaimer provision's effect on Coleman's merger holding, Appellant also argues Coleman erred in finding the disclaimer demonstrated an intent for the contracts not to merge. Appellant's Br. at 11. Appellant suggests Ms. Butler could also disclaim the Admission Agreement by walking away from Appellant's facility. This is another argument specifically rejected in Thompson, at 40. While it is true Ms. Butler could choose to leave Appellant's facility, the Arbitration Agreement was different because it permitted Ms. Butler to choose not to arbitrate without affecting her residency status. This provision was clear proof Appellant did not intend to link the two agreements.

Appellant's merger argument also relies on the Admission Agreement's incorporation of "exhibits" and asserts that the Arbitration Agreement is an "exhibit" of the Admission Agreement. Appellants Br. at 9. However, the Admission Agreement never defines "exhibit" and nothing in the Arbitration Agreement indicates that it is intended to be the Admission Agreement's exhibit. In fact, "exhibit" appears just once in the Admission Agreement and does not appear at all in the Arbitration Agreement. Any ambiguity as to merger must be construed against Appellants since they were the agreements' exclusive drafters. Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455 (citing Davis v. KB Home of S.C., Inc., 394 S.C. 116, 129, 713 S.E.2d 799, 805 n. 4 (Ct. App. 2011)). Accordingly, Thompson rejected Appellant's "exhibit" argument because the term is ambiguous and the ambiguity must be construed against Appellant. Thompson, at 41 (citing Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455; Ellie, Inc. v. Miccichi, 358 S.C. 78, 94, 594 S.E.2d 485, 493 (Ct. App. 2004)). Thompson went a step further and held that parsing out a possible definition of "exhibit" was unnecessary because "the parties intent for [the Arbitration Agreement] to stand by itself as an independent contract" could be ascertained by even a cursory reading of its first page. Thompson at 41 n. 1.

Appellant's merger argument suffers from other flaws. Klutts indicates that merger only applies to instruments executed "at the same time, by the same parties, for the same purpose, and in the course of the same transaction." 268 S.C. at 88, 232 S.E.2d at 24. The circuit court properly ruled that the Admission Agreement and Arbitration Agreement were not entered by the same parties for the same purpose. (R. p. 6-7). As the circuit court's order recognized, the two Agreements were not executed for the same purpose. (R. p. 7). The Admission Agreement purports to cover a bed hold policy, pharmacy selection, and other activities incident to nursing home services. In contrast, the Arbitration Agreement's stated purpose is to establish the

procedures "to submit for resolution by arbitration any disputes that may arise." (R. p. 74). For all these reasons, the Act does not apply to the Arbitration Agreement, and the circuit court correctly rejected Appellant's motion on this basis.

B. Ms. Butler was not a third-party beneficiary of any alleged agreement between Appellant and Ms. Robinson.

Appellant argue Respondents are bound to the Arbitration Agreement since Ms. Butler was a third-party beneficiary. However, this issue was not presented to the circuit court and is not preserved for review. Even if the issue had been properly preserved, it should be rejected because there is no valid Arbitration Agreement to which Ms. Butler could be a third-party beneficiary, Ms. Butler has made no efforts to enforce the Arbitration Agreement, and Ms. Butler has not otherwise assented to arbitration.

1. Appellant's third-party beneficiary argument is not preserved for review.

Appellant did not assert a third-party beneficiary argument in its circuit court motion and may not raise it for the first time on appeal. See I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000) (holding that a "losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review"). Appellant's motion to compel arbitration raised three arguments: (1) the Arbitration Agreement is governed by the Federal Arbitration Act ("FAA") and Respondent's claims fell within the Agreement's scope; (2) Ms. Robinson had authority to enter the Arbitration Agreement on Ms. Butler's behalf pursuant to the Act and the common law merger doctrine; and (3) Respondent should be estopped from refusing to arbitrate. (R. p. 49-59). During the circuit court hearing Appellant raised only the Act/merger (R. p. 147, lines 12-15) and estoppel (R. p. 148, line 1). Accordingly, the circuit court's order was limited to these two issues. (R. pp. 1-9).

