

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2020-000584

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SC Court of Appeals

Jimmie Foreman, as Personal Representative of the Estate of
Katie Dixon,.....Respondent,

v.

Shiloh Management Company, Inc, Pepper Hill Nursing Center, Inc., Pepper Hill
Nursing & Rehab Center, LLC d/b/a Pepper Hill Nursing & Rehab
Center,.....Appellants.

APPELLANTS' INITIAL BRIEF

Mark V. Gende, SC Bar No. 72835
Brandon R. Gottschall, SC Bar No. 100621
Sweeny Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, South Carolina 29211
(803)256-2233
Attorneys for Appellants

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STATEMENT OF ISSUES ON APPEAL

- I. **DID THE TRIAL COURT ERR IN FINDING THAT NO BINDING ARBITRATION AGREEMENT EXISTED?**
- II. **DID THE TRIAL COURT ERR IN FAILING TO FIND THAT RESPONDENT IS EQUITABLY ESTOPPED FROM DECLINING TO PARTICIPATE IN ARBITRATION?**
- III. **DID THE TRIAL COURT ERR IN FAILING TO COMPEL ARBITRATION WHERE MS. DIXON WAS A THIRD-PARTY BENEFICIARY OF THE ADMISSION AGREEMENT?**
- IV. **DID THE TRIAL COURT ERR IN MAKING CERTAIN FACTUAL FINDINGS IN ITS ORDER DECLINING TO COMPEL ARBITRATION?**

STATEMENT OF THE CASE

On November 12, 2019, Respondent filed an action against Appellants alleging Appellants were negligent in providing nursing home care to Ms. Katie Dixon, who was a resident at Pepper Hill Rehab and Nursing Center (“Pepper Hill”) from May 19, 2016 to November 25, 2016. (R. p. ____; Complaint ¶¶ 95, 104). On January 21, 2020, in lieu of an Answer, Appellants filed a Motion to Dismiss and to Compel Arbitration. (R. p. ____; Motion to Dismiss and Compel Arbitration).¹ The Circuit Court conducted a hearing on the Motions to Dismiss and Compel Arbitration on March 2, 2020.

At the conclusion of the hearing, the Court requested proposed orders from the parties. On March 12, 2020, Appellants and Respondents e-filed proposed orders with the trial court. (R. p. ____; Appellants’ Proposed Order on Motion to Compel Arbitration; Respondent’s Proposed Order on Motion to Compel Arbitration).

On March 25, 2020, the Court entered an Order Denying Appellants’ Motion to Dismiss and Compel Arbitration. (R. p. ____; Order Denying Appellants’ Motion to Dismiss and Compel Arbitration).

Appellants filed a Motion to Reconsider on March 30, 2020. (R. p. ____; Motion to Reconsider). The Court denied the Motion to Reconsider in a Form 4 Order on March 31, 2020. (R. p. ____; Form 4 Order Denying Motion to Reconsider).

Appellants filed a Notice of Appeal on April 3, 2020. (R. p. ____; Notice of Appeal).

¹ A similar motion to dismiss and compel arbitration was also filed by The Place At Pepper Hill LLC, and Pepper Hill Senior Properties, LLC D/B/A The Place At Pepper Hill, both of whom have since been dismissed from this action. (R. p. ____; The Place At Pepper Hill LLC’s Motion to Dismiss and Compel Arbitration). Following the trial court’s hearing on the motions, a stipulation of dismissal was entered on March 20, 2020, as to The Place At Pepper Hill, LLC and Pepper Hill Senior Properties, LLC D/B/A The Place At Pepper Hill. (R. p. ____; Stipulation of Dismissal).

STANDARD OF REVIEW

“Determinations of arbitrability are subject to de novo review.” *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 609, 571 S.E.2d 711, 713 (Ct. App. 2002). “However, the circuit court's factual findings will not be overruled if there is any evidence reasonably supporting them.” *Id.* at 610, 571 S.E.2d at 713.

