THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

RECEIVED
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SC Court of Appeals

Appellate Case No. 2019-000028

Teresa Murphy, as Personal Representative for the Estate of Isaac Strong, ... Respondent

v.

Hunt Valley Holdings, LLC f/k/a Fundamental Long Term Care Holdings, LLC, Fundamental Clinical and Operational Services, LLC, Fundamental Consulting, LLC, Fundamental Administrative Services, LLC, THI of Baltimore, Inc., THI of South Carolina, LLC, THI of South Carolina at Rock Hill, LLC d/b/a Magnolia Manor of Rock Hill, and Amisub of S.C., Inc. d/b/a Piedmont Medical Center ..... Defendants.

Of which Hunt Valley Holdings, LLC f/k/a Fundamental Long Term Care Holdings, LLC, Fundamental Clinical and Operational Services, LLC, Fundamental Consulting, LLC, Fundamental Administrative Services, LLC, THI of Baltimore, Inc., THI of South Carolina, LLC, THI of South Carolina at Rock Hill, LLC d/b/a Magnolia Manor of Rock Hill ..... Appellants

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INITIAL BRIEF OF RESPONDENT

Chad A. McGowan
Eve S. Goodstein
Jordan C. Calloway
MCGOWAN, HOOD & FELDER, LLC
1539 Health Care Drive
Rock Hill, South Carolina 29732
803-327-7800
cmcgowan@mcgowanhood.com
egoodstein@mcgowanhood.com
jcalloway@mcgowanhood.com

John G. Felder, Jr.
Richard A. "Trey" Jones III
MCGOWAN, HOOD & FELDER, LLC
1517 Hampton Street
Columbia, South Carolina 29201
(803) 779-0100
jfelder@mcgowanhood.com
tjonesmcgowanhood.com

Attorneys for Respondent

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2. Whether Mr. Strong conferred apparent authority on his daughter to enter an arbitration contract for him when he was neither present at the nursing home nor capable of speaking when the contract was presented.

3. Whether South Carolina's Bill of Rights for Residents of Long-Term Care Facilities can be construed as an avenue for forcing a vulnerable nursing home resident to dismiss his lawsuit alleging negligent care and to pursue those claims only through arbitration to which he did not agree.

4. Whether a nursing home can ask a court to "sanction" discovery the nursing home has the legal right to conduct without court permission or to preemptively rule that doing so will not waive the nursing home's perceived right to pursue arbitration later.

STATEMENT OF THE CASE

Teresa Murphy, appointed as personal representative of the Estate of her father Isaac Strong, filed a Summons and Complaint in the York County Court of Common Pleas on May 14, 2018. (Compl. ¶ 1). The Complaint alleged wrongful death and survival claims against THI of South Carolina at Rock Hill, LLC d/b/a Magnolia Manor of Rock Hill ("Magnolia Manor" or "the Facility") along with related entities the Complaint alleged to have operational or managerial control over Magnolia Manor and Amisub of S.C. d/b/a Piedmont Medical Center, a hospital in Rock Hill, SC. (Compl. ¶¶ 3-20; 50-53). Magnolia Manor moved to compel arbitration and to stay court proceedings on July 17, 2018. With the exception of Fundamental Consulting, LLC, the remaining Defendants answered in June-July 2018. Magnolia Manor amended its motion to compel arbitration and to stay court proceedings on July 24, 2018. Motions to stay were filed by Defendants Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, and THI of South Carolina, LLC on August 23, 2018. A hearing on the motions was held before the Honorable William A. McKinnon on August 30, 2018. The circuit court took the motions under advisement, granting the parties leave to file additional memoranda supporting their legal arguments.

On October 24, 2018, the circuit court entered an order denying Magnolia Manor's motion to compel arbitration and dismissing as moot the other Defendants' motions to stay. (Order, dated Oct. 24, 2018). Magnolia Manor filed a Rule 59(e), SCRCP motion on November 5, 2018. On the same date, Defendants Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, and THI of South Carolina, LLC, filed Rule 59(e) motions seeking reconsideration of their motions to stay. The circuit court held a hearing on these motions on December 5, 2018. On that same day, the Court entered an order making slight alterations to its

original findings but reaffirming its conclusions on all motions. Magnolia Manor, Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, and THI of South Carolina, LLC served a notice of appeal on January 4, 2019.

STATEMENT OF THE FACTS

Isaac Strong was admitted to Magnolia Manor on December 22, 2014, following a multi-week hospitalization in Piedmont Medical Center related to a stroke that caused persistent weakness along his right side. (Compl. ¶¶ 25, 28). Four days before Mr. Strong was transferred to the Facility, his daughter Teresa Murphy was at Magnolia Manor when she was presented with two adhesion contracts. The first was an "Admission Agreement" that governed the type of care Mr. Strong would receive from Defendants and Mr. Strong's financial obligation to pay for those services. On the Admission Agreement's final page, labeled as "Page 12 of 12," there was an "Entire Agreement" provision indicating these 12 pages constituted "the entire agreement and understanding between the parties" concerning Mr. Strong's admission to the Facility. Ms. Murphy signed the Admission Agreement on the "Signature of Representative" line. Defendants did not ask Ms. Murphy for proof of authority to act on Mr. Strong's behalf.

On the same day, Ms. Murphy signed a contract called "Arbitration Agreement." This contract was not part of the 12 pages comprising the Admission Agreement but was its own separate contract (labeled "Page 1 of 1") with its own signature blocks. The Arbitration Agreement, purportedly a contract between Magnolia Manor and Mr. Strong, provides for alternative dispute resolution for any claim a party may bring against another arising out of Mr. Strong's admission in the Facility. Ms. Murphy signed the Arbitration Agreement on the line labeled "Resident/Representative Signature." Magnolia Manor's counsel admitted to the circuit court Mr. Strong agreeing to arbitrate was not a condition or prerequisite to his admission at the Facility.

When Mr. Strong arrived in the Facility on December 22, 2014, he had a pressure ulcer and was at an elevated risk of developing new ulcers. (Compl. ¶ 28). Orders were entered requiring that Mr. Strong be turned or repositioned every two hours. (Compl. ¶ 26). However, over the next couple weeks, Mr. Strong's pressure ulcer worsened, becoming infected and then septic. (Compl. ¶¶ 31-33). Mr. Strong's condition grew increasingly severe over the following months requiring hospitalizations and painful procedures before passing away on September 5, 2015. (Compl. ¶¶ 34-46). On May 14, 2018, Ms. Murphy initiated this action as the personal representative for Mr. Strong's estate. The Complaint alleges wrongful death and survival claims arising from Defendants' corporate negligence, professional malpractice, and custodial neglect including failure to adequately treat Mr. Strong's skin condition causing his wrongful and premature death.

On July 17, 2018, Magnolia Manor chose to forego discovery and filed a motion to compel arbitration and petition to stay state court proceedings. Relying on the Arbitration Agreement that Mr. Strong did not sign, Magnolia Manor argues Plaintiff must arbitrate rather than litigate her claims. The circuit court denied the motion. (Order, dated Oct. 24, 2018). In a motion to reconsider, Magnolia Manor asked the circuit court to "sanction" arbitration-related discovery. (Tr. of Record Dec. 5, 2018 at 5, lines 6-8, 22-24). Counsel acknowledged he did not need the court's permission to send discovery requests but argued he would "rather not" without the court's blessing for fear that doing so could subject Magnolia Manor to claims that it waived its purported right to arbitrate. Id. at 22, lines 19-20. The circuit court denied this motion as well. (Order, dated Dec. 5, 2019).

STANDARD OF REVIEW

Appellate courts apply a *de novo* review to a circuit court's finding on whether a nonsignatory is bound to an arbitration contract. Wilson v. Willis, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019) (citing Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 707

(2007) and Pearson v. Hilton Head Hosp., 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012)). However, under a *de novo* review, the circuit court's factual findings will not be reversed so long as "any evidence reasonably supports those findings." Wilson, 426 S.C. at 335, 827 S.E.2d at 172 (citing Aiken, 373 S.C. at 148, 644 S.E.2d at 707). To the extent the appeal of a discovery order is properly before the Court, Magnolia Manor must prove a clear abuse of the circuit court's discretion. Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 576, 813 S.E.2d 292, 309 (Ct. App. 2018) (quoting Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 536 787 S.E.2d 485, 495 (2016)).