Appellant then filed a motion pursuant to Rule 59, SCRCP asking the circuit court to reconsider its ruling on the Act/merger (R. p. 118) and equitable estoppel (R. p. 121). Appellant's motion also asked the circuit court to rule on the FAA issue raised in its original motion but not addressed in the initial order. (R. p. 123). The circuit court denied Appellant's Rule 59 motion and reaffirmed its earlier ruling except for a footnote unrelated to this appeal. (R. p. 10).

There was no point during the circuit court proceedings when Appellant asked the circuit court to enforce arbitration against Respondents or Ms. Butler as a third-party beneficiary to a purported Arbitration Agreement between Appellant and Ms. Robinson. The third-party beneficiary doctrine was never even mentioned during the hearing. As a result, the circuit court's orders did not rule on the issue. This Court's role is "error correction," and Appellant's failure to raise the third-party beneficiary issue means there is no circuit court ruling Appellant can ask the Court to correct. See Jean Hoefer Toal et al., Appellate Practice in South Carolina 12-13 (2d ed. 2002) ("The Court of Appeals is an error-correction court"). In sum, Appellant failed in its duty to raise a third-party beneficiary argument and to obtain a ruling from the circuit court before asking this Court to consider the matter. The issue has not been preserved and should not be considered in this appeal. See I'On, 338 S.C. at 422, 526 S.E.2d at 724 (describing how preservation rules are designed to prevent a litigant from "keeping an ace card his sleeve" to pull out for the first time on appeal).

2. There is no valid contract to which Ms. Butler or her estate can be a third-party beneficiary.

Appellant's third-party beneficiary argument must fail because there can be no third-party beneficiary in the absence of a valid contract. Thompson at 44 (citing Dickerson, 995 A.2d at 742). Since Ms. Butler did not sign the Arbitration Agreement and Ms. Robinson lacked authority to enter the Arbitration Agreement on Ms. Butler's behalf, there was no contract to

arbitrate between Ms. Butler and Appellant. The evidence also shows there was no valid contract between Ms. Robinson and Appellant. Appellant did not intend for Ms. Robinson to be a party to the Arbitration Agreement in her individual capacity. Throughout the agreement, Ms. Robinson is identified only as "Patient/Resident Representative," never in her individual capacity. Ms. Robinson signed the agreement in a signature block labeled "Patient/Resident Representative." (R. p. 78).

The only language purporting to bind Ms. Robinson to the Arbitration Agreement in her individual capacity is on the final page in nondescript type below the signature block. Id. Appellant's intent to include Ms. Robinson only as Ms. Butler's representative is clear in Appellant's filings with the circuit court. In an affidavit attached to Appellants's Motion to Compel Arbitration, UPAC-Bamberg's administrator indicated that Ms. Robinson signed admission paperwork including the Arbitration Agreement only **"as the representative"** of Ms. Butler. (R. pp. 95-96, ¶ 5). (emphasis added). There is no contract, and there can be no third-party beneficiary.

3. Ms. Butler's care was not the "essential purpose" of the separate and independent Arbitration Agreement.

Since Appellants cannot establish a valid Arbitration Agreement they attempt to hitch their third-party beneficiary argument to the Admission Agreement, a document containing no reference to arbitration. Appellant's third-party beneficiary argument is based on an untenable premise. Appellant argues Ms. Butler's care was the "essential purpose" of all the contracts presented to Ms. Butler's family near the time of her admission. Appellant's Br. at 13. However, there is no reasonable basis to conclude nursing home care is the essential purpose of a separate and independent Arbitration Agreement, the terms of which are limited to dispute resolution. Certainly none of the cases cited in Appellant's brief supports this argument.