FACTS

Jimmie Foreman, as Personal Representative for the Estate of Katie Dixon (“Respondent”) alleges Appellants were negligent in providing nursing home care to Ms. Dixon, who was a resident at Pepper Hill Rehab and Nursing Center (“Pepper Hill”) from May 19, 2016 until she died on November 25, 2016. (R. p. ____; Complaint ¶¶ 95, 104). Upon admission, Ms. Dixon’s representative and biological daughter, Rhonda Thames, entered into an Admission Agreement (“Agreement”). The Admission Agreement included an arbitration provision and the heading of every page of the Agreement states:

THIS AGREEMENT IS SUBJECT TO MANDATORY ARBITRATION PURSUANT TO THE FEDERAL ARBITRATION ACT, AND IF THE FEDERAL ARBITRATION ACT IS INAPPLICABLE, THE UNIFORM ARBITRATION ACT, SECTION 15-48-10, ET. SEQ., CODE OF LAWS OF SOUTH CAROLINA (1976), AS AMENDED.

Ms. Thames expressly represented that she was “authorized by the Resident to act on the Resident’s behalf.” (R. p. ____, Admission Agreement at 12). Respondents provided Ms. Dixon residency and care for over six months in reliance on this agreement. (R. p. ____; Complaint ¶¶ 95, 104).

Respondent’s Complaint alleges causes of action arising out of Ms. Dixon’s residency, care, and treatment at Pepper Hill. Specifically, prior to Ms. Dixon’s admission to Pepper Hill, Ms. Dixon had developed gangrene in an arterial wound to her right leg, which resulted in an

above-the-knee amputation on July 5, 2016. (*See* R. p. ____; Complaint ¶¶ 95, 96). Over the course of the next several months, Respondents allege that Ms. Dixon developed several pressure ulcers and that by October 27, 2016, Ms. Dixon was diagnosed with sepsis as a result of her infected right leg stump and multiple stage 4 ulcers. (R. p. ____; Complaint ¶¶ 97-99). Respondent further alleges that the pressure sores that developed and led to sepsis were “avoidable and the direct and proximate result of Defendants’ substandard care and negligent care and treatment.” (*See* R. p. ____; Complaint ¶ 105).

Respondent filed suit alleging causes of action for negligence, wrongful death, and survivorship. Appellant moved to compel arbitration based on the Arbitration provision in the Admission Agreement. (R. p. ____; Motion to Dismiss and Compel Arbitration). The trial court denied the motion on March 25, 2020. (R. p. ____; Order Denying Appellants’ Motion to Dismiss and Compel Arbitration). This appeal follows.

I. THE TRIAL COURT ERRED IN FINDING THAT NO BINDING ARBITRATION AGREEMENT EXISTED.

In the present case, it is undisputed that Ms. Dixon’s biological daughter, Ms. Thames, executed the Admission Agreement, which included the Arbitration provision. As a result, the first question at issue is whether Ms. Thames had the authority to execute the Admission Agreement. Because the trial court erred in finding that there was no evidence that Ms. Thames had actual or apparent authority to enter the agreement and in failing to compel arbitration, and because Ms. Thames had authority to execute the Admission Agreement, the trial court’s order should be reversed and this matter should be compelled to arbitration.

a. Ms. Thames, the Signatory to the Admission Agreement, had Actual or Apparent Authority to Execute the Admission Agreement, which Included the Arbitration Provision.

“Agency is a fiduciary relationship which results from the manifestation of consent by one person to another to be subject to the control of the other and to act on his behalf.” *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145, 425 S.E.2d 764, 773 (Ct. App. 1992). “An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow.” *Id.* The agency relationship “may be proved by circumstantial evidence showing a course of dealing between the two parties.” *Id.*

Actual authority may be either express or implied. *Roberson v. S. Fin. of S.C., Inc.*, 365 S.C. 6, 10, 615 S.E.2d 112, 115 (2005). On the other hand, “[a]pparent authority to do an act is created as to a third person by written or spoken words *or any other conduct of the principal* which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him.” *Froneberger v. Smith*, 406 S.C. 37, 47, 748 S.E.2d 625, 630 (Ct. App. 2013) (emphasis in original).

“[T]he elements which must be proven to establish apparent agency are: (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment.” *Id.* “The first element of apparent agency can be established by either: (1) affirmative conduct or (2) conscious and voluntary inaction.” *Id.* “Under the first of these two scenarios, the principal makes direct representations to a third party that another has authority to act on his behalf.” *Id.* at 48, 748 S.E.2d at 630. This can be accomplished by “written or spoken words or any other conduct of the principal” that shows consent to allow another to act on the

principal's behalf. *Id.* (citing *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 244–45, 473 S.E.2d 865, 868 (Ct.App.1996)). Under the second of these two scenarios, “the principal implies authority by passively permitting another to appear to third parties to have authority to act on his behalf.” *Froneberger*, 406 S.C. at 48, 748 S.E.2d at 630. Also, “[a]gency may be implied or inferred and may be circumstantially proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal.” *Id.* (citing *Fernander v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982)).