ARGUMENT

Magnolia Manor's motion to dismiss sought to deny Mr. Strong's estate the constitutionally-guaranteed right to a jury trial based on an invalid arbitration contract. Arbitration may be favored by federal law but only when the parties voluntary agree to it. Here, Mr. Strong was not even at Magnolia Manor when its employee presented the Arbitration Agreement for signature, and Magnolia Manor produced nothing to show Mr. Strong's daughter (Teresa Murphy) had the authority to bind her father (or his estate) to the Arbitration Agreement. South Carolina appellate courts have repeatedly rejected nearly all of the legal and equitable theories Magnolia Manor now proposes to create a binding contract where there is not one. Just last year, this Court also rejected Magnolia Manor's discovery-related argument. Hodge, 422 S.C. at 576, 813 S.E.2d at 309. In sum, Magnolia Manor failed to meet its burden to show a valid arbitration contract and was in no way denied the opportunity to conduct discovery before filing its motion to compel arbitration.[1]

[1] For the same reasons, the Court should affirm the circuit court's ruling dismissing the remaining Appellants' motions to stay as moot. As made clear in their Rule 59(e) motions, the motions to

1. **The Independently-Invalid Arbitration Agreement does not Merge with the Admission Agreement, and Mr. Strong's Estate is not Equitably Estopped from Opposing Arbitration.**

Magnolia Manor argues Mr. Strong's estate must arbitrate his claims against Appellants, but Mr. Strong never agreed to do so. Mr. Strong never signed or otherwise assented to the Arbitration Agreement on which Magnolia Manor relies to support its motion to dismiss the estate's civil action. Ms. Murphy's signature on the Arbitration Agreement is ineffective because Magnolia Manor has produced nothing to show she had authority to bind Mr. Strong to a dispute resolution contract. As the circuit court concluded, Mr. Strong's presence at Magnolia Manor does not equitably estop[2] the estate from contesting arbitration, and South Carolina law does not recognize any form of agency relationship between Mr. Strong and Ms. Murphy. Finally, the South Carolina South Carolina Bill of Rights for Residents of Long-Term Care Facilities, a statute

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stay are wholly dependent on the outcome of Magnolia Manor's motion to compel arbitration. See e.g., Fundamental Clinical and Operational Services, LLC's Mot. to Alter or Amend J. at 1-2.

[2] Magnolia Manor incorrectly claims the circuit court erred in citing South Carolina's equitable estoppel elements rather than those applied by federal law. Appellants Br. at 6-7 n. 10 (citing Pearson v. Hilton Head Hosp., 400 S.C. 281, 289, 733 S.E.2d 597, 601 (Ct. App. 2012). Pearson has been criticized in other jurisdictions as inconsistent with U.S. Supreme Court precedent. See e.g., 3D Sys. Corp. v. Miller, No. 1:17-cv-03252-RLY-MJD, 2018 WL 7350927 (S.D. Ind. Feb. 8, 2018) (citing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 632 (2009), and finding Pearson "ignored the United States Supreme Court's decision")). Miller further found Thompson acknowledged Pearson's holding cannot be reconciled with Arthur Andersen. Miller, 2018 WL 7350927, at * 3 (citing Thompson, 416 S.C. at 57, 784 S.E.2d at 687-88). If there was any remaining doubt, the South Carolina Supreme Court recently resolved it, finding South Carolina substantive law applies to equitable estoppel arguments. Wilson, 426 S.C. at 338, 827 S.E.2d at 173-74 (citing Arthur Andersen, 556 U.S. at 630-31) ("Whether an arbitration agreement may be enforced against nonsignatories, and under what circumstances, is an issue controlled by state law")). Magnolia Manor's footnote includes a passing reference to South Carolina's equitable estoppel elements but makes no effort to apply them. Similarly, while Wilson references "direct benefits estoppel," Appellants' brief is limited to "equitable estoppel." To the extent Magnolia Manor does seek to apply direct benefits estoppel, Thompson and Hodge refused to find a nonsignatory nursing home resident gained any direct benefit from an independent arbitration contract. Thompson, 416 S.C. at 59-60, 784 S.E.2d at 688; Hodge, 422 S.C. at 563, 813 S.E.2d at 302.

intended to protect Mr. Strong from abuse and exploitation, cannot be twisted to bind Mr. Strong's estate to the otherwise invalid Arbitration Agreement.

This appeal centers on core components of contract formation. Since Magnolia Manor points only to the Arbitration Agreement as a basis for dismissing Mr. Strong's claims, it cannot prevail without first establishing the Arbitration Agreement is a properly formed, binding contract. However, while Magnolia Manor offered the Arbitration Agreement as an alternative means for settling disputes, Mr. Strong never accepted that offer. Moreover, even if the Court accepts Magnolia Manor's evolving argument on Ms. Murphy's authority to admit Mr. Strong to its facility, the Arbitration Agreement does not derive validity from the intentionally distinct Admission Agreement or the targeted statutory authority that makes it valid.

a. Magnolia Manor Cannot Show the Core Requirements to Form a Contract.

A contract is formed only when one party makes an offer, the other manifests acceptance, and the contract's promises are supported by valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). Acceptance requires an "objective manifestation of . . . assent at the time the contract was made." Laser Supply & Services, Inc. v. Orchard Park Assoc., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009). The Arbitration Agreement was not signed by Mr. Strong and, while Magnolia Manor once falsely claimed otherwise, its records show Mr. Strong was not even in the building when the Arbitration Agreement was offered for signature. See Defs.' Reply Mem. in Supp. of Mot. to Compel Arb. at 5; Pla. Mem. in Opp. to Mot. to Alter or Amend J. at 4 and Exhibits 1-2. Since Mr. Strong never personally assented to the Arbitration Agreement, Magnolia Manor argues the signature of his daughter (Ms. Murphy) assented on his behalf. However, Magnolia Manor presents nothing to show Ms. Murphy had authority to contract for Mr. Strong. Instead, Magnolia Manor now argues

Ms. Murphy had statutory authority to enter Mr. Strong to the Facility and that authority either carries over to the Arbitration Agreement or equitably estops Mr. Strong's estate from opposing arbitration. The circuit court correctly refused both of these arguments because they have been rejected by South Carolina appellate courts three times in the last five years.

South Carolina's Adult Health Care Consent Act empowers designated family members of some vulnerable adults to sign a contract admitting the vulnerable adult to a skilled nursing facility and agreeing to pay the fees imposed by that facility for its services. S.C. Code Ann. § 44-66-60(A); Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450, 453 (2014). But, since the Act is limited to "health care" decisions, it provides no authority for separate contracts like the Arbitration Agreement. Id. at 354, 755 S.E.2d at 454; Thompson v. Pruitt Corp., 416 S.C. 43, 51, 784 S.E.2d 679, 684 (Ct. App. 2016) (citing Coleman and agreeing an "Arbitration Agreement does not deal with healthcare decisions"). Additionally, a family member signing a nursing home admission contract pursuant to authority derived from the Act does not estop a later argument that the same family member lacked authority to sign a separate arbitration contract. Coleman, 407 S.C. at 354-56, 755 S.E.2d at 455; Thompson, 416 S.C. at 60, 784 S.E.2d at 688. The Act was never meant to affect anything other than "health care" decisions and, as Magnolia Manor admitted to the circuit court, signing the Arbitration Agreement was not a health care decision because Mr. Strong could get all the health care services covered in the Admission Agreement without agreeing to arbitrate. (Tr. of Record Aug. 30, 2018 at 23:24-24:10).

Coleman did acknowledge the possibility that equitable estoppel could be invoked if the disputed arbitration language was actually or effectively in the same admission contract. 407 S.C. at 355, 755 S.E.2d at 455. This narrow path to a successful estoppel argument requires several steps. Preliminarily, Magnolia Manor must establish the Act empowered Ms. Murphy to enter the

Admission Agreement on Mr. Strong's behalf. See Hodge, 422 S.C. at 574, 813 S.E.2d at 308 (finding that there can be no estoppel argument where signatory family member lacked authority under Act to enter admission contract). Then, Magnolia Manor must meet multiple requirements to apply the common law contract law interpretation principle by which courts interpret multiple writings as a single contract. Coleman, 407 S.C. at 355, 755 S.E.2d at 455. This "merger" principle cannot apply unless the writings in question were executed "at the same time, by the same parties, for the same purpose, and in the course of the same transaction." Id. (quoting Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)). Even then, merger does not apply if there is "anything indicating a contrary intention." Id. Thus, simultaneously executed writings relating to the same general subject matter will not be viewed as a single or merged agreement if either their language or the circumstances show the parties actually intended the writings to be distinct, separate contracts. Three nursing homes have previously attempted but failed to meet these robust requirements, and South Carolina's appellate courts have never applied merger to nursing home admission and arbitration contracts. See generally Coleman, Thompson, and Hodge.

b. Magnolia Manor Makes Inconsistent Arguments on Ms. Murphy's Authority under the Adult Health Care Consent Act.