None of the cases Appellant cites are from South Carolina courts. Plus, three of the six relate to arbitration provisions **within an admission agreement**. Appellant's Br. at 13-14 (citing THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert, 2014 WL 6863550 *1 (D.S.C. Oct. 31, 2014) (noting "the Admission Contract contains an Arbitration Provision"); THI of S.C. at Columbia, LLC v. Wiggins, C/A No. 3:11-888-CMC, 2011 WL 4089435 (D.S.C. Sept. 13, 2011); Trinity Mission Health & Rehab. v. Scott, 19 So.3d 735 (Miss. App. 2008)). When a single contract governs the terms of nursing home services and imposes arbitration, it is more plausible to argue a resident's care is the essential purpose of a contract containing arbitration language. These cases have no persuasive authority[8] here since admission and arbitration were covered by two independent contracts.

Appellant does cite a couple of cases involving two contracts which held a resident was a third-party beneficiary. Appellant's Br. at 13-14 (citing Cook v. GGNSC Ripley, LLC, 786 F. Supp. 2d 1166 (N. D. Miss. 2011) and McCutcheon v. THI of S.C. at Charleston, LLC, Case No. 2:11-CV-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011). However, in both instances the courts treated the two contracts as one after finding the contracts merged. Cook applied the third-party beneficiary doctrine only after finding an admission agreement and arbitration agreement merged as indicated in the arbitration agreement's terms. 786 F. Supp. 2d at 1171-72 (finding arbitration agreement "became part of the admission agreement upon execution, as reflected by its express terms"). Similarly, McCutcheon cited the Klutts test and treated the two contracts as one. McCutcheon, 2011 WL 6318575 at *3 (citing Klutts, 268 S.C. at 88, 232 S.E.2d at 24). As discussed above, there is no merger here, and the Arbitration Agreement expressly says so. (R. p.

[8] Of course, this Court is not bound by rulings from another state or this state's federal district court. See e.g. Chase Home Fin., LLC v. Risher, 405 S.C. 202, 213, 746 S.E.2d 471, 477 (Ct. App. 2013) (noting federal district court rulings are persuasive at most).

78) ("The signing of this [Arbitration] Agreement is not a precondition to admission").[9] Therefore, Appellant has not provided the Court a single case where a nursing home resident was forced to arbitrate as a third-party beneficiary to an arbitration contract that is expressly independent of the contract governing the resident's nursing home care. Appellant's "essential purpose" argument simply does not make sense in the context of this case.

4. Appellant did not intend for Ms. Butler to benefit from the Arbitration Agreement as a third party.

Additionally, the third-party beneficiary doctrine does not apply to the Arbitration Agreement because it was not the purported parties' intent to benefit Ms. Butler as a third-party. The third-party beneficiary doctrine is an exception to the rule barring enforcement of a contract by or against a non-party. Windsor Green Owners Ass'n v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004). The exception only applies if the contracting parties intended to create a direct benefit in a "third person." Id. The purported parties' intent is a material element of the third-party beneficiary doctrine. The parties must recognize the attempted beneficiary as a non-party and intend to benefit that person as a non-party. To determine Appellant's intent for the Arbitration Agreement, this Court must look beyond Appellant's current statements to the moment when the purported contract was formed. Laser Supply & Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009).

When the Arbitration Agreement was presented to Ms. Robinson, Appellant intended to make Ms. Butler a party. For the many reasons discussed above, Appellant failed to effectuate this intent by obtaining the assent of Ms. Butler or one authorized to act on her behalf. Appellant

[9] Appellant also cites Owens v. Coosa Valley Health Care, Inc., 890 So.2d 983 (Ala. 2004), but Owens cannot support Appellant's argument since it does not refer to a third-party beneficiary at all.

only seek to deem Ms. Butler a third-party because their efforts to label her a party do not comply with South Carolina contract law. The letter and spirit of that law would be severely undermined if Appellant succeeds. Appellant's intent to make Ms. Butler a party to the contract means Appellant cannot prove a material element required to bind Respondent to the agreement as a third-party beneficiary.

