THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Appellate Case No. 2020-000500

Betty Nanney, by and through her Attorney-in-Fact, Leslie Nanney, …………….. Respondent

v.

THI of South Carolina at Spartanburg, LLC, d/b/a Magnolia Manor-Spartanburg, Rusty Flathmann, Laura Anne Winn, and Olishia Gaffney, ……………….. Appellants.

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COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether a nursing home can use the South Carolina Adult Health Care Consent Act's limited authority for "health care" decisions to bind a nursing home resident to an independent arbitration contract to which she did not assent.

2. Whether a nursing home resident can be equitably estopped from opposing an arbitration contract she did not see or sign, from which she derives no "direct benefit," and that does not form the basis for any of her legal claims.

3. Whether a proposed nursing home arbitration contract is invalid when the contract demands an inscrutable process for arbitrator selection, provides no guidance for conducting arbitration proceedings, and effectively ensures Respondent may not access key evidence before an arbitration hearing.

4. Whether a nursing home can ask a court to "permit" discovery already authorized by the rules or to preemptively rule that conducting discovery will not waive the nursing home's perceived right to pursue arbitration later.

STATEMENT OF THE CASE

Respondent Leslie Nanney ("Daughter"), in the role as attorney-in-fact for her mother Betty Nanney, filed a Summons and Complaint in the Spartanburg County Court of Common Pleas on September 4, 2019. (R. p. 26 ¶¶ 1-2). The Complaint alleged negligence, reckless, and statutory-based claims against Appellant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg ("the Facility") along with Appellants Rusty Flathmann, Laura Anne Winn, and Olishia Gaffney, i.e. individuals the Complaint alleged to have operational or managerial control over the Facility. (R. pp. 27-28 ¶¶ 3-8). The Facility, Flathmann, and Gaffney each filed Answers on October 10-11, 2019, and Winn's first response was a motion to dismiss pursuant to Rule 12(b)(6), SCRCP on October 11, 2019. (R. pp. 59-101; 147-48).

The Facility, Flathmann, and Gaffney each moved to compel arbitration and to stay court proceedings on November 11, 2019. (R. pp. 149-55). A hearing on the motions was held before the Honorable Grace Gilchrist Knie on December 16, 2019. (R. pp. 102-46). On January 7, 2020, the circuit court entered an order denying the motions to compel arbitration. (R. pp. 1-19). Appellants filed a consolidated motion to alter or amend judgment on January 17, 2020, which was denied in an Order dated February 13, 2020. (R. pp. 20-23; 257-74). Appellants served a notice of appeal on March 16, 2020. (R. pp. 275-79).

STATEMENT OF THE FACTS

Ms. Nanney was admitted to the Facility on October 28, 2016, to recover from emergency surgery following a ruptured brain aneurysm. (R. p. 28 ¶ 12). On that same date, her son Kaileb Horn ("Son") was presented with two adhesion contracts at the Facility. The Facility's representative did not ask Son for proof of authority to act on Ms. Nanney's behalf. Son was not empowered to act for Ms. Nanney through a power of attorney or any other mechanism recognized

under South Carolina law. Ms. Nanney was not present during this process. (R. p. 193 ¶ 3). The first contract was an "Admission Agreement" governing the type of care Ms. Nanney would receive at the Facility and Ms. Nanney's financial obligation for those services. (R. pp. 232-43). 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 Ms. Nanney's admission to the Facility. (R. p. 243). Son signed the Admission Agreement on the "Signature of Representative" line. Id.

On the same day, Son 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. (R. p. 151). Appellants admit agreeing to the Arbitration Agreement was not a condition or prerequisite to admission at the Facility. Appellants' Br. at 8; R. p. 121, lines 8-10. The Arbitration Agreement, purportedly a contract between the Facility and either Ms. Nanney ***or*** Son, provided for alternative dispute resolution of any claim its parties may bring against another arising out of Ms. Nanney's admission in the Facility. (R. p. 151). Son signed the Arbitration Agreement on the line labeled "Resident/Representative Signature." Id.