Magnolia Manor cannot meet any of the requirements to support its equitable estoppel argument. First, Magnolia Manor does not even offer a consistent position on whether the Act empowered Ms. Murphy to enter the Admission Agreement on Mr. Strong's behalf. The Act only applies if Mr. Strong was "unable to consent," a term defined by the Act as limited to a person who cannot (1) appreciate the nature and implications of both his condition and proposed interventions; (2) form a reasoned decision concerning proposed treatment courses; or (3) communicate his decisions in an unambiguous manner. S.C. Code Ann. § 44-66-20(8). Appellants'

brief argues it is "without question" Ms. Murphy had authority under the Act (Appellants' Br. at 6) but their counsel made a different argument to the circuit court. There, Magnolia Manor refused to acknowledge Mr. Strong was incapacitated and argued he "had capacity and the ability to make his needs known." (Tr. of Record Dec. 5, 2018 at 12:5-7, 14:4-8). If Mr. Strong had the capacity Magnolia Manor represented to the circuit court, then he may not qualify as a person "unable to consent," the Act would not apply even to the Admission Agreement, and the merger argument would fail at its initial hurdle. Hodge, 422 S.C. at 574, 813 S.E.2d at 308.

c. The Admission Agreement and Arbitration Agreements Serve Different Purposes.

Second, Magnolia Manor cannot show the Admission Agreement and Arbitration Agreement were executed for the same purpose. The Admission Agreement was formed because its "parties wish to admit [Mr. Strong] to" Magnolia Manor. (Admission Agreement at 1). That purpose is borne out in the Admission Agreement's twelve pages. Magnolia Manor agreed to "[f]urnish room, routine meals, nursing care, personal care, or custodial care" (Admission Agreement at 2, § (A)(3)) to Mr. Strong who, in turn, agreed to "[p]ay all fees and charges" for those skilled nursing services. Id. at 3, § (B)(4). The Admission Agreement's provisions referred to Medicaid eligibility, bed hold policies, late fees for unpaid service charges, etc. The Arbitration Agreement covers a completely different issue. It is solely devoted to directing an alternative dispute resolution method and purporting to eliminate its parties' right to seek relief through the courts. (Arbitration Agreement). These two contracts cannot have the same purpose because, as Appellants' counsel admits, the Arbitration Agreement "was not a pre-condition for admission [and] not mandatory." (Tr. of Record Aug. 30, 2018 at 23:24-24:10).

d. The Terms and Context Show the Parties Intended the Admission Agreement and Arbitration Agreement to be Separate Contracts.

Third, even if the Court were to find the Act applied to Mr. Strong and the prerequisites to merger were present, Magnolia Manor's argument fails because the language and circumstances of the Admission Agreement and Arbitration Agreement show the parties intended they be construed as separate contracts. Coleman, Thompson, and Hodge are the key precedent here because they illustrate the type of contract language or structure showing parties do not intend multiple agreements to be interpreted as one. For example, an arbitration contract does not merge with an admission contract in which a nursing home and its resident chose to insert an "entire agreement" or integration provision (aka "merger clause") limiting its parameters and excluding other writings. Coleman, 407 S.C. at 355, 755 S.E.2d at 455. Coleman held one such provision proved "on its face" that merger does not apply. Id. Also, admission and arbitration contracts cannot merge if they contain inconsistent terms, especially provisions related to how each contract may be terminated. Id.; Thompson, 416 S.C. at 53, 784 S.E.2d at 685. Moreover, courts look at the way the contracts are structured, finding it is unlikely parties intended two contracts to be treated as one if they chose separate titles, required separate signatures, and numbered each contract's pages differently. Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562, 813 S.E.2d at 302. Finally, Hodge held a nursing home cannot argue for merger when it chose to separate arbitration and admission into two agreements while taking the position that agreeing to the former was not required to obtain the benefits of the latter. 422 S.C. at 562-63, 813 S.E.2d at 302. All four of these examples apply to the Admission Agreement and Arbitration Agreement used by Magnolia Manor.

i. The Admission Agreement's "Entire Agreement" Provision

The Admission Agreement concludes with an "Entire Agreement" provision identifying the limited scope of that contract. (Admission Agreement at 12, § XVIII). Specifically, this provision states "this Agreement represents the entire . . . understanding between the parties." "Agreement" is capitalized because it is a defined term, which the Admission Agreement's opening line limits to "THIS ADMISSION AGREEMENT." (Admission Agreement at 1) (emphasis in original). Magnolia Manor argues the Admission Agreement's "Entire Agreement" provision is different than its counterparts in Coleman, Thompson, and Hodge because it does not specifically reference the Arbitration Agreement. Appellants' Br. at 9-10. However, the Admission Agreement's "Entire Agreement" provision is just as probative against merger as those in earlier cases. It specifically limits the contract's interpretation to the "Agreement" and then defines that term narrowly in a way that does not include the Arbitration Agreement or any other writing. To argue the "Entire Agreement" provision must specifically reference a separate writing to exclude that writing from the common law merger rule is to overlook the fundamental purpose an integration provision serves in a contract. See Palmetto State Sav. Bank of S.C. v. Barr, 293 S.C. 252, 253-54, 359 S.E.2d 531, 532 (Ct. App. 1987) (finding purpose of integration provision is to create "strong implication the whole intentions of the parties has been expressed" in the writing containing the clause); Wilson v. Landstrom, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984) (citing Armour Fertilizer Works v. Hyman, 120 S.C. 375, 113 S.E. 330 (1922) (the terms of a completely integrated contract "cannot be varied or contradicted by parol evidence of prior or contemporaneous agreements not included in the writing")).

Plus, there is contract language here that tracks Coleman and progeny almost word for word. In Coleman, the court focused on the fact that the admission contract's "Entire Agreement"

provision referenced "[t]his Agreement . . . and the Arbitration Agreement." Referencing the two writings distinctly was "the admission agreement's recognition of the arbitration agreement as a separate document." Thompson, 416 S.C. at 52, 784 S.E.2d at 684 (citing Coleman, 407 S.C. at 355, 755 S.E.2d at 455). Hodge applied the same principle using language from an arbitration contract that referenced an admission contract in distinct terms. 422 S.C. at 562, 813 S.E.2d at 302. If an arbitration contract explains its scope extends to disputes arising from "this Agreement or the . . . Admission Agreement," then the parties "recognized a separateness" between the two contracts. Id. The Arbitration Agreement in this case does exactly what Coleman, Thompson, and Hodge identify as proof that defeats Magnolia Manor's merger argument. In describing its term, the Arbitration Agreement states that its effect will continue even after the termination of "this Agreement ***or the Admission Agreement***." (Arbitration Agreement) (emphasis added).

Finally, Magnolia Manor hints that the "Entire Agreement" provision supports an Admission Agreement-Arbitration Agreement merger because it incorporates "other Admissions Materials." Appellants' Br. at 9-10 (quoting Admission Agreement at 12 § XVIII). To the extent Magnolia Manor implies the Arbitration Agreement was incorporated by reference into the Admission Agreement, Magnolia Manor has offered nothing in either contract to support this conclusion. "Admissions Materials" is not a defined term and there is nothing to suggest the Arbitration Agreement was intended to be included within it. Plus, since Magnolia Manor admits agreeing to arbitration was not required for admission, it would be counterintuitive to conclude the Arbitration Agreement was an "admissions material." Thompson rejected a similar argument when a nursing home argued its admission contract's "entire agreement" provision incorporated a separate arbitration contract by referring broadly to "exhibits." Since "exhibit" was undefined and not referenced elsewhere in either contract, the term was ambiguous and was interpreted against

the nursing home who drafted it. 416 S.C. at 53-54, 784 S.E.2d at 685 (citing Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455).

ii. Inconsistent Termination Provisions

Two contracts executed at the same time do not merge if they contain inconsistent terms. The parties likely did not intend for the two be read as one if they chose to, for example, apply different substantive law to the two agreements. Hodge, 422 S.C. at 562, 813 S.E.2d at 302. Coleman, Thompson, and Hodge made special note of inconsistent provisions in admission and arbitration contracts regarding when each contract may be cancelled at the resident's urging. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 551, 813 S.E.2d at 296. In each instance, the arbitration contract allowed the resident to disclaim or revoke its provisions within thirty days but the admission contract did not include a similar right. Id. Here, the Arbitration Agreement does not have a disclaimer provision, and Magnolia Manor positions this fact as its primary argument for distinguishing Coleman, Thompson, and Hodge. Appellants' Br. at 9.