This argument is supported not only by the South Carolina law cited above, but also by rulings from other jurisdictions. See e.g., Dickerson v. Longoria, 995 A.2d 721, 742 n. 21 (Md. 2010) (rejecting nursing home's third-party beneficiary argument when combined with home's attempt to bind resident to contract as party and finding "inconsistency belies [home's] arguments") Barbee v. Kindred Healthcare Operating, Inc., No. W2007-00517-COA-R3-CV, 2008 WL 4615858 at *10 n. 3 (Tenn. App. Oct. 20, 2008) (rejecting nursing home's attempt to label resident's relative as party and resident as third-party beneficiary because "this argument has already been rejected by this court").

5. Ms. Butler never consented to arbitrate claims against Appellant.

Appellant's third-party beneficiary argument is also flawed because it would force a person to enter arbitration for claims for which she never consented to arbitrate. South Carolina contract law generally precludes enforcement of a contract's terms against a person failing to manifest assent. Laser Supply & Servs., Inc., 382 S.C. at 334, 676 S.E.2d at 143-44. South Carolina authority does indicate that a non-signatory can enforce or be bound by an arbitration provision is some limited instances. Pearson v. Hilton Head Hosp., 400 S.C. 281, 288-89, 733 S.E.2d 597, 600-01 (Ct. App. 2012) (citing Int'l Paper Co. v. Scwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416-17 (4th Cir. 2000)). However, even in those instances, the assent requirement remains. Pearson relies heavily on the Fourth Circuit's reasoning in

International Paper, which acknowledged that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." 206 F.3d at 416. Notwithstanding the federal and state policies favoring alternative dispute resolution, arbitration "is a matter of consent, not coercion." Volt Information Scis., Inc., 489 U.S. at 479.

Pearson simply recognized that a person can demonstrate the required assent "by means other than personally signing." 400 S.C. at 288, 733 S.E.2d at 600 (citing Int'l Paper, 206 F.3d at 416). Yet, none of the doctrines Pearson discussed apply to Ms. Butler. Alternative means of assenting to arbitration include assumption of an existing contract, the signature of a person properly acting as another's agent, and conduct by an individual inconsistent with denying arbitration sufficient to apply the equitable doctrine of estoppel. Pearson, 400 S.C. at 289, 733 S.E.2d at 601 (citing Thompson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995)). Each of these doctrines require affirmative conduct by the person to be bound to arbitration by which the person either expressed her desire to arbitrate or attempted to enforce a portion of the contract such that avoiding the contract's arbitration requirement would be inequitable. See also Thompson at 44 (quoting Dickerson, 995 A.2d at 742) (finding third-party nursing home resident may not be bound to arbitrate "unless the third party is attempting to enforce the contract containing the arbitration agreement")).

Ms. Butler did neither. Her diminished mental capacity precluded conduct expressing a desire to assent and neither she nor Respondents have attempted to enforce the Arbitration Agreement's terms. A person cannot be forced into arbitration by the independent conduct of others. Any third-party beneficiary argument that omits a discussion of assent is an "incomplete" analysis. Drury v. Assisted Living Concepts Inc., 262 P.3d 1162, 1166 (Or. App. 2011). A court must consider whether the alleged third-party somehow manifested assent. Id. Otherwise, "the

contracting parties have waived the beneficiary's right to a jury trial without her consent." Thompson, at 44 (quoting Drury, 262 P.3d at 1166 n. 5). Not even Pearson's broad scope of arbitration permits this result. Neither South Carolina law nor persuasive authority cited in their brief supports Appellant's third-party beneficiary argument, and the circuit court's ruling must be affirmed.

C. Respondents are not equitably estopped from denying Ms. Robinson had authority to enter the Arbitration Agreement on Ms. Butler's behalf.

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

The circuit court correctly found Appellant did not meet its burden to establish these elements. (R. p. 8). Appellant does not attempt to apply or even cite these elements in its brief. The circuit court noted several example of how Appellants could not meet their burden. Ms. Butler's diminished mental capacity rendered her incapable of making the type of representations required to support equitable estoppel. (R. p. 8); see also Thompson at 47 (finding resident's "incapacity prevented her from forming the intent or having the requisite knowledge to mislead" nursing home). Moreover, Appellant had the ability to determine whether Ms. Robinson had

legal authority to agree to arbitration on Ms. Butler's behalf by simply asking to see proof that Ms. Robinson was Ms. Butler's guardian, conservator, attorney-in-fact, etc. (R. p. 8).