When Ms. Nanney arrived in the Facility, she suffered from partial paralysis and posed a substantial risk of falling if not properly assisted. (R. p. 28 ¶¶ 12-13). At the time, her paralysis did not allow Ms. Nanney to communicate. During her first fall risk assessment at the Facility, Ms. Nanney scored a 20 (10 or higher is considered high risk), and she required hands on assistance to stand, for all transfers, and for bed mobility. (R. pp. 28-29 ¶¶ 13-15). Sometime in late-October or early-November, Ms. Nanney suffered an unspecified acute injury the Facility failed to document. (R. p. 29 ¶ 17). It was not until November 3, 2016, that Ms. Nanney's chart documented leg pain

so intense that it left her in tears. (R. p. 29 ¶ 18). Four days later, an x-ray revealed Ms. Nanney had suffered a fractured right femur. (Compl. ¶ 22). She was then transferred to Spartanburg Regional Medical Center where emergency room personnel described the source of her injury as a "suspected fall." (R. p. 30 ¶ 23). While the Facility never documented the specifics of Ms. Nanney's fall, Appellants' failure to properly manage and care for her medical conditions were a direct and proximate cause of the fall and the resulting injuries. (R. pp. 30-31 ¶¶ 24-29).

On September 4, 2019, Daughter initiated this action in her role as Ms. Nanney's attorney-in-fact. (R. p. 26 ¶ 1; 189-92). The Complaint alleged claims for negligence/recklessness, neglect of a vulnerable adult (citing South Carolina's Omnibus Adult Protection Act), and negligent administration of the Facility's operations. (R. pp. 52-57 ¶¶ 132-56). On November 11, 2019, Appellants (excluding Winn) chose to forego discovery and filed motions to compel arbitration and to stay state court proceedings. Relying on the Arbitration Agreement Ms. Nanney and Daughter did not sign, the Facility argued Ms. Nanney and Daughter must arbitrate rather than litigate their claims. The circuit court denied the motion, finding Son lacked authority to enter the Arbitration Agreement on Ms. Nanney's behalf and that extensive South Carolina precedent rejected Appellants' equitable estoppel argument. (R. pp. 1-19).

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. While the Federal Arbitration Act ("FAA") imposes a presumption favoring arbitration, the presumption does not apply to the "identity of the parties who may be bound to such an agreement." Id. at 337-38, 827 S.E.2d at 173. In fact, there is a presumption against arbitration when enforcement is sought against a non-signatory. Id. To the extent a discovery order is properly before the Court, Appellants must prove an 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

Ms. Nanney did not agree to arbitrate her legal claims against Appellants. The Facility never even asked her to. As the circuit court found (and Appellants did not challenge on appeal)[1], Ms. Nanney was "lucid and competent" when she became the Facility's resident. (R. p. 2). Yet, the Facility waited until Ms. Nanney was out of the room to present the Arbitration Agreement to Son, and he had no authority to act on Ms. Nanney's behalf. (R. p. 193 ¶ 3). The circuit court correctly noted substantive problems with its provisions render the Arbitration Agreement invalid (R. pp. 14-18), but its primary issue remains the lack of mutual assent required to form a binding agreement. (R. pp. 5-7). Appellants' insistence that Son's signature means Ms. Nanney must arbitrate is a serious distortion of contract law. The Arbitration Agreement does not even purport to make Ms. Nanney a party.[2]

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[1] Any ruling not specifically challenged on appeal is the law of the case and must be affirmed. League v. S.C. Dep't of Health & Envtl. Control, 363 S.C. 67, 76, 610 S.E.2d 482, 487 (2005).

[2] The Facility drafted the Arbitration Agreement's parties section in the disjunctive, stating that either Son "***or***" Ms. Nanney was a party. (R. p. 151) (emphasis added). Since only Son signed the Arbitration Agreement, the only reasonable inference is that he alone was intended as a party. Moreover, the Arbitration Agreement's express scope is limited to disputes between "the parties." Id. ("It is further understood that in the event of any controversy or dispute between **the parties** .