In the present case, the evidence ably demonstrates that Ms. Thames had actual or apparent authority to execute the Admission Agreement to admit Ms. Dixon to Pepper Hill.

First, the evidence demonstrates that Ms. Thames was Ms. Dixon's actual agent. Among other things, (1) Ms. Dixon had her daughter accompany her to Pepper Hill for the specific purpose “of having [Ms. Dixon] admitted as a resident to the Pepper Hill nursing home,” (R. p. _____, Affidavit of Rhonda Thames at ¶ 4); (2) Respondent's counsel represented that while Ms. Dixon had capacity to sign the agreement, Ms. Dixon “got her biological daughter,” apparently for the purpose of signing for her, (*see* R. p. _____, Transcript of Hearing at 14:12); (3) the Admissions Agreement, which is a signed writing executed by Ms. Thames, represents that Ms. Thames was “authorized by the Resident to act on the Resident's behalf,” (R. p. _____, Admission Agreement at 12); and (4) Ms. Dixon then accepted admission and other benefits under the contract, as was her goal in having her daughter accompany her to Pepper Hill that day. These actions demonstrate that Ms. Thames was Ms. Dixon's actual agent in relation to the Admission Agreement.

Second, the above actions demonstrate Ms. Thames' apparent agency through affirmative conduct. For example, by specifically seeking to be admitted to Pepper Hill on May 19, 2016,

showing up at the nursing home with her daughter accompanying her, and getting her daughter to sign the agreement, Ms. Dixon's affirmative conduct showed consent to allow another to act on her behalf. Further, by then accepting admission to Pepper Hill and staying at Pepper Hill for over six months, to the detriment of Pepper Hill which relied on the agreement to provide Ms. Dixon benefits under the agreement, Ms. Dixon further engaged in conduct showing consent to Ms. Thames' execution of the agreement.

Third, the evidence also shows that Ms. Dixon passively permitted Ms. Thames to act on her behalf. Ms. Dixon's conduct in allowing her daughter to sign the paperwork, particularly when combined with Ms. Dixon's acceptance of the benefits of admission, is at the very least passive permission to Ms. Thames to act in a way that would reasonably suggest to third parties that Ms. Thames had the authority to act. Further, by expressly representing that she was authorized by the Resident to act on the Resident's behalf, Ms. Thames, the purported agent, exhibited a pretense of authority with Ms. Dixon's knowledge, obtaining Ms. Dixon's admission to Pepper Hill which was, in fact, Ms. Dixon's goal on May 19, 2016. *Fernander*, 278 S.C. at 293 S.E.2d at 426 (“[A]gency may be implied or inferred and may be circumstantially proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal.”). (See also R. p. _____, Affidavit of Rhonda Thames at ¶ 4; R. p. _____, Admission Agreement at 12). After admission, Ms. Dixon remained at Pepper Hill for over six months, accepting and retaining services including room accommodations, food services, professional nursing services, therapy, housekeeping, and others. (See R. p. _____, Admission Agreement at 2).

Fourth, other factors also demonstrate that Ms. Thames had authority to execute the agreement. In assisting her mother to be admitted to Pepper Hill, Ms. Thames took a number of

steps and provided information of a nature that represents she was authorized by Ms. Dixon to act as her agent: (1) she identified Ms. Dixon's attending physician, (R. p. _____, Admission Agreement at 2); (2) she signed to certify that information provided in relation to payment under the Social Security act is correct and authorized release of medical or other information to the Social Security Administration, and requested that payment or authorized benefits be made, (R. p. _____, Admission Agreement at 7); (3) she obtained Ms. Dixon's admission to Pepper Hill that same day by completing and executing the Admission Agreement, which was specifically the reason Ms. Dixon had Ms. Thames accompany her that day, (R. p. _____, Affidavit of Rhonda Thames); and (4) she has never denied that Ms. Dixon authorized her to execute the Admissions Agreement, (R. p. _____, Affidavit of Rhonda Thames (containing nine paragraphs of information but never denying that Ms. Dixon authorized her to execute the Admission Agreement)).

