STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF AIKEN)	SECOND JUDICIAL CIRCUIT
)	
Jimmie Foreman, as Personal Representative Of the Estate of Katie Dixon,)	Civil Action No.: 2019CP202824
Plaintiff,)	
)	
vs.)	**ORDER**
)	
Shiloh Management Company, Inc., Pepper Hill Nursing Center, Inc., Pepper Hill Nursing & Rehab Center, LLC d/b/a Pepper Hill Nursing & Rehab Center, The Place at Pepper Hill, LLC, Pepper Hill Senior Properties, LLC d/b/a The Place at Pepper Hill,)	
Defendants.)	

This matter came before the Court on March 2, 2020. After consideration of arguments put forth by all parties, this Court **DENIES** Defendants' Motion to Dismiss and Compel Arbitration. The Court's basis and reasons are contained within this Order.

FACTS

Katie Dixon was admitted as a resident of Defendants' nursing home on May 19, 2016. As part of the admission process, Defendants' had Katie Dixon's biological daughter – Rhonda Thames – sign their admission agreement. Defendants' admission agreement also contained an arbitration clause. Katie Dixon did not sign the admission and arbitration agreement.

Prior to May 19, 2016, Rhonda Thames was never provided a copy of Defendants' admission and arbitration agreement. She was presented Defendants' admission and arbitration agreement for the first time on May 19, 2016 on a "take it or leave it basis" where the terms were not negotiable and the execution of the document was a necessary precondition to her mother's admission to Pepper Hill Nursing & Rehab Center. Ms. Thames was provided the agreement

without any meaningful choice, and she was not provided with an opportunity to discuss the significance of the agreement with a lawyer. Rhonda Thames is not an attorney, and she did not understand the meaning of arbitration on May 19, 2016.

At hearing of this matter, there was no evidence presented to the Court that Katie Dixon lacked the requisite capacity to sign Defendants' admission and arbitration agreement. Before her death, Katie Dixon never executed a durable power of attorney, healthcare power of attorney, or any other document providing Rhonda Thames with any authority to enter into contracts, agreements, or any other documents related to healthcare decisions.

DISCUSSION

I. Defendants' Admission And Arbitration Agreement Is Unenforceable As Rhonda Thames Did Not Have Authority To Sign the Agreement.

Arbitration is a matter of contract and South Carolina courts must determine the enforceability of an arbitration agreement based on the principles of contract law. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 538, 542, S.E.2d 360, 364 (2001). "[I]n order to have a valid and enforceable contract, there must be a meeting of the minds as to all essential and material terms of the contract." *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989). "Where it is determined that the parties intended not to be bound until the written contract is executed, no valid and enforceable obligation will arise." *Bugg v. Bugg,* 272 S.C. 122, 125, 249 S.E.2d 505, 507 (1978).

A. Defendants Produced No Evidence of Actual Authority.

Katie Dixon would only be bound by the admission and arbitration agreement if there was evidence of an express or implied agency relationship between Katie Dixon and her daughter. Agency may be established with clear evidence of actual or apparent authority conferred by the principal on the alleged 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). The party asserting an agency relationship has the burden of proof. *Pee Dee Nursing Home, Inc. v. Florence Gen. Hosp.*, 309 S.C. 80, 85, 419 S.E.2d 834, 837 (Ct. App. 1992). The burden is not to make a mere prima facie showing but rather to show that agency is "clearly established by the facts." *Id.* South Carolina law imposes this weighty burden because a person dealing with an alleged agent has a legal duty of due care to determine the scope of the perceived agent's authority. *Id.*, (*citing McCall v. Finley,* 294 S.C. 1, 362 S.E.2d 26 (Ct. App. 1987)).

The South Carolina Adult Health Care Consent Act governs "who may make health care decisions for patient[s] who are [unable] to consent" or "appreciate the nature and implications of [their] condition and proposed health care, to make a reasoned decision concerning the proposed health care, or communicate that decision in an unambiguous manner." *Coleman v. Mariner Health Care, Inc.,* 407 S.C. 346, 351, 755 S.E.2d 450, 453 (2014)(*quoting* S.C. Code Ann. § 44-66-20). "A patient's inability to consent must be certified by two licensed physicians, each of whom have examined the patient." S.C. Code Ann. § 44-66-20(8).

In the present case, there is no evidence that Katie Dixon lacked capacity or the ability to sign Defendants' admission and arbitration agreement. Defendants have been unable to demonstrate that two physicians examined Katie Dixon prior to her admission to Defendants' nursing home and certified that she (1) was unable to consent to her own healthcare decisions and (2) was unable to personally sign Defendants' admission and arbitration agreement. Without the certification of two examining physicians, Defendants' agreement is unenforceable because Rhonda Thames had no authority to sign their admission and arbitration agreement under the South

Carolina Adult Health Care Consent Act. *See Coleman v. Mariner Health Care, Inc.,* 407 S.C. 346, 755 S.E.2d 450 (2014)(*quoting* S.C. Code Ann. § 44-66-20).