To challenge the circuit court's finding of no valid contract, Appellants rely on a series of unsupported assertions: (1) Son had statutory authority to sign a separate Admission Agreement for Ms. Nanney; (2) the Arbitration Agreement and Admission Agreement are really a single contract; and (3) Ms. Nanney and Daughter are somehow estopped from opposing arbitration as a result of Son's actions. Appellants' arguments would be flawed even if the issues were novel. But, South Carolina's appellate courts have been here before and three times rejected the merger and estoppel theories Appellants need to prevail. Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014); Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).[3]

Recently, this Court rejected Appellant's estoppel argument for a *fourth* time, reinforcing that a nursing home resident is not equitably barred from suing the home for negligent care based on a family member's signature on an admission contract. Weaver v. Brookdale Senior Living, Inc., ___ S.C. ___, 847 S.E.2d 268 (Ct. App. 2020). For the reasons discussed below, the Court should reject Appellants' attempts to distinguish this growing body of precedent and the multiple instances where Appellants implicitly ask the Court to overrule these cases. In the end, Appellants' pursuit of arbitration should fail for the same reason as the nursing homes in Coleman, Thompson, Hodge, and Weaver: Ms. Nanney and Daughter did not agree to arbitrate and have taken no action to prevent them from insisting on a judicial forum for their claims.

. . then **the parties** agree" arbitration is required) (emphasis added). Son is not a party to Respondent's Complaint and has not asserted any claims against the Facility.

[3] Appellants' sister facilities and related entities are pursuing the same flawed arguments in at least two other pending appeals. Murphy v. Hunt Valley Holdings, LLC, Case No. 2019-000028 (S.C. Ct. App.); Estate of Mary Solesbee v. Fundamental Clinical & Operational Services, LLC, Case No. 2019-001731 (S.C. Ct. App.).

1. **The Independently-Invalid Arbitration Agreement does not Merge with the Admission Agreement.**

The Facility argues Ms. Nanney and Daughter must arbitrate Ms. Nanney's claims against Appellants, but they never agreed to do so. They never signed or otherwise assented to the Arbitration Agreement on which the Facility relies to support its motion to dismiss Ms. Nanney and Daughter's claims. Son's signature on the Arbitration Agreement is ineffective because he did not have authority to bind Ms. Nanney to a dispute resolution contract. Moreover, as the circuit court concluded, the fact that Ms. Nanney lived at the Facility as a resident does not estop her or Daughter from contesting arbitration under South Carolina or federal equitable estoppel principles.

This appeal centers on core components of contract formation. Since Appellants point only to the Arbitration Agreement as a basis for dismissing Ms. Nanney and Daughter's claims, they cannot prevail without first establishing the Arbitration Agreement is a properly formed, binding contract. However, while the Facility offered the Arbitration Agreement as an alternative means for settling disputes, neither Ms. Nanney nor Daughter ever accepted that offer. Moreover, as established in South Carolina precedent, any statutory authority Son may have had to admit Ms. Nanney to the Facility does not confer authority to enter the Arbitration Agreement, a document the Facility drafted as a separate and distinct contract offered for a completely different purpose.

a. **The Facility 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 Ms. Nanney and she was not even in the room when the Arbitration

Agreement was offered for signature. (R. p. 193 ¶ 3). Appellants argue Son's signature assented on her behalf, but they present nothing to show Son had authority to contract for Ms. Nanney. Instead, Appellants now seem to argue Son had statutory authority to enter Ms. Nanney to the Facility and that authority either carries over to the Arbitration Agreement or equitably estops Ms. Nanney and Daughter from opposing arbitration. The circuit court correctly refused both of these arguments because they have been rejected by South Carolina appellate courts four times in less than seven years.

South Carolina's Adult Health Care Consent Act ("the 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, 407 S.C. at 352, 755 S.E.2d at 453. 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, 416 S.C. at 51, 784 S.E.2d at 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 the Arbitration Agreement was not a health care decision because Ms. Nanney could get all the health care services covered in the Admission Agreement without agreeing to arbitrate. Appellants' Br. at 8 (admitting Arbitration Agreement was "optional" and "not required to gain admission to the Facility").