In sum, the circumstantial and direct evidence indicates that Ms. Thames had actual or apparent authority to execute the Admission Agreement and admit Ms. Dixon to Pepper Hill. The trial court, however, not only declined to enforce arbitration, but instead found there was *no* evidence of either actual or apparent authority. The trial court's findings were in error. As a result, the trial court's order should be reversed, and this matter should be compelled to arbitration.

b. Even had Ms. Dixon lacked capacity, Ms. Thames had Authority to Execute the Admission Agreement, which Included the Arbitration Provision.

In the alternative, even had Ms. Dixon lacked capacity to execute the Admission Agreement, Ms. Thames would have had statutory authority to sign for Ms. Dixon under the Adult Health Care Consent Act ("Adult Health Care Act"), S.C. Code Ann. ¶ 44-66-10 *et seq.*

(R. p. _____, Appellants’ Memorandum in Support of Motion to Compel Arbitration (discussing *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014)), Appellants’ Proposed Order Granting Motion to Compel Arbitration). Specifically, Ms. Thames had authority under the Act because she was the adult child available for consultation, and because Ms. Dixon had no court-appointed guardian, attorney in fact, or spouse. *See also Coleman*, 407 S.C. at 351, 755 S.E.2d at 453 (“Sister was authorized to make health care decisions for Decedent... because Decedent had no guardian or attorney-in-fact, no other individual had statutory priority, and she had neither a spouse, a parent, nor an adult child.”).

Ms. Thames’ authority under the Act to make health care decisions for Ms. Dixon included the authority to execute the arbitration provision that was part of the Admission Agreement. *See, e.g., THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185, at *2 (D.S.C. Mar. 19, 2015). In *THI*, the court distinguished, *Coleman*, in which the court denied a motion to compel arbitration. Specifically, the *Coleman* court found that the sister of the decedent had been authorized under the Adult Health Care Consent Act to make decisions concerning the decedent’s health care. *Coleman*, 407 S.C. at 351, 755 S.E.2d at 453. However, that authority did not extend to executing an optional arbitration agreement that was *separate* from the admissions agreement. *Id.* at 354, 755 S.E.2d at 454. The court in *THI* distinguished *Coleman* because unlike the separate arbitration and admissions agreements in *Coleman*, “the admission agreement [at issue in *THI*] contained the arbitration provision.” *THI*, 2015 WL 1268185, at *2 (emphasis in original). The court found that a representative’s authority to sign an arbitration agreement “is simply not implicated” where the arbitration and admissions terms were contained in the same agreement, and thus the arbitration provision was enforceable. *Id.* *See also Thompson v. Pruitt Corp.*, 416 S.C. 43, 51, 784 S.E.2d

679, 684 (Ct. App. 2016) (noting that *Coleman* involved an arbitration agreement *separate* from the admissions agreement).

Because the Arbitration provision in the Admission Agreement executed by Ms. Thames was not a separate, optional arbitration contract, (*see* R. p. _____, Affidavit of Rhonda Thames), Ms. Thames' authority under the Adult Health Care Consent Act would have extended to the arbitration provision. *See THI*, 2015 WL 1268185, at *2.

For these reasons, even had Ms. Dixon lacked capacity, the arbitration provision would be binding, and the trial court erred in declining to compel arbitration.

II. THE TRIAL COURT ERRED IN FAILING TO FIND THAT RESPONDENT IS EQUITABLY ESTOPPED FROM DECLINING TO PARTICIPATE IN ARBITRATION.

While Appellants contend that an enforceable contract existed, equitable estoppel in the form of direct-benefits estoppel would apply even in the absence of an enforceable contract. In the present case, as to equitable estoppel, the trial court erred in applying a general equitable estoppel framework rather than the direct-benefits estoppel framework. (R. p. _____, Order Denying Appellants' Motion to Dismiss and Compel Arbitration at 6-8). In addition, the trial court erred in finding that Appellants failed to provide evidence that Ms. Dixon received a direct benefit under the contract. (R. p. _____, Order Denying Appellants' Motion to Dismiss and Compel Arbitration at 6-8).