Another major flaw in Appellant's equitable estoppel argument is that it is premised on Appellant's faulty merger argument. In Coleman, the South Carolina Supreme Court rejected a nursing home's equitable estoppel argument because it was based on the home's faulty assertion that an admission agreement merged with a separate and independent arbitration agreement. 407 S.C. at 354-55, 755 S.E.2d at 455. Appellant make similar arguments in its brief. Appellant's Br. at 18-19. Appellant somewhat subtly premises its estoppel argument on its discredited merger argument by claiming Ms. Butler "received all the benefits of the Admissions Agreements" (Appellant's Br. at 18) so as to suggest the Admission Agreement and Arbitration Agreement are one and the same. Appellant then argues Respondents are not free to selectively enforce portions of the Admission Agreement. Id. However, Respondents have not chosen to "enforce" any portion of the Admission Agreement. The Complaint alleges wrongful death and survival claims premised on common law duties owed by a nursing home to its resident. (R. pp. 17-18). For the same reason, Appellant errs when it claims Respondents seek to "repudiate" any agreement. Respondents' Complaint does not reference and is not based on any contract.

Even if Respondents had based a claim on an alleged breach of the Admission Agreement, such conduct would not equitably estop them from opposing enforcement of the separate and independent Arbitration Agreement. Appellant's brief refers to Respondents picking and choosing portions of the Admission Agreement to enforce. Appellant's Br. at 19. However, the Admission Agreement does not reference arbitration at all. Presumably, Appellant is arguing the Admission Agreement and Arbitration Agreement merge, and Respondents are bound by the later by seeking to enforce the former. Yet, Respondents do not seek to enforce either agreement

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

The District Court orders Appellant cites do not support applying estoppel in this case. Again, Appellant relies primarily on cases where a nursing home admission agreement had an integrated arbitration provision. Appellant's Br. at 17 (citing THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert, Civil Action No. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. March 19, 2015); Wiggins, 2011 WL 4089435 at * 6). By choosing to separate the Arbitration Agreement from the Admission Agreement, Appellant has rendered Gilbert and Wiggins inapplicable. Even if the Court were to accept Appellant's contention that Ms. Butler "accepted" the benefits of admission, such acceptance could not estop her from contesting the separate and independent Arbitration Agreement. McCutcheon v. THI of S.C. at Charleston, No. 2:11-CV-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011), serves Appellant no better. McCutcheon did apply equitable estoppel to a two-contract nursing home arbitration case but only after finding the contracts merged. Id. at *3 (citing Klutts Resort Realty, Inc., 268 S.C. at 87, 232 S.E.2d at 24). Plus, the McCutcheon plaintiff attempted to enforce the merged contract's terms while also seeking to avoid its arbitration provision. Id. at *3 (noting resident's estate "attempts to hold [nursing home] liable for alleged breach of certain contractual terms"). The absence of merger and the lack of a breach of contract claim in this case render McCutcheon inapposite.

The separateness of the two contracts in this case also distinguishes the "direct benefit" cases on which Appellant relies. Appellant's Br. at 16. International Paper notes that equitable estoppel can apply to bar refusal of arbitration when the refusing party "receives a direct benefit from a contract containing an arbitration clause." 206 F.3d at 418 (quoting Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999)). But, the Fourth Circuit

also found that equitable estoppel only applies to a person who has "constantly maintained that other provisions of the same contract should be enforced." Pearson, 400 S.C. at 290, 733 S.E.2d at 601 (quoting Int'l Paper, 206 F.3d at 418). This is the "direct benefit" courts look for when applying equitable estoppel. Pearson, 400 S.C. at 291, 733 S.E.2d at 602. This "direct benefit" is absent in this case because Ms. Butler (and her estate) made no effort to enforce the Arbitration Agreement's terms. The so-called "benefits" of arbitration do not meet the "direct benefit" standard. Thompson held that "direct benefit" typically entails something much more concrete and substantial than the (minimal) alleged financial benefits of arbitration itself. Thompson at 46 (noting "direct benefit" has been applied to a $150,000 payout or lucrative employment opportunity).[10] Crucially, Appellant points to no case applying Pearson/ International Paper as Appellant proposes.