Coleman did acknowledge the possibility equitable estoppel could be invoked if the disputed arbitration language was actually or effectively part of 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, Appellants must establish the Act empowered Son to enter the Admission Agreement on Ms. Nanney'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, Appellants must link the admission and arbitration contracts by meeting multiple requirements to apply a 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. (emphasis added). 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 even hint that the parties actually intended the writings to be distinct, separate contracts. Three nursing homes have previously attempted but failed to meet these 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. The Facility Makes Inconsistent Arguments on Son's Authority under the Adult Health Care Consent Act.

Appellants cannot meet any of the requirements to support their equitable estoppel argument. First, they do not even offer a consistent position on whether the Act applies in this case. As Coleman and Thompson demonstrate, Appellants' merger and estoppel arguments could only

be relevant to this appeal if Son had authority under the Act. Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (noting estoppel argument "is premised on [nursing home's] contention that, under state law, the admissions agreements and the [arbitration contract] merge"); Thompson, 416 S.C. at 49-50, 784 S.E.2d at 683 (finding merger argument depended on notion that "Son was authorized to execute [admission contract] under the Act"). However, Appellants made a different argument in written and oral submissions to the circuit court. There, they argued the Act "is not relied on by [Appellants] in support of their motions." (R. p. 261); see also R. p. 136 lines 23-24 ("We're not arguing that the Adult Health Care Consent Act allows or provides authority here."). As this Court has held, expressly disclaiming an argument based on the Act and merger at the circuit court hearing is enough to doom a merger and estoppel argument on appeal. Thompson, 416 S.C. at 50, 784 S.E.2d at 683 (finding nursing home waived merger argument through statement at circuit court). Since Appellants have argued the Act does not apply, their merger and estoppel arguments fail at their initial hurdle.

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

Second, the Facility 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 [Ms. Nanney] to" the Facility. (R. p. 232). That purpose is borne out in the Admission Agreement's twelve pages. The Facility agreed to "[f]urnish room, routine meals, nursing care, personal care, or custodial care" (R. p. 233, § (A)(3)) to Ms. Nanney who, in turn, agreed to "[p]ay all fees and charges" for those skilled nursing services. (R p. 234 § (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. (R. p. 151). These two contracts cannot have the same purpose because, as Appellants' counsel admits, the Arbitration Agreement was not a pre-condition for admission. Appellants' Br. at 8.

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 Appellants' shifting argument on the Act has not been waived and the prerequisites to merger were present, Appellants' 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 or the substantive law governing their interpretation. 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.

The Facility preemptively dismisses all of these factors, arguing none of them suggest the parties intended the Admission Agreement and Arbitration Agreement not merge. Appellants' Br. at 8-12. However, by rejecting or discounting these factors, the Facility is arguing against well-established, recent precedent (Coleman, Thompson, and Hodge) without offering the Court any reason why it should so dramatically and quickly reverse course. All four of these factors apply to the Admission Agreement and Arbitration Agreement and provide extensive evidence to support the circuit court's finding that the contracts do not merge.

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

The Admission Agreement concludes with an "Entire Agreement" provision identifying the contract's limited scope. (R. p. 243 § 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." (R. p. 232) (emphasis in original). Thus, the Admission Agreement's "Entire Agreement" provision is similar to the admission contracts in Coleman, Thompson, and Hodge and 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. In this sense, the "Entire Agreement" provision is consistent with 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 "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 verbatim. 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 against merger. In describing its term, the Arbitration Agreement states that its effect will continue even after the termination of "this Agreement ***or the Admission Agreement***." (R. p. 151) (emphasis added).

Finally, Appellants argue the "Entire Agreement" provision supports merger because it incorporates "other Admissions materials." Appellants' Br. at 8 (R. p. 243 § XVIII). Appellants claim it is beyond question the Arbitration Agreement was incorporated by reference into the Admission Agreement (Appellants' Br. at 8), but they offer 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 Appellants admit 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 claimed 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 must be 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. In Hodge, this Court found significant that the admission contract it considered expressly chose to be governed by South Carolina law, while the arbitration contract was governed by the FAA. Id. The Admission Agreement and Arbitration Agreement use very similar terms. The Admission Agreement chose South Carolina substantive law (along with federal nursing home regulations) and the Arbitration Agreement expressly disclaimed South Carolina law in favor of the FAA. Compare R. p. 241 § IX (adopting "laws of the State in which Facility is located") *with* R. p. 151 (disclaiming application of the South Carolina Uniform Arbitration Act). Hodge found the choice of law provisions were against merger because "the Admissions Agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law." 422 S.C. at 562, 813 S.E.2d at 302. That statement is equally true in this case.