Applied to arbitration, the doctrine of direct-benefits equitable estoppel "recognizes that a party may be estopped from asserting that the lack of [their] signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that the other provisions of the same contract should be enforced to benefit him." *Thompson*, 416 S.C. at 59, 784 S.E.2d at 688 (citing *Pearson v. Hilton head Hosp.*, 400 S.C. 281, 290, 733

S.E.2d 597, 601 (Ct. App. 2012)). “In other words, ‘[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.’” *Id.*

Applying South Carolina state law, the court in *THI of South Carolina at Columbia, LLC v. Wiggins* found a nursing home resident’s estate was equitably estopped from disclaiming the enforceability of the arbitration provision contained in the admissions contract. *THI of South Carolina at Columbia, LLC v. Wiggins*, 2011 WL 4089435 (D.S.C. 2011). In *Wiggins*, a daughter executed an admissions contract to a nursing home on behalf of her father. Following the death of the father and a subsequent filing of suit, the nursing home moved to compel arbitration. *Id.* at *2. The father’s estate argued that the arbitration provision was unenforceable because no evidence existed that the daughter had the “authority to act as her father’s agent, to legally bind her father, or waive her father’s right to a jury trial.” *Id.* at *5. In holding that it would be inequitable for the estate to avoid the arbitration provision within the admissions contract, the court noted the father received the benefits provided under the admissions contract and the nursing home performed in reliance on the terms of the agreement. *Id.* at *6.

Regarding the direct benefits provided to Ms. Dixon, the Admission Agreement executed by Ms. Thames on Ms. Dixon’s behalf served as the foundation for Ms. Dixon’s admission to Pepper Hill. It contained the duties and obligations which the parties had to one another. (R. p. _____, Admission Agreement at 2). Pursuant to the Admission Agreement, Respondents provided Ms. Dixon with residency, care, and other benefits for over six months, which are precisely the benefits Ms. Thames and Ms. Dixon sought. (R. p. _____, Affidavit of Rhonda

Thames at ¶ 4, indicating that she and Ms. Dixon went to Pepper Hill “for the purposes of having [Ms. Dixon] admitted as a resident”).

After the execution of the Agreement, Ms. Dixon became a resident of Pepper Hill, and as such, received the benefits provided for in the Agreement. Respondent’s claims as alleged in this matter all arise out of her residency and care at Pepper Hill. It is inequitable to permit Respondent to disclaim the arbitration clause, which is part of the Admission Agreement, after Pepper Hill performed in reliance on the Admission Agreement for over six months.

To the extent the trial court relied on *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 563, 813 S.E.2d 292, 302 (Ct. App. 2018), and its discussion of whether the resident in that case received a benefit under the admissions agreement, the trial court’s order is further in error. The trial court cited dicta in *Hodge* considering whether the resident would have been considered to have received benefits under the admissions agreement had the admissions agreement and arbitration agreement in that case been merged. Specifically, the *Hodge* court stated the following:

Because Mable, Husband, and the Estate 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 Mable was admitted to the Facility as a result of it. **However, because the Facility allegedly caused Mable's injuries that later led to her death, we find it difficult to find she benefited even from being admitted.**

(R. p. ____, Order Denying Motion to Compel Arbitration at 6 (emphasis in Order) (citing *Hodge*, 422 S.C. at 563, 813 S.E.2d at 302. However, this entire portion of the decision in *Hodge* is dicta and does not reflect the law in South Carolina. (R. p. ____, Appellants’ Proposed Order at 9). In particular, these statements were not necessary to reach the Court’s decision: the Appellate Court had found in the paragraph immediately preceding this citation that “the

Admissions Agreement and Arbitration Agreement did not merge.” *Hodge*, 422 S.C. at 563, 813 S.E.2d at 302. *See also* DICTUM, Black's Law Dictionary (11th ed. 2019) (“[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential”).

In addition, Appellants challenge this dicta as not accurately stating the law in South Carolina. Specifically, in issuing the above-cited statements, the *Hodge* court was considering the law that “when a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine prevents the non-signatory from averring he or she is not bound to the arbitration agreement when he or she receives a direct benefit from a contract that contains an arbitration clause.” *Hodge*, 422 S.C. at 558, 813 S.E.2d at 299–300 (citing *Thompson*, 416 S.C. at 59, 784 S.E.2d at 688). It appears from the above-cited dicta that the *Hodge* court may have been considering the term “benefit” in the context of whether a person “came out ahead” in entering the contract, rather than whether the individual obtained contractual “benefits” (i.e. enforced terms of the contract for his or her benefit). The distinction between these two concepts of “benefit” is important. Specifically, parties enter contracts all the time in which they receive contract “benefits” (i.e. enforcement of a contract provision for their benefit) yet in which they do not, perhaps, “benefit” overall. For example, a party may knowingly purchase a vehicle with a salvage title at a bargain price for a family member but still end up providing their family member a lemon that costs more to repair than what was paid for it. The family member, who may have been a non-signatory to the purchase agreement, still would have received a “benefit” under the contract in that they obtain a vehicle, even though the individual may not have “benefited” overall in the long run.