Defendants' reliance on the Bill of Rights for Residents of Long-Term Care Facilities is inappropriate as S.C. Code Ann. § 44-81-10 confers no authority on family members or next of kin to execute contracts or make healthcare decisions. *Compare* S.C. Code Ann. § 44-66-20. In the present matter, the South Carolina Adult Health Care Consent Act provides the governing authority and guidelines as to when family members may execute documents concerning health care decisions.

Because there is no evidence in the record that Katie Dixon lacked the requisite capacity to sign the admission agreement, Rhonda Thames had no authority to sign Defendants' admission and arbitration agreement under the theory of actual authority.

B. Defendants Have Produced No Evidence of Apparent Authority.

Defendants have failed to produce sufficient evidence establishing the necessary elements of apparent authority. Apparent authority is based on " . . . representations made by the principal to [a] third party and reliance by the third party on those representations." *Young v. S.C. Dept. of Disabilities & Special Needs,* 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). "Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief." *Thompson v. Pruitt Corp.,* 416 S.C. 43, 55, 784 S.E.2d 679, 685 (Ct. App. 2016)(*quoting Froneberger v. Smith,* 406 S.C. 37, 47, 748 S.E.2d 625, 630 (Ct. App. 2013).

The burden of establishing agency is upon the party asserting a principal-agent relationship exists. *Frasier v. Palmetto Homes of Florence, Inc.,* 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996). The party seeking to establish apparent authority must prove ". . . (1) the purported

principal consciously or impliedly represented another to be his agent; (2) the proponent relied on the representation; and (3) there was a change of position to the [proponent's] detriment." *Thompson,* 406 S.C. at 54, 748 S.E.2d at 685 (*quoting Froneberger v. Smith,* 406 S.C. 37, 47, 748 S.E.2d 625, 630 (Ct. App. 2013)).

"The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent, but on that between the principal and the third party." *R&G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.,* 343 S.C. 424, 432-33, 540 S.E.2d 113, 118 (Ct. App. 2000)(*citing Vereen v. Liberty Life Ins. Co.,* 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991)). "It is the duty of the one dealing with the agent to use due care to ascertain the scope of the agent's authority." *Justus v. Universal Credit Co.,* 189 S.C. 487, 495, 1 S.E.2d 508, 511 (1939).

In the present case, there is no evidence that Katie Dixon consciously or impliedly made any representations to Defendants' staff that Rhonda Thames was her agent for purposes of executing the admission and arbitration agreement. Defendants were required to determine the scope of any agent's authority. There is no evidence that Katie Dixon made any representations to the Defendants or was ever aware of the execution of the admission and arbitration agreement or knew of its existence.

Without proof of representations made by Katie Dixon as to Rhonda Thames' agency, Defendants' admission and arbitration agreement is not enforceable under a theory of apparent agency because the necessary elements have not been satisfied. *Thompson,* 406 S.C. at 54, 748 S.E.2d at 685 (*quoting Froneberger v. Smith,* 406 S.C. 37, 47, 748 S.E.2d 625, 630 (Ct. App. 2013)).

II. Plaintiff Is Not Equitably Estopped From Denying The Enforceability Of The Admission and Arbitration Agreement.

South Carolina recognizes that "[w]hen 'a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine estops the non-signatory from claiming that he is not bound to the arbitration agreement when he receives a "direct benefit" from a contract containing an arbitration clause.'" *Thompson v. Pruitt Corp.,* 416 S.C. 43, 59, 784 S.E.2d 679, 688 (Ct. App. 2016). Under South Carolina law, the elements of equitable estoppel as to the party to be estopped are:

> (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is *calculated* to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) *intention,* or at least expectation, that such conduct shall be acted upon by the other party; and (3) *knowledge,* actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Thompson, 416 S.C. at 60, 784 S.C.2d at 688-89 (*quoting Boyd v. Bellsouth Tel. Tel. Co.,* 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006)).

In *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC,* 422 S.C. 544, 557-64, 813 S.E.2d 292, 299-02 (2018), the Court of Appeals of South Carolina considered the nursing home's argument that a resident should be equitably estopped from denying an arbitration agreement's enforceability. The *Hodge* Court contemplated the equitable estoppel argument in circumstances where an admission agreement and separate arbitration agreement had merged and become one document:

> [The Plaintiffs] received no benefit from the Arbitration Agreement, equitable estoppel would only apply if documents were merged. The only agreement from which Respondents even arguably received a benefit was the Admission Agreement because [the resident] was admitted to the Facility as a result of it. **However, because the Facility allegedly caused [the resident's] injuries that later led to her death, we find it difficult to find she benefited even from being admitted. [The Plaintiffs] are not seeking to enforce the Arbitration Agreement nor have they previously tried to do so. Further, even if the Admission Agreement and Arbitration Agreement merged, because [the Plaintiffs] are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement. Therefore, the circuit court did not err in finding equitable estoppel did not bar [Plaintiffs'] claims.**

Hodge, 433 S.C. at 563, 813 S.E.2d at 302.