However, the contracts' termination provisions are just as inconsistent here as in those cases. The Arbitration Agreement states that its effect on disputes between the parties would survive even if both the Admission Agreement and Arbitration Agreement are cancelled. (Arbitration Agreement). As structured by Magnolia Manor, there does not seem to be any means by which a resident could unilaterally cancel the Arbitration Agreement. The Admission Agreement is very different in that it allows a resident to unilaterally terminate that contract "at any time." (Admission Agreement at 6, § IV, ¶ 1). Thus, while Magnolia Manor is correct the Arbitration Agreement is technically different than Coleman and progeny because it lacks a disclaimer provision, that distinction makes no difference because the Arbitration Agreement and

Admission Agreement still have inconsistent termination provisions that rebut any argument the parties intended these two separate contracts merge into one.

iii. Contract Formatting and Structure

Thompson and Hodge prove it is not just specific contract language that shows a nursing home and its resident did not intend for admission and arbitration contracts to merge. Intent can be derived from the way a contract is formatted or structured. Rather than adding an arbitration provision to the admission contract or attaching that language as an exhibit, the nursing home in Thompson chose to place it in an entirely separate document with its own, distinct "Arbitration Agreement" label. 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1. That choice was in itself further proof of "the parties' intent for [the arbitration contract] to stand by itself as an independent contract." Id. Magnolia Manor did the same here, and the Arbitration Agreement announces itself as a distinctive contract from its very title. Hodge also noted the importance of formatting choices a nursing home makes when constructing its admission and arbitration contracts. 422 S.C. at 562, 813 S.E.2d at 302. An arbitration contract looks more and more like its own independent document if entering it requires a separate signature than the admission contract and the documents have separate pagination. Id. Here, the Arbitration Agreement required separate signatures. Plus, the Admission Agreement ran from "Page 1 of 12" to "Page 12 of 12," while the Arbitration Agreement was all on its own as "Page 1 of 1."

iv. Admission is not Dependent on Arbitration Agreement

Magnolia Manor's merger argument is also rebutted by its counsel's admissions. The purported interaction between two separate contracts can be judged not only by their language but also by how their parties treat each contract. An arbitration contract is far less likely to merge with an admission contract if the nursing home admits arbitration is not required for admission. Thus,

in Hodge, this Court cited as further evidence against merger an arbitration contract provision stating that arbitration was not a precondition to a resident's acceptance into the nursing home. 422 S.C. at 562-63, 813 S.E.2d at 302. Similarly, Magnolia Manor does not treat the Admission Agreement and Arbitration Agreement as if they are interdependent or even as related to the same purpose. Magnolia Manor's counsel told the circuit court that executing the Arbitration Agreement was not mandatory and not a precondition to admission. (Tr. of Record Aug. 30, 2018 at 23:24-24:10).

In sum, the Arbitration Agreement and Admission Agreement have the same four indicators South Carolina courts have looked to in the past to find the parties did not intend for simultaneously-executed contracts to merge into one. Moreover, contrary to Magnolia Manor's arguments, any uncertainty about these four indicators as applied to this case must be resolved in Ms. Murphy's favor, not to her detriment. Magnolia Manor argues merger is the default position and must be applied absent an affirmative showing of contrary intent. Appellants' Br. at 12-13. But, that argument overlooks two key holdings from Coleman. First, to the extent merger is a presumption, it is an easily rebuttable one because "***anything*** indicating a contrary intention" means a court will not apply merger. 407 S.C. at 355, 755 S.E.2d at 455 (quoting Klutts, 268 S.C. at 88, 232 S.E.2d at 24) (emphasis added). Thus, Magnolia Manor's task on appeal is not to successfully oppose one of the four indicators discussed above but to prove all four are absent here. Second, since Magnolia Manor drafted these form contracts of adhesion, any ambiguities must be construed against the Facility. Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455. Coleman applied this rule to a nursing home's quibbles over the effect of an "entire agreement" clause, and Thompson used it to reject a nursing home's argument that an arbitration contract was incorporated

into an admission contract. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53-54; 784 S.E.2d at 685.

Accordingly, Magnolia Manor's bottom line argument on merger (i.e. the evidence "might (or might not) reflect a contrary intention" to merger)[3] is flawed not only in the specific ways described above but also in its very conception of when and how the merger doctrine operates. The circuit court properly applied the extensive South Carolina law in this field and correctly rejected Magnolia Manor's contention that the Arbitration Agreement and Admission Agreement merged. The circuit court also properly found Ms. Murphy's purported authority to enter the Admission Agreement does not estop Mr. Strong's estate from opposing arbitration.

2. Magnolia Manor Did Not Establish a Principal-Agent Relationship Between Mr. Strong and Ms. Murphy.

Agency is a legal relationship allowing an individual (principal) to choose a trusted person (agent) to act in the principal's stead and to interact with third parties on the principal's behalf. Principals control agency. They decide when an agent is appointed and how far his/her authority extends. Fronberger v. Smith, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (holding that an agent is always "subject to the principal's control"). Even where the law recognizes apparent agency or apparent authority, the relationship cannot exist without the purported principal doing something intentional or knowing to sanction it. Magnolia Manor presents nothing to show Mr. Strong appointed Ms. Murphy as his agent to sign away his jury trial rights. Instead, Magnolia Manor relies on apparent authority, arguing Mr. Strong did something at the time the Arbitration Agreement was presented to make the Facility believe Ms. Murphy was his agent. But, despite what Magnolia Manor told the circuit court, Mr. Strong was not in the room (or even the same

[3] Appellants Br. at 13.

building) when the Arbitration Agreement was signed and, due to a recent stroke, could not speak or make decisions on his own.

An agency relationship may be established with clear evidence of actual or apparent authority conferred by the purported principal on the purported agent. Cowburn v. Leventis, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). Actual authority is "expressly conferred upon the agent by the principal." Richardson v. PV, Inc., 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009). Apparent authority is based on "representations made by the principal to the third party and reliance by the third party on those representations." Young v. S.C. Dep't of Disabilities & Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). To prove apparent authority, a party must show (1) purported principal consciously or impliedly represented another to be his agent; (2) reliance on the representation by a third party; and (3) change in position by third party in reliance on the representation. Cowburn, 366 S.C. at 39-40, 619 S.E.2d at 448. For apparent authority to exist, "[e]ither the principal must intend to cause the third person to believe the agent is authorized to act for him, or he should realize his conduct is likely to create such belief." R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000).

Thompson and Hodge both rejected agency arguments to enforce arbitration contracts signed by a nursing home resident's family member, and these cases show the flaws in Magnolia Manor's arguments. First, a family member's act in signing an arbitration contract cannot alone create an agency relationship even if the contract specifically says the signer is representing herself to have legal authority. Hodge, 422 S.C. at 573-74, 813 S.E.2d at 308. Apparent authority cannot be based solely on representations of the purported agent. Cowburn, 366 S.C. at 39-40, 619 S.E.2d at 448. Second, any actual or apparent authority a family member may have to make health care decisions on a nursing home resident's behalf does not confer authority to sign a separate

arbitration agreement. Thompson, 416 S.C. at 55, 784 S.E.2d at 686 (citing Dickerson v. Longoria, 995 A.2d 721, 736-37 (Md. 2010)); Hodge, 422 S.C. at 567, 813 S.E.2d at 304 (quoting Dickerson). Third, mental incapacity prevents a nursing home resident from performing any act that conveys apparent authority. Thompson, 416 S.C. at 55, 784 S.E.2d at 686. As Magnolia Manor admits in its brief, apparent authority can be conferred only by the purported principal's intentional or knowing acts. Appellants' Br. at 15 (citing Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 245, 473 S.E.2d 865, 868 (Ct. App. 1996)).