Coleman, Thompson, and Hodge also 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 while the admission contract signed by a resident's family member did not include a similar right. Id. Here, the Arbitration Agreement does not have a disclaimer provision, and Appellants argue this fact as a means of distinguishing Coleman, Thompson, and Hodge. Appellants' Br. at 8.

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. (R. p. 151). As structured by the Facility, 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." (R. p. 237 § IV, ¶ 1). Thus, while Appellants are 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. The Facility 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

Appellants' merger argument is also rebutted by their 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. Appellants argue the fact that admission does not depend on consent to arbitrate somehow supports merger. Appellants' Br. at 9. But, 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, the Facility does not treat the Admission Agreement and Arbitration Agreement as if they are interdependent or even as related to the same purpose. Appellants admit in their brief that executing the Arbitration Agreement was not mandatory and not a precondition to admission. Appellants' Br. at 8.

In sum, the Arbitration Agreement and Admission Agreement have the same four indicators South Carolina courts have cited in the past to find simultaneously-executed contracts were not intended to merge into one. Moreover, contrary to Appellants' arguments, any uncertainty about these four indicators must be resolved in Ms. Nanney and Daughter's favor, not to their

detriment. Appellants argue merger is the default position and must be applied absent an affirmative showing of contrary intent. Appellants' Br. at 11. 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, Appellants' 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 the Facility drafted these form contracts of adhesion, any ambiguities must be construed against Appellants. Appellants argue that applying the ambiguity rule here "makes no sense" (Appellants' Br. at 11), but they do not acknowledge their argument effectively asks the Court to reverse its own ruling on the issue and to overrule Supreme Court precedent. Coleman applied the "presumption against drafter" 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, Appellants' merger argument 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 extensive South Carolina law in this field and rejected Appellants' contention that the Arbitration Agreement and Admission Agreement merged.

2. Respondent is not Equitably Estopped from Opposing Arbitration.

Ms. Nanney did not sign the Arbitration Agreement or authorize anyone to sign for her and was not even in the room when it was presented for signature. Yet, Appellants argue South Carolina Supreme Court precedent suggests Ms. Nanney and Daughter are equitably estopped from opposing arbitration. Appellants' Br. at 13-17 (citing Wilson). However, Appellants do not

cite or attempt to apply the elements of equitable estoppel imposed by South Carolina law.[4] Plus, Wilson actually refused to compel arbitration against a non-signatory, holding there is a presumption *against* forcing someone to arbitrate based on a contract she did not sign. 426 S.C. at 338, 827 S.E.2d at 173. Wilson even went on record to say equitable estoppel is rarely appropriate to force arbitration. Id. at 345, 827 S.E.2d at 177 (finding equitable estoppel "should be used sparingly"). Finally, as this Court recently reaffirmed in Weaver, Appellants cannot meet the "direct benefits" test considered in Wilson because Ms. Nanney's claims in no sense rely on the Arbitration Agreement's terms, and Appellants' argument to the contrary expressly links their estoppel claim to their fatally flawed merger argument.