Although Defendants contend that Plaintiff should be equitably estopped from denying the enforceability of the admission and arbitration agreement, Defendants are unable to satisfy the necessary elements of equitable estoppel, and they have failed to produce sufficient evidence that Mrs. Dixon received a direct benefit under their contract. As mentioned above, there has been no evidence that Katie Dixon made any representations to the Defendants or knew that the admission and arbitration agreement ever existed. Defendants have produced no evidence that Katie Dixon concealed material facts, formed any intent as to her conduct towards the Defendants, or had any knowledge as to the existence of the admission and arbitration agreement. *Thompson*, 416 S.C. at 60, 784 S.C.2d at 688-89 (*quoting Boyd v. Bellsouth Tel. Tel. Co.,* 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006)).

Defendants claim that the Plaintiff should be equitably estopped solely because she was admitted as a resident on May 19, 2016 and "received a bed" until she died in November of 2016. Defendants have failed to identify sufficient benefits that Plaintiff received under the admission and arbitration agreement. If this Court accepts Defendants' position, every resident admitted to a nursing home would be estopped from denying the enforceability of any admission contract. This would be unfair and inequitable as a general premise.

Defendants are unable to assert that Ms. Dixon is equitably estopped from denying the enforceability of the admission and arbitration agreement solely because she was admitted. As in *Hodge*, Defendants are unable to claim that she received a direct benefit from being admitted to their facility because Pepper Hill allegedly caused her injuries that later led to her death. (*See* Compl.). The Complaint does not reference or mention the admission agreement. (*Id.*). Plaintiff's allegations are

based in tort and are not seeking to enforce or recover under Defendants' agreement, which is consistent with *Hodge. Hodge,* 433 S.C. at 563, 813 S.E.2d at 302.

Defendants' reliance on the unpublished federal court opinion of *THI of South Carolina at Columbia, LLC v. Wiggins,* C/A No. 3:11-888-CMC, 2011 WL 4089435 (D.S.C. Sept. 13, 2011) to support their equitable estoppel argument is also misguided. The *Wiggins* case is not binding on this Court and holds no precedential value. A review of the *Wiggins* opinion reveals that there was no review of whether the nursing home established the necessary elements of equitable estoppel, which is critical to the present matter before this Court. As such, it would be inappropriate to grant Defendants' motion based on *Wiggins.*

Based on the lack of evidence to establish the necessary elements of equitable estoppel and the analysis in *Hodge,* Defendants have failed to produce sufficient evidence to estop Plaintiff from denying the enforceability of the admission and arbitration agreement.

III. Plaintiff Cannot Be A Third Party Beneficiary Because No Valid Contract Existed.

Because the admission and arbitration agreement was not valid or enforceable, Katie Dixon cannot be a third party beneficiary. "A third-party beneficiary is a party that the contracting parties intend to directly benefit." *Thompson v. Pruitt Corp.,* 416 S.C. 43, 57, 784 S.E.2d 679, 687 (Ct. App. 2016)(*quoting Helms Realty, Inc. v. Gibson-Wall Co.,* 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). "However, there can be no third-party beneficiary unless a valid contract exists." *Thompson,* 416 S.C. at 57, 784 S.E.2d at 687(*citing Dickerson v. Longoria,* 414 Md. 419, 452, 995 A.2d 721, 742 (Ct. App. 2009)("Before once can enforce a contract, however, whether as a party to the contract or as a third-party beneficiary, there must be a contract to enforce.")). "A third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to

enforce the contract containing the arbitration agreement." *Thompson,* 416 S.C. at 57, 784 S.E.2d at 687.

As mentioned above, Katie Dixon cannot be a third party beneficiary because no valid or enforceable contract exists. Rhonda Thames did not have authority to sign the admission agreement. Even if there was an enforceable contract, only a third party beneficiary would have standing to enforce the contract containing an arbitration provision. Plaintiff is not seeking to enforce Defendants' agreement. Since there was no valid or enforceable contract, Katie Dixon cannot be a third party beneficiary.

IV. The Federal Arbitration Act Is Inapplicable Because No Enforceable Contract Existed.

Because there was no enforceable contract or arbitration agreement, the Federal Arbitration Act is inapplicable to the present matter.

The determination of substantive arbitrability under the FAA requires the Court to "engage in a limited review to ensure that the dispute is arbitrable – i.e., that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement." *Glass v. Kidder Peabody & Co., Inc.,* 114 F.3d 446, 453 (4th Cir. 1997)

The FAA does not apply in the present matter because no valid or enforceable contract existed, which is explained in detail above.

CONCLUSION

For the reasons stated above, **IT IS HEREBY ORDERED AND ADJUDGED** that Defendants' Motion to Dismiss and Compel Arbitration is **DENIED.**

_____
The Honorable Michael Nettles

March _____, 2020

Aiken Common Pleas

Case Caption: Jimmie Foreman , plaintiff, et al VS Shiloh Management Inc , defendant, et al

Case Number: 2019CP0202824

Type: Order/Other

So Ordered

s/ The Honorable Michael G. Nettles #2140