Magnolia Manor asks the Court to reject all three of these established principles. Its brief does not point to any actual agency relationship between Mr. Strong and Ms. Murphy. Accordingly, Magnolia Manor is left to argue how Mr. Strong's words or conduct knowingly represented Ms. Murphy as his agent to make decisions on possible future legal claims. At the circuit court, Magnolia Manor argued Mr. Strong was sitting beside Ms. Murphy when she signed the Arbitration Agreement, thereby giving his tacit approval. (Defs.' Reply Mem. in Supp. of Mot. to Compel Arb. at 5). In truth, Mr. Strong was still in the hospital, miles away from where Ms. Murphy and a Magnolia Manor employee considered the Arbitration Agreement. (Pla. Mem. in Opp. to Mot. to Alter or Amend J. at 4 and Exhibits 1-2). Since Mr. Strong was not even present to make representations to Magnolia Manor that might convey authority on Ms. Murphy, Magnolia Manor points to the fact that the Arbitration Agreement Ms. Murphy signed indicated she was his "representative." Appellants' Br. at 16. However, Magnolia Manor cannot prevail by relying on what Ms. Murphy said. Hodge, 422 S.C. at 573-74, 813 S.E.2d at 308; Cowburn, 366 S.C. at 39-40, 619 S.E.2d at 448.

Magnolia Manor offers two "representations" Mr. Strong supposedly made when the Arbitration Agreement was signed even though he was not even there to see it. First, Magnolia

Manor argues Mr. Strong conveyed apparent authority for the Arbitration Agreement because he allowed Ms. Strong to procure his admission. Appellants' Br. at 16-17. That precise argument was rejected in Hodge and with good reason. 422 S.C. at 573-74, 813 S.E.2d at 308 (affirming circuit court's rejection of argument claiming family member was authorized to sign arbitration contract because resident "allow[ed] him to procure her admission"). Authority to procure nursing home admission is not the same as authority to sign a separate arbitration contract. Thompson, 416 S.C. at 55, 784 S.E.2d at 686; Hodge, 422 S.C. at 567, 813 S.E.2d at 304; Dickerson, 995 A.2d at 736-37. The "health care" v. arbitration distinction is part of the South Carolina Adult Health Care Consent Act as interpreted by our Supreme Court in Coleman. Plus, Magnolia Manor is assuming Mr. Strong had the mental capacity to grant apparent authority to Ms. Murphy even for health care decisions and its own medical records do not support that conclusion. Pla. Mem. in Opp. to Mot. to Alter or Amend J. at 4 and Exhibits 1-2; see also Tr. of Record Aug. 30, 2018 at 8, line 24 – 9, line 8. Without mental capacity, Mr. Strong could not confer apparent authority on Ms. Murphy for any purpose. Thompson, 416 S.C. at 55, 784 S.E.2d at 686.

Second, Magnolia Manor argues Mr. Strong represented Ms. Strong as his agent for entering the Arbitration Agreement by later accepting the benefits of admission without objecting to arbitration. Appellants' Br. at 17. Again, Magnolia Manor is improperly conflating admission to the Facility with arbitrating future disputes even though it has admitted the former is not dependent on the latter. This happens several times in this section of Magnolia Manor's brief.[4] Just

[4] For example, Magnolia Manor repeatedly calls the Arbitration Agreement part of the "admissions paperwork" even though agreeing to it was not required for admission. Appellants' Br. at 17-18. Magnolia Manor then contends Mr. Strong's estate seeks to "ratify" one part of "the contract" (presumably the Admission Agreement) while also "avoid[ing] that part which he later deems disadvantageous" Id. Mr. Strong is not trying to "avoid" the Admission Agreement. Magnolia Manor can only make this argument by merging the two contracts together which, as discussed above, is not supported by South Carolina law.

as in Thompson, "being admitted to the facility and receiving medical care, is of no moment" to Magnolia Manor's efforts to bind Mr. Strong to the Arbitration Agreement. 416 S.C. at 60, 784 S.E.2d at 688. Magnolia Manor makes no effort to show how Mr. Strong accepted any "benefits" of the Arbitration Agreement itself. This Court has been skeptical that there was any benefit there for Mr. Strong to accept, and the Fourth Circuit agrees. Id.; Weckesser v. Knight Enters. S.E., LLC, 735 Fed. Appx. 816, 823 (4th Cir. June 12, 2018) (citing Thompson and finding "South Carolina courts have recognized that the mere 'benefit' of mutual arbitration is thin indeed").[5]

It is also odd to claim Mr. Strong conferred apparent authority to sign the Arbitration Agreement by accepting admission *after the contracts were signed.* Magnolia Manor does allude to a ratification argument in this section but does not cite the required elements or attempt to apply them to the facts. This sort of conclusory argument shows Magnolia Manor has effectively abandoned the issue on appeal. Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). Moreover, to prevail on ratification, Magnolia Manor must show (1) Mr. Strong accepted some benefit from the Arbitration Agreement Ms. Murphy signed; (2) Mr. Strong had full knowledge of the facts related to the arbitration contract; and (3) Mr. Strong "affirmative[ly] elect[ed]" to accept arbitration as the mechanism for resolving disputes with Defendants. Stiltner v. USAA Cas. Ins. Co., 395 S.C. 183, 191, 717 S.E.2d 74, 78 (Ct. App. 2011).

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[5] Magnolia Manor's reliance on Carraway v. Beverly Enters. Ala., Inc., 978 So.2d 27, 30-31 (Ala. 2007) is also misplaced. Appellants' Br. at 15-17. Carraway could never be binding precedent in this Court and its expansive view of apparent agency was rejected in Hodge, where the court rejected the notion that a nursing home resident represents his/her family member has authority to enter an arbitration agreement on the resident's behalf simply by failing to object to the family member's signature. 422 S.C. at 573-74, 813 S.E.2d at 308 (noting home argued resident "represented" her husband had authority by "allowing him to procure her admission" but still finding "no evidence . . . that [the resident], as the principal, represented husband was her agent"). Defendants make the precise argument Hodge rejected. Defs.' Mem. at 8 (suggesting Mr. Strong created apparent agency relationship "by allowing Ms. Murphy to procure Mr. Strong's admission to the Facility").

Mr. Strong did not affirmatively elect to accept the Arbitration Agreement, and there is nothing to suggest he derived any benefit from it.

In sum, the circuit court correctly rejected Magnolia Manor's agency argument because there was no principal-agent relationship between Mr. Strong and Ms. Murphy. There was also nothing Mr. Strong did or said to Magnolia Manor to suggest he had conferred authority to Ms. Strong to enter an arbitration contract on his behalf.

3. South Carolina's "Bill of Rights for Residents of Long-Term Care Facilities" was Designed to Protect Mr. Strong, not Force His Estate into Unwanted Arbitration.

South Carolina's "Bill of Rights for Residents of Long-Term Care Facilities" states its legislative purpose directly in the statute. The Bill of Rights are designed to allow nursing home residents "to assert their rights fully as individual citizens." S.C. Code Ann. § 44-81-20. Magnolia Manor wants to use the Bill of Rights to take away Mr. Strong's constitutionally-guaranteed right to a jury trial. The circuit court correctly held this interpretation is not consistent with the statute's language or its express purpose. (Order at 13).

Magnolia Manor's effort to connect the Bill of Rights to the conferral of authority to enter an arbitration contract is comprised of a string of unsupported inferences. The Bill of Rights seeks to protect residents by requiring a nursing home to provide a written explanation for how the resident can raise concerns over care to management-level nursing home representatives or with the South Carolina Department of Health and Environmental Control. S.C. Code Ann. § 44-81-30 to -60. A nursing home must deliver that explanation to each resident or his/her "representative," which is defined broadly to include not just guardians but also a "next of kin" or "other person acting as agent" for the resident. S.C. Code Ann. § 44-81-30(3). Magnolia Manor suggests that, since Ms. Murphy received this written explanation for Mr. Strong, she was his agent and, in turn, the alleged agency provided authority to enter an arbitration contract on Mr. Strong's behalf.

Appellants' Br. at 19. But, receiving the written explanation required by the Bill of Rights does not necessarily create an agency relationship. A "representative" for purposes of the statute could include an "agent" or a non-agent "next of kin." S.C. Code Ann. § 44-81-30(3).