In much the same way, a non-signatory to an admissions agreement for a nursing home may receive “benefits” under the admissions agreement (i.e. room and board, meals, therapy, care, treatment, and other benefits) even though they later allege damages arising out of their stay at the nursing home. The fact that the individual (or their estate) alleges damages in a lawsuit does not negate the fact that the resident may have enforced or received benefits under the admissions agreement. *See Thompson*, 416 S.C. at 59, 784 S.E.2d at 688 (stating that the test is whether a party maintained that the other provisions of the same contract should be enforced to benefit him”).

For these reasons, Appellants contend that the *Hodge* dicta discussed above is an incorrect statement of the law in the way the trial court here appears to have relied on the statement. Rather, for purposes of “direct-benefit” equitable estoppel, the question is whether the individual received a direct “benefit” from a contract that contains an arbitration clause. To put it another way, the doctrine of direct-benefit estoppel “recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause *when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.*” *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012) (emphasis in original) (citing *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)). Thus, the question is not whether an individual benefitted overall from a contract, a question that could involve highly subjective evaluations and allow a third-party to escape from an arbitration provision simply by alleging a purported tort. Instead, the question is whether the third-party inequitably sought benefits under a contract while seeking to repudiate the arbitration provision.

Here, Ms. Dixon undoubtedly received benefits under the contract, including as set forth above. Notably, she received admission to Pepper Hill on May 19, 2016, which was the specific reason she and her daughter visited the facility. Further, she received meals, accommodations, care, therapy, and other benefits. Under the theory of direct-benefits estoppel, Respondent is therefore estopped from seeking to avoid the arbitration agreement that was also part of the Admission Agreement under which Ms. Dixon received benefits. As a result, the trial court's order erred in refusing to enforce the arbitration agreement under direct-benefits equitable estoppel, and the trial court's order should be reversed and arbitration compelled.

III. THE TRIAL COURT ERRED IN FAILING TO COMPEL ARBITRATION WHERE MS. DIXON WAS A THIRD-PARTY BENEFICIARY OF THE ADMISSION AGREEMENT.

The trial court also erred in failing to find that Respondent is bound to the arbitration agreement as an intended third-party beneficiary of the Admission Contract. "Under South Carolina law, '[a] third-party beneficiary is a party that the contracting parties intend to directly benefit.'" *THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. 7:13-CV-2929-BHH, 2014 WL 6863550, at *3 (D.S.C. Oct. 31, 2014), *report and recommendation adopted*, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. Mar. 19, 2015) (citing *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 611 S.E.2d 485, 488 (2005)). Where a resident of a skilled nursing facility was an intended third-party beneficiary of the admissions agreement signed by family member, the resident and his or her estate is bound by the arbitration provision. *Wiggins*, 2011 WL 4089435, at *6. "Well-established common law principles dictate that in an appropriate case a non-signatory can ... be bound by... an arbitration provision within a contract executed by other parties." *Int'l Paper Co.*, 206 F.3d at 416-17.

In the present case, while Ms. Dixon did not sign the Admission Agreement, she is named as the resident to be admitted to the facility. (R. p. _____, Admission Agreement). *See Wiggins*, 2011 WL 4089435 at *6. The terms of the Admission Agreement refer to “benefits and responsibilities of the resident, the facility, and the fiduciary party.” (R. p. _____, Admission Agreement). *See Wiggins*, 2011 WL 4089435 at *6. Ms. Dixon’s care was the essential purpose of the Admission Agreement. (R. p. _____, Admission Agreement). *See Wiggins*, 2011 WL 4089435 at *6. Thus, she was an intended third-party beneficiary of the Contract and the arbitration agreement is enforceable against her estate. *See THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185, at *2 (D.S.C. Mar. 19, 2015); *Wiggins*, 2011 WL 4089435 at *6; *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575, at *3 (D.S.C. Dec. 15, 2011) (finding that non-signatory resident was bound to arbitration agreement as third-party beneficiary of care provided for in admissions agreement).