Additionally, International Paper considered a single contract in which a party was suing to enforce some terms while seeking to avoid the same contract's arbitration provision. The same is true for Jackson v. Iris.com, 524 F. Supp. 2d 742, 749-50 (E.D. Va. 2007), which Appellant cites in further support of its estoppel argument. In Jackson, a musician was estopped from refusing a contract's mandatory arbitration provision when he sought to enforce the same contract's liquidated damages provision. Id. at 750-51. Even if federal law applies, Appellant's equitable estoppel argument is only potentially viable if this Court finds the Admission Agreement and Arbitration Agreements merge. However, as in Coleman and Thompson, the evidence shows the contracts are separate, and Appellant cannot meet its burden to prove merger.

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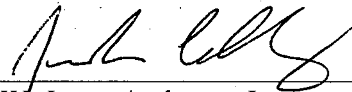
[10] The Thompson court also appeared unconvinced that the "benefits" of arbitration to Ms. Butler were really benefits at all. Thompson at 46 (referring to Arbitration Agreement's cost-shifting provision only as "an alleged benefit" that is "offset by the [Arbitration Agreement's] requirement that [resident] waive her right to access to the courts and her right to a jury trial").

CONCLUSION

Based on the arguments stated above, Respondents respectfully request this Court affirm the circuit court's denial of Appellant's motion to compel arbitration. Appellant seeks to expand the Adult Healthcare Consent Act far beyond its recognized bounds in an effort to bar litigation of the claims of an elderly nursing home resident who never consented to the Arbitration Agreement. The circuit court correctly refused Appellant's motion and the circuit court's ruling should be affirmed.

Respectfully submitted,



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August 3, 2016
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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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 .... Respondents,

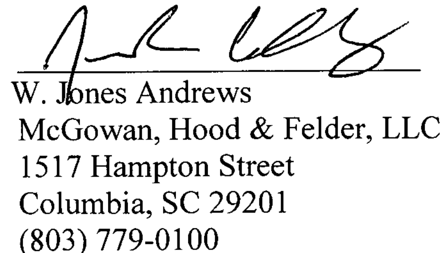
v.

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

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

CERTIFICATE OF COUNSEL

Pursuant to Rule 211, SCACR, Respondents' counsel certifies that Respondents' Final Brief complies with Rule 211(b), SCACR.



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August 3, 2016
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Post – Acute Care of Bamberg, LLC

Of whom Pruitt Health-Bamberg,
LLC d/b/a Uni-Health Post-Acute
Care of Bamberg, LLC .... Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on this 3rd day of August, 2016, she served counsel for the Defendants with a copy of the Final Brief of Respondents in this matter by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses:

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SC Court of Appeals

August 3, 2016

Honorable Jenny Abott Kitchings
SC Court of Appeals Clerk of Court
1220 Senate Street
Columbia, SC 29201

Re: Polly McGill and Mary Broxton as Co-Personal Representative of the Estate Of Virginia Butler, Deceased v. The Regional Medical Center Foundation d/b/a The Regional Medical Center, et al.
Case No. 2015-CP-05-00124
Appellate Case No. 2015-002493

Dear Mrs. Kitchings:

Please find enclosed one (1) original and fourteen (14) copies of the Final Brief of Respondents along with a Certificate of Counsel and Proof of Service for filing in the above-reference matter. File the original and return a filed copy in the enclosed envelope.

If you have any questions, feel free to contact our office.

Sincerely,

Jordan Calloway

Jordan Calloway

JCC/ksj
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