Even assuming Ms. Murphy was an agent for purposes of the Bill of Rights, there is no justification for Magnolia Manor's additional leap in concluding she signed the Arbitration Agreement in the course of this same purported agency. There is no legal or logical connection between the Bill of Rights and the Arbitration Agreement. Any agency created by statute would be limited in scope by the statutory terms. Transp. Ins. Co. v. S.C. Second Injury Fund, 318 S.C. 68, 456 S.E.2d 369 (1994) (citing Nucor Steel v. S.C. Pub. Serv. Comm'n, 310 S.C. 539, 426 S.E.2d 319 (1992) (authority of agency created by statute is limited to that granted by the legislature)). Magnolia Manor makes one final unsupported analytical leap, arguing that if Ms. Murphy was "capable" of receiving the Bill of Rights' required written explanation for Mr. Strong, then she was "capable" of signing the Arbitration Agreement. Appellants' Br. at 20. However, the question here is not about Ms. Murphy's capabilities, it is about what she was *authorized* to do. Ms. Murphy was physically capable of signing the Arbitration Agreement, but Magnolia Manor has not provided any evidence she was authorized to do so on Mr. Strong's behalf. Nothing in the Bill of Rights helps Magnolia Manor on this point. The statute has nothing to do with arbitration and can provide no basis for claiming Ms. Murphy was acting as an authorized agent when she signed the Arbitration Agreement.

4. Magnolia Manor was not Denied the Opportunity to Conduct Discovery and May Not ask the Courts to Preemptively Rule on Waiver.

Magnolia Manor's second issue on appeal suggests the circuit court unreasonably tied its hands in discovery and prevented Magnolia Manor from accessing essential information to support

arbitration.[6] That argument could wield a measure of intuitive heft except that Magnolia Manor's right to conduct discovery was never threatened and is not really what it seeks here. Instead, what Magnolia Manor's counsel asked of Ms. Murphy (and failing there, the circuit court) was a prophylactic assurance that choosing to engage in discovery would not lead Ms. Murphy to argue, or the circuit court to find, Magnolia Manor waived its right to pursue arbitration. Magnolia Manor's request of Ms. Murphy was unreasonable and its request of the circuit court was unconstitutional.

As the circuit court noted, neither the procedural rules nor its opponent's conduct prevented Magnolia Manor from serving discovery requests. In fact, Magnolia Manor had the right to serve written discovery requests and to notice depositions from the moment Ms. Murphy filed her Complaint with the York County Clerk of Court. Rule 30(a)(1), SCRCP (permitting depositions "[a]fter commencement of an action"); Rule 33(a), SCRCP (same for serving interrogatories); Rule 34(b), SCRCP (same for serving requests for production); see also Rule 3(a), SCRCP (stating that a civil action is "commenced" when the complaint is filed if later served within the statute of limitations). The rules specifically provide that a party need not seek a court's permission before serving discovery requests. Rule 33(a), SCRCP; Rule 34(b), SCRCP. Plus, it is not as if Magnolia Manor tried and failed or was somehow thwarted in seeking information from Ms. Murphy. The record contains no discovery requests Ms. Murphy ignored and no subpoenas to which she objected. Magnolia Manor lacks the information it claims now to need only because Magnolia Manor never asked for it.

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[6] Regardless of the justiciability issues and substantive flaws discussed below, the Court should dismiss Issue No. 2 for lack of appellate jurisdiction. Discovery orders are interlocutory and not otherwise immediately appealable because they do not involve the merits of an action or affect a substantive right. Grosshuesch v. Cramer, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008); Rule 201(a), SCACR (limiting appeals to a final judgments and appealable orders).

With limited exceptions, Magnolia Manor does not contest that it was fully within its power to obtain information from Ms. Murphy or others before moving to compel arbitration. Instead, Magnolia Manor's concern relates to the possible consequences of pursuing discovery. South Carolina law holds that a party may waive any right it may have to pursue arbitration if it first chooses to litigate in a way that would render a shift to arbitration prejudicial to its opponent. Johnson v. Heritage Healthcare of Estill, LLC, 416 S.C. 508, 513, 788 S.E.2d 216, 218 (2016); Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 388, 759 S.E.2d 727, 736 (2014). The point at which a party delves too deeply into litigation to assert a right to arbitrate varies because the analysis is heavily fact driven. Johnson, 416 S.C. at 513, 788 S.E.2d at 219 (citing Liberty Builders, Inc. v. Horton, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999)). In any given case, a party seeking arbitration faces uncertainty in knowing when it is vulnerable to a waiver argument, and the opposing party is uncertain when it may become necessary to assert one.

What Magnolia Manor now calls its request for discovery was actually its improper effort to eliminate its uncertainty at Ms. Murphy's expense. Magnolia Manor pursued this end in two ways. First, its counsel asked Ms. Murphy to concede and place on the record that she would not raise a waiver argument following discovery. (Tr. of Record Dec. 5, 2018 at 7, lines 1-5). Ms. Murphy's counsel rejected the offer. Id. at 7, lines 8-9, 21-23; at 9, lines 16-23. Second, Magnolia Manor then turned to the circuit court and sought assurances that choosing to conduct discovery would not expose it to a waiver argument. Id. at 5, lines 22-24 ("if the Court sanctions [discovery] here today I think I'd be more than comfortable in opposing any argument of waiver"). The circuit court also refused this request. (Order dated Dec. 5 2018, at 2).

Both at the hearing and in its brief, Magnolia Manor paints Ms. Murphy's refusal as unreasonable. (Tr. of Record Dec. 5, 2018 at 11, lines 4-5) (claiming Ms. Murphy's counsel was

playing "a game of gotcha and a catch 22"); Appellants' Br. at 21. However, it was unreasonable to expect Ms. Murphy to do what Magnolia Manor was asking. For example, during the hearing on its motion to alter or amend judgment, Magnolia Manor's counsel argued he was unable to serve subpoenas. (Tr. of Record Dec. 5, 2018 at 11, line 14). That is not true, and Magnolia Manor's request for Ms. Murphy to agree that serving subpoenas does not expose the Facility to a waiver argument shows why that request is unreasonable. See Rule 45, SCRCP (allowing subpoenas when there is a civil action pending). Subpoenas are one of the discovery devices that is almost always permitted in litigation and almost never allowed in arbitration. 9 U.S.C. § 7 (allowing subpoenas in arbitration only when issued by arbitration panel and only for appearances at the arbitration hearing); Comsat Corp. v. Nat'l Sci. Found., 190 F.3d 269, 278 (4th Cir. 1999) (finding no authority for subpoena "for pre-hearing discovery, absent a showing of special need or hardship").[7] Magnolia Manor choosing to serve subpoenas and then quickly seeking arbitration without allowing Ms. Murphy to respond in kind would be precisely the type of prejudice that would support the waiver argument Magnolia Manor asked Ms. Murphy to surrender. Magnolia Manor was asking for a license to discovery without fear of waiver regardless of what rhetorical disadvantage Ms. Murphy would face or what level of prejudice Ms. Murphy might experience. It was not reasonable to expect Ms. Murphy to go along.

Magnolia Manor's request of the circuit court presented a bigger problem because what it called a request for discovery did not present an issue any court could resolve in its favor. No

[7] See also Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004); CVS Health Corp. v. Vividus, LLC, 878 F.3d 703, 708 (9th Cir. 2017) ("we reject the proposition that section 7 [of the FAA] grants arbitrators implicit powers to order document discovery from third parties prior to a hearing"); Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 212 (2d Cir. 2008) (citing Hay Group and finding FAA "does not enable arbitrators to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding").

South Carolina court can address the merits of a party's argument unless it presents a justiciable claim. Lennon v. S.C. Coastal Council, 330 S.C. 414, 417-18, 498 S.E.2d 906, 908 (Ct. App. 1998). South Carolina courts cite the "case or controversy" requirement in the U.S. Constitution's Article III and apply federal standards for identifying a justiciable controversy under South Carolina law. Id.; Waters v. S.C. Land Resources Conservation Comm'n, 321 S.C. 219, 227-28, 467 S.E.2d 913, 917-18 (1996). A claim is justiciable only if it presents a "real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." Sloan v. Greenville Cnty., 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003) (quoting Pee Dee Elec. Coop., Inc. v. Carolina Power Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983)). Justiciability specifically considers a party's standing as well as the suitability of the dispute for judicial resolution. Courts may not address claims that are unripe, moot, or seek only an advisory opinion. Jowers v. S.C. Dep't of Health & Envtl. Control, 423 S.C. 343, 815 S.E.2d 446 (2018).