Because Ms. Dixon was undoubtedly the third-party beneficiary of the Admissions Agreement, and because she received and enforced benefits under the contract, including her admission to the facility which was her specific purpose in visiting the facility, the trial court’s order erred in refusing to enforce the arbitration agreement. As a result, the trial court’s order should be reversed and arbitration compelled.

IV. THE TRIAL COURT ERRED IN MAKING CERTAIN FACTUAL FINDINGS IN ITS ORDER DECLINING TO COMPEL ARBITRATION.

The trial court erred in making a number of factual findings under the “FACTS” heading of its Order denying Appellants’ Motion to Compel Arbitration. Among other things, the trial court made the following findings:

- (1) That Ms. Thames was presented the Admission Agreement with the Arbitration provision 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 Ms. Dixon’s admission to Pepper Hill;
- (2) That Ms. Thames was provided the agreement without any meaningful choice;
- (3) That Ms. Thames was provided the agreement without an opportunity to discuss the significance of the agreement with a lawyer;
- (4) That Ms. Thames did not understand the meaning of arbitration on May 19, 2016.

(R. p. ____; Order Denying Motion to Compel Arbitration at 1-2).

These findings by the trial court improperly place the trial court in the position of fact finder in relation to disputed facts, were premature, were not reasonably supported by the record, were not relevant to the legal findings of the Court, and were erroneous under the law. Among other things, the findings were disputed, made prior to discovery, were not supported by the information before the court, and were made solely based on an affidavit submitted without any independent support or even the opportunity of Appellants to depose the affiant. (R. p. ____; Affidavit of Rhonda Thames, Transcript of Hearing at 21-25). At the time of the trial court’s order, Appellants had filed only a Motion to Dismiss and Compel Arbitration in lieu of an Answer. Further, no discovery had occurred due to the pending Motion to Compel Arbitration. Moreover, even without discovery, the Affidavit was thoroughly contested at the hearing based on Ms. Thames’ signed representations made in the Admission Agreement and on other grounds. (R. p. ____; Transcript of Hearing at 21-25).

The factual dispute regarding the trial court’s findings is supported by a variety of evidence. First, Ms. Thames completed page 1 of the Admission Agreement, which included a

paragraph representing that Ms. Thames “has reviewed this ADMISSION AGREEMENT, has had opportunity to ask questions of Pepper Hill Nursing & Rehab Center personnel about the Agreement and understands that admission to Pepper Hill Nursing & Rehab Center constitutes agreement to be bound by said ADMISSION AGREEMENT.” (R. p. ____; Transcript of Hearing at 21). Second, Ms. Thames initialed page 14 of the Admission Agreement immediately below the Arbitration heading and immediately after the Arbitration agreement page. (R. p. ____; Admission Agreement at p. 14; Transcript of Hearing p. 21). Third, Ms. Thames signed page 14 immediately following a paragraph stating that “I have read this Admission Agreement and the information packet and have been given an opportunity to ask questions relevant to this admission.” (R. p. ____; Admission Agreement at p. 14; Transcript of Hearing p. 21).

The contention that Ms. Thames lacked choice is also disputed and contrary to the evidence. Among other things, counsel for Appellants noted (1) that Ms. Thames and Ms. Dixon had ample choice of facilities, with 17 other nursing home facilities located in Aiken alone, (R. p. ____; Transcript of Hearing p. 21:9-11); and (2) that according to Ms. Thames’ affidavit, they had selected Pepper Hill prior to receiving the Admissions Agreement because they visited Pepper Hill the day of Ms. Dixon’s admission specifically for the purpose of admitting her to Pepper Hill (R. p. ____, Affidavit of Rhonda Thames). Rather than lacking choice, Respondent actively chose Pepper Hill even before they visited the facility on the day Ms. Dixon was admitted. Respondents showed nothing that prevented them from discussing the agreement with anyone else, including counsel. (*See* R. p. ____; Transcript of Hearing p. 24:6-11; Affidavit of Rhonda Thames).