Here, Magnolia Manor lacked standing to assert a discovery argument that was both unripe and sought an advisory opinion. Magnolia Manor's second issue on appeal argues it was denied its "request . . . for limited discovery." Appellants' Br. at 1. Magnolia Manor lacks standing to assert this claim. Under South Carolina law, standing may be acquired by statute, using the "public importance" exception, or by satisfying the requirements of "constitutional standing" derived from federal constitutional principles. ATC South, Inc. v. Charleston Cnty., 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). Only constitutional standing could apply here, and Magnolia Manor cannot meet those requirements for its discovery-based argument. Constitutional standing demands a concrete and particularized "injury-in-fact," a causal connection between the injury and the conduct complained of, and a finding that the injury will likely be redressed by a ruling in the

injured party's favor. Id. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). Magnolia Manor has not suffered any concrete and particularized injury. As discussed above, the South Carolina Rules of Civil Procedure authorized the precise action—serving discovery requests—Magnolia Manor claims it was denied. Rules 30(a)(1), 33(a), and 34(b), SCRCP. Magnolia Manor cannot claim to be injured by its own decision to forego a right the law unconditionally provided.

Magnolia Manor also cannot meet the remaining constitutional standing requirements. There is no causal connection between Magnolia Manor's proposed injury (i.e. a lack of discovery) and either Ms. Murphy's conduct or the circuit court's order. Neither denied Magnolia Manor the right to conduct discovery before filing its motion to compel arbitration. Nor can Magnolia Manor meet constitutional standing's redressability requirement. Given the procedural rules' repeated statements that discovery requests may be made "without leave of court,"[8] it is not at all clear it would ever be appropriate for a party in Magnolia Manor's position to ask a circuit court to "sanction" discovery. (Tr. of Record Dec. 5, 2018 at 5, line 7, 22; at 21, line 3).

When the true nature of Magnolia Manor's request is revealed, other justiciability issues arise. At one point, Magnolia Manor argued it had been denied discovery. Id. at 13, lines 8-9. But, in one telling exchange with the circuit court, Magnolia Manor's counsel admitted it was his fear of the potential consequences, not any conduct by Ms. Murphy or any ruling by the circuit court, that kept Magnolia Manor from exercising its discovery rights. Id. at 5, lines 4-9. In another instance, counsel admitted he could have served discovery requests before seeking arbitration but would "rather not" in light of the uncertainty doing so could create regarding waiver. Id. at 22, lines 19-20. Nothing in Magnolia Manor's request was about getting discovery it was allegedly

[8] Rule 33(a), SCRCP; Rule 34(b), SCRCP.

denied; it was all about making Magnolia Manor "more . . . comfortable in opposing any argument of waiver." Id. at 5, lines 22-24. Thus, it appears Magnolia Manor was asking the circuit court to find any discovery the Facility chose to perform would, as a matter of law, not subject it to waiver argument.

This was a proposed ruling the circuit court could not issue. While waiver could become an issue later in this litigation, it was not ripe for adjudication before Magnolia Manor sent its first discovery request. A claim is not ripe if it is "contingent, hypothetical, or abstract." Jowers, 423 S.C. at 353-54, 815 S.E.2d at 451 (quoting Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty., 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006)). Before a potential waiver dispute could ripen, Magnolia Manor would have to conduct whatever discovery it planned, file a later motion to compel arbitration, and then Ms. Murphy could raise a waiver argument citing prejudice the Facility's discovery course caused her. Without those progressions in the litigation, the circuit court could have no basis to rule on the future viability of Ms. Murphy's potential waiver argument. Alternatively, Magnolia Manor's discovery argument may have been an attempt to get some guidance from the circuit court on just how far it could go in discovery before seriously risking waiver. That is also a non-justiciable issue. A party seeking an advisory opinion asks a court to go beyond its jurisdiction. Booth v. Grissom, 265 S.C. 190, 217 S.E.2d 223 (1975); see also Sangamo v. Weston, Inc. v. Nat'l Surety Corp., 307 S.C. 143, 414 S.E.2d 127, 130 (1992) ("This court will not issue advisory opinions and cannot alter precedent based on questions presented in the abstract"); Dodge v. Dodge, 332 S.C. 401, 420, 505 S.E.2d 344, 354 (Ct. App. 1998) ("State appellate courts will not issue advisory opinions on questions for which no meaningful relief can be granted"). In other words, the waiver issue was not only unripe, Magnolia Manor erred in asking

the circuit court to rule on it because parties may not "fish in judicial ponds for legal advice." City of Columbia v. Sanders, 231 S.C. 61, 68, 97 S.E.2d 210, 213 (1957).[9]

Beyond the justiciability flaws, Magnolia Manor's discovery argument is incorrect on the merits. Part of the discovery Magnolia Manor seeks is Ms. Murphy's deposition. However, that deposition could not support Magnolia Manor's apparent authority argument because that legal doctrine focuses on Mr. Strong's representations. Frasier, 323 S.C. at 245, 473 S.E.2d at 868. Hodge addressed a similar argument, affirming a circuit court's refusal to compel a deposition that would add nothing probative to the agency analysis. 422 S.C. at 578, 813 S.E.2d at 310. Moreover, Magnolia Manor must show a clear abuse of discretion to reverse the circuit court's discovery ruling. Id. at 576, 813 S.E.2d at 309 (quoting Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 536 787 S.E.2d 485, 495 (2016)). The circuit court first rejected Magnolia Manor's argument that Ms. Murphy was using the threat of a waiver argument to keep the Facility from learning whether she had authority to act on Mr. Strong's behalf. (Order Denying Mot. to Alter or Amend

[9] Magnolia Manor's counsel told the circuit court he felt compelled to pursue a pre-discovery ruling on waiver for fear that proceeding with discovery and potentially risking waiver could be legal malpractice. Tr. of Record Dec. 5, 2018 at 22, lines 12-13. That concern is misplaced. Since waiver is a fact-specific issue, there is inevitable uncertainty for attorneys on both sides. However, an attorney's role often requires him/her to make predictions or even venture into uncertain areas of the law. Doing so rarely subjects an attorney to malpractice liability so long as he/she properly advises the client of the uncertainty. Cianbro Corp. v. Jeffcoat & Martin, 804 F. Supp. 784, 789 (D.S.C. 1992) (quoting R. Mallen, *Recognizing and Defining Legal Malpractice*, 30 S.C. L. Rev. 203, 210 (1979)) ("a legal malpractice action is unlikely to succeed when the attorney erred because an issue of law was unsettled or debatable. The perfect vision and wisdom of hindsight is an unreliable test for determining the past existence of legal malpractice"); see also Wood v. McGrath, North, Mullin & Kratz, P.C., 589 N.W.2d 103, 106 (Neb. 1999) (quoting 2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 17.15 at 531-32 (4th ed. 1996) ("the attorney should inform the client that the issue is uncertain, unsettled, or debatable and allow the client to make the decision"); Williams v. Ely, 668 N.E.2d 799, 806 (Mass. 1996) (finding attorney's error was not in making a recommendation in an uncertain legal area but in failing to advise the client of the uncertainty); Halvorsen v. Ferguson, 735 P.2d 675, 681 (Wash. App. 1986) (finding "virtually universal acceptance" for notion that attorney is not liable for malpractice for error of judgment concerning "uncertain, unsettled, or debatable" legal issues).

J. at 2). Magnolia Manor had the opportunity and incentive to make this determination before accepting Mr. Strong for admission. Id.[10] The circuit court also found it inherently unfair to grant Magnolia Manor discovery while the Facility was simultaneously seeking to force Ms. Murphy into arbitration where her discovery rights would be significantly curtailed. Id. Finally, the circuit court correctly noted medical and other pertinent records related to Mr. Strong's admission are in Magnolia Manor's existing records. Id. The circuit court's findings were all supported by the facts and the law, the circuit court acted within its discretion in denying Magnolia Manor's request.

CONCLUSION

Based on the arguments stated above, Ms. Murphy respectfully requests the Court affirm the circuit court's order denying Magnolia Manor's motion to compel arbitration and dismissing as moot the other Appellants' motions to stay. Magnolia Manor cannot force Mr. Strong's estate to arbitrate its nursing home negligence claims without showing a valid arbitration contract. The Arbitration Agreement was not valid because Mr. Strong did not assent to its terms, and Magnolia

[10] Magnolia Manor argues for the first time on appeal Ms. Murphy breached the implied covenant of good faith and fair dealing. Appellants' Br. at 21 (citing Adams v. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995)). Issues not raised and ruled on at the circuit court level are waived on appeal. Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). This argument also has a number of substantive flaws. For one, South Carolina does not recognize an independent claim for breach of the implied covenant. RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 472-73, 597 S.E.2d 881, 884 (Ct. App. 2004). An alleged breach may only be raised in conjunction with a breach of contract claim which does not exist in this case. Id. Moreover, the required breach of contract claim would first require proof of a properly formed contract. Branche Builders, Inc. v. Coggins, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009). That factor is also missing because Mr. Strong did not assent to the Arbitration Agreement's terms. Also, Magnolia Manor seeks a remedy that does not appear to exist for violating the implied covenant. In asking the Court to enforce the Arbitration Agreement, Magnolia Manor seeks specific performance but offers no South Carolina law to suggest that is an available remedy. Finally, Magnolia Manor cannot show Ms. Murphy's hypothetical misconduct would rise to the level of bad faith as opposed to a misunderstanding or even a negligent interpretation of the legal significance of the undefined terms "representative" and "authority" as used in the Arbitration Agreement.

Manor has not shown Ms. Murphy had legal authority to do so either by statute or common law agency principles. Additionally, while Magnolia Manor argues the circuit court denied it the opportunity to conduct discovery on key issues, discovery was fully available and Magnolia Manor chose not to pursue it. By asking the circuit court to find discovery would not subject Magnolia Manor to arguments it had waived its purported right to arbitration, the Facility was pursuing a non-justiciable claim and a ruling the circuit court could not issue.

Respectfully submitted,

Chad A. McGowan
Eve S. Goodstein
Jordan C. Calloway
MCGOWAN, HOOD & FELDER, LLC
1539 Health Care Drive
Rock Hill, South Carolina 29732
803-327-7800
cmcgowan@mcgowanhood.com
egoodstein@mcgowanhood.com
jcalloway@mcgowanhood.com

John G. Felder, Jr.
Richard A. "Trey" Jones III
MCGOWAN, HOOD & FELDER, LLC
1517 Hampton Street
Columbia, South Carolina 29201
(803) 779-0100
jfelder@mcgowanhood.com
tjones@mcgowanhood.com

Attorneys for Respondent

Columbia, SC
August 7, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Sr. Circuit Court Judge
Kristi Lea Harrington, Circuit Court Judge

RECEIVED
AUG 08 2019
SC Court of Appeals

Appellate Case No. 2019-000028

Teresa Murphy, as Personal Representative for the Estate of Issac Strong ..... Respondent

v.

Hunt Valley Holdings, LLC f/k/a Fundamental Long Term Holdings, LLC, Fundamental Clinical and Operational Services, LLC, Fundamental Consulting, LLC, Fundamental Administrative Services, LLC, THI of Baltimore, Inc., THI of South Carolina, LLC, THI of South Carolina at Rock Hill, LLC d/b/a Magnolia Manor of Rock Hill, and Amisub of S.C., Inc. d/b/a Piedmont Medical Cente ..... Appellants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of August, 2019, she served counsel for the Defendants with a copy of the Respondent's Initial Brief and Designation of Matter to Be Include in the Record on Appeal in this matter by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses:

Russell G. Hines, Esquire
Young Clement Rivers, LLP
25 Calhoun Street, Suite 400

William B. Darwin, Jr., Esquire
A. Walker Barnes, Esquire
Holcombe Bomar, PA

PO Box 993
Charleston, SC 29402

101 West St. John Street, Suite 100
Spartanburg, SC 29306

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

Kennardy Jones
Paralegal to Jordan Calloway

McGowan, Hood & Felder, LLC

Chad A. McGowan (SC,GA,NC)
S. Randall Hood
John G. Felder, Jr.
W. Jones Andrews, Jr.
Russell T. Burke
Jordan C. Calloway
Susan F. Campbell
Deborah Casey (NC)*
Ashley White Creech
Shawn B. Deery
Chance M. Farr (SC,NC)

Eve S. Goodstein
Whitney B. Harrison
Patrick M. Killen
Anna S. Magann
Robert V. Phillips
Ranee Saunders
James L. Ward, Jr. (SC,NC)
James Stephen Welch (SC,OK)*
Jay F. Wright
Joseph G. Wright, III*
*Of Counsel

August 6, 2019

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SC Court of Appeals

Honorable Jenny Abbott Kitchings
SC Court of Appeal Clerk of Court
1220 Senate Street
Columbia, SC 29201

Re: Teresa Murphy as Personal Representative of the Estate of Issac Strong
vs. Hunt Valley Holdings, LLC f/k/a Fundamental Long Term Care Holding, LLC et al.
Appellate Case No.: 2019-000028

Dear Judge Kitchings:

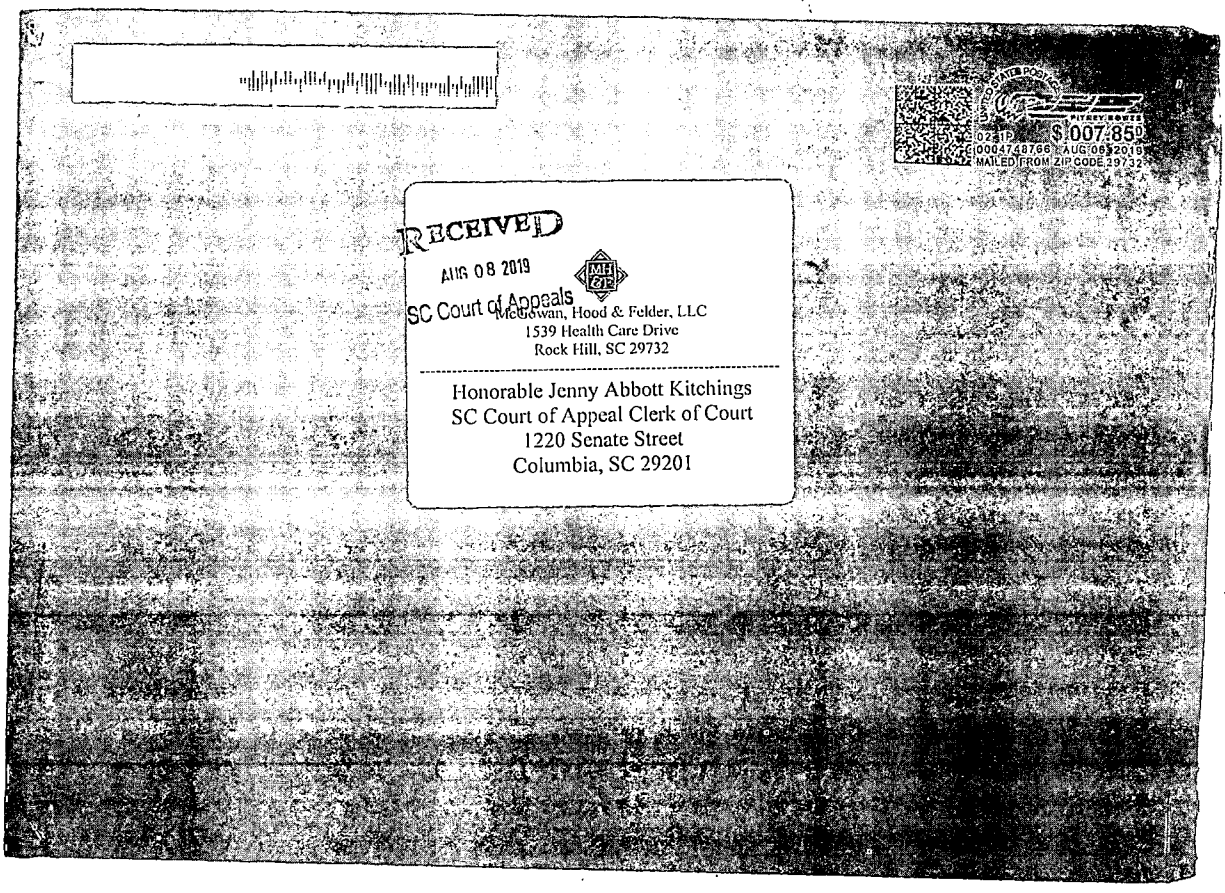
Please find enclosed one (1) original and one (1) copy of the Respondent's Designation of Matter to Include in the Record on Appeal and the Respondent's Initial Brief for filing in the above-referenced matter. Return the filed copies in the enclosed envelope.

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

Sincerely,

Jordan Calloway

JCC/ksj
cc: Russell G. Hines, Esq.
William B. Darwin, Jr., Esq.
A. Walker Barnes, Esq.



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