Moreover, regarding the nature of the contract itself, the Arbitration provision was neither a surprise nor inconspicuous. Among other things, (1) notice of Arbitration was at the top

of each page of the Admission Agreement underlying, in bold, and in all caps. (R. p. ____; Admission Agreement 1-14); the arbitration agreement itself appeared on its own page under the heading “ARBITRATION” in all-caps, (R. p. ____; Admission Agreement 1-13); and Ms. Thames initialed immediately after page 13 and immediately below the arbitration heading set out in bold, underline, and all caps. (R. p. ____; Admission Agreement 14).

Further, while Appellants also contest Respondent’s mischaracterization of the purported “take it or leave it” nature of the agreement and argue that Ms. Thames was not a lawyer, neither the fact that a contract is one of adhesion nor the position of the parties alone invalidate an arbitration agreement. *Arredondo v. SNH SE Ashley River Tenant, LLC*, No. 2017-001298, 2019 WL 3814725, at *3 (S.C. Ct. App. Aug. 14, 2019). By signing the agreement, Ms. Thames acknowledged that she had been given the opportunity to ask questions, although she reportedly did not take advantage of this opportunity. (R. p. ____; Admission Agreement at 1, 14). *See Arredondo* 2019 WL 3814725, at *3 (upholding arbitration agreement where, “[b]y signing the Arbitration Agreement, [signatory] acknowledged she had been given the opportunity to ask questions and seek the advice of an attorney, although she did not take advantage of this opportunity”). Ms. Thames and Ms. Dixon purposefully selected Pepper Hill. The represented that they had the opportunity to ask questions. By no means did Pepper Hill place Respondent into a position of duress or otherwise force them to enter the contract. Rather, they entered of their own free will.

In sum, the above-listed factual findings by the trial court were premature, not reasonably supported by the record, were not relevant to the legal findings of the trial court, and were erroneous under the law. Rather, the trial court’s findings of fact in light of the disputed issues

and questions of fact acted as an improper and premature grant of summary judgment as to material issues. As a result, these factual findings should be reversed.

V. Conclusion

In seeking to circumvent arbitration, Respondent has improperly asked the court to discharge Respondent of its obligation when it is undisputed that (1) Ms. Dixon and her daughter went to Pepper Hill on May 19, 2016, for the specific purpose of admitting Ms. Dixon; (2) Ms. Dixon and Ms. Thames apparently believed it was important that Ms. Dixon be admitted that very day; (3) Ms. Dixon asked or permitted her daughter to execute the Admission Agreement for her; (4) Ms. Thames represented in a signed writing through the Admission Agreement that she had authority to act as Ms. Dixon's representative; and (5) Ms. Thames and Ms. Dixon accepted the benefits of the Admission Agreement for over six months. In short, Respondent is attempting to retain all the benefits of the Admission Agreement with none of its attendant responsibilities.

For these and the additional reasons set forth above, Appellants request that the Court reverse the trial court's Order and compel arbitration.

Signature Page to Follow

Respectfully submitted,

SWEENY, WINGATE & BARROW, P.A.

s/Mark V. Gende

Mark V. Gende, SC Bar No. 72835

Brandon R. Gottschall, SC Bar No. 100621

Sweeny, Wingate & Barrow, P.A.

Post Office Box 12129

Columbia, SC 29211

(803) 256-2233

**ATTORNEYS FOR APPELLANTS
SHILOH MANAGEMENT COMPANY, INC.,
PEPPER HILL NURSING CENTER, INC.,
AND PEPPER HILL NURSING & REHAB
CENTER, LLC D/B/A PEPPER HILL
NURSING & REHAB CENTER**

Columbia, South Carolina
September 14, 2020



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SWEENEY WINGATE & BARROW P.A. SC Court of Appeals

September 15, 2020

Reply to: Main Office

Mark V. Gende
(803) 256-2233
mvg@swblaw.com

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: *Jimmie Foreman, as the Personal Representative of the Estate of Katie Dixon v. Shiloh Management, Inc., Pepper Hill, et al.*
Appellate Case No. 2020-000584
Our File: 3919-12243

Dear Ms. Kitchings:

Please replace Appellant's Initial Brief, which was e-filed yesterday with the copy attached. Our previous submission erroneously referred to *Respondents'* Initial Brief, instead of Appellants' Initial Brief.

Thank you.

Respectfully,

SWEENEY, WINGATE & BARROW, P.A.

Mark V. Gende

MVG/gpc
Attachment