Appellants wholly omit the fact that the "direct benefits estoppel" discussed in Wilson could only apply if Respondent has "consistently maintained that other provisions of the same contract should be enforced to benefit" her. 426 S.C. at 340, 827 S.E.2d at 175 (quoting Pearson, 400 S.C. at 290, 733 S.E.2d at 601). In other words, Appellants' burden is to show (1) Ms. Nanney's claims arise from the purportedly merged Admission Agreement-Arbitration

[4] As Wilson recognized, whether a non-signatory may be bound to an arbitration contract is a state law issue. 426 S.C. at 348, 827 S.E.2d at 174 (citing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630-31 n. 5 (2009)). Under South Carolina law, equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conducted be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on conduct of the party to be estopped. Id. Wilson did not dismiss or eliminate this test for equitable estoppel but only found its application was an issue that had not been preserved for appellate review. 426 S.C. at 341 n. 9, 827 S.E.2d at 175 n. 9. The Facility argues Wilson concluded this test only applies to "non-arbitration cases." Appellants' Br. at 13 (citing Wilson, 426 S.C. at 340 n. 9, 827 S.E.2d at 175 n. 9). However, that could not have been Wilson's meaning because applying different rules to arbitration and non-arbitration contracts would violate the U.S. Supreme Court's equal-treatment principle. See Prima Paint Corp. v. Flood Conklin Mfg. Co., 388 U.S. 395, 404 n. 12 (1967) (finding intent of FAA was "to make arbitration agreements as enforceable as other contracts, but not more so").

Agreement; (2) Ms. Nanney and Daughter have "exploited" other parts of the contract by reaping its benefits; and (3) Ms. Nanney's claims rely solely on the contract terms to impose liability. Weaver, Op. No. 5752, at 4 (citing Wilson, 426 S.C. at 340-44, 827 S.E.2d at 175-77). Appellants make no attempt to meet this burden and cannot do so. Ms. Nanney's claims do not cite or rely on the Arbitration Agreement. Instead, Appellants argue Ms. Nanney's alleged direct benefit was admission itself and the nursing home services she received while a Facility resident. Appellants' Br. at 13-14.

But, this argument has two key flaws. First, Appellants expressly link their estoppel claim to a merger argument they cannot prove. Appellants' Br. at 14-15 (arguing estoppel applies because Admission Agreement and Arbitration Agreement merged). As discussed in Argument 1 above, there is no merger here because (1) Appellants dispute Son's statutory authority to enter the Admission Agreement; (2) the contracts were created for different purposes; and (3) there are many indications from the contracts' language they were not intended to be construed as one. Second, Ms. Nanney has not obtained a "direct benefit" from the Admission Agreement as that term is used for estoppel purposes. The complaint does not allege a breach of contract claim based on the Admission Agreement or otherwise rely on that contract to assert liability against Appellants. The mere fact that Ms. Nanney's relationship with the Facility underlying the claims was memorialized in the Admission Agreement is not sufficient for Appellants to invoke estoppel. Wilson, 426 S.C. at 343, 827 S.E.2d at 176 ("direct benefits estoppel is not implicated simply because a claim relates to or would not have arisen 'but for' a contract's existence").

Weaver applied this principle to reject the argument that a nursing home resident receives the required "direct benefit" through her admission or "exploits" either the admission or arbitration contracts by suing for poor nursing home care. 847 S.E.2d at 273-74. In Weaver, a granddaughter

brought wrongful death and survival claims based on a nursing home's failure to supervise a resident who wandered away from the home and was killed by a wild animal. Id. at 271. Equitable estoppel did not apply because the granddaughter's claims "rely on general tort duties . . . not any provision of the residency agreement." Id. at 273. Weaver did not create new law; it followed Hodge's lead in holding that a nursing home resident or her family members do not "exploit" an admission contract by alleging common law negligence claims. Id. (citing Hodge, 422 S.C. at 563, 813 S.E.2d at 302).

Thompson also rejected a nursing home's attempt to use direct benefits estoppel to compel a non-signatory nursing home resident to arbitrate. Thompson, 416 S.C. at 58-59, 784 S.E.2d at 687-88; After surveying state and Fourth Circuit precedent, Thompson rejected this form of estoppel because it generally requires proof of some benefit to the party opposing estoppel in "*the contract that includes the arbitration provision*." 416 S.C. at 59, 784 S.E.2d at 688 (emphasis added). Appellants, therefore, cannot build an estoppel argument by citing benefits Ms. Nanney supposedly gained in the Admission Agreement. Thompson also rejected any effort to argue Ms. Nanney gained a "direct benefit" from the Arbitration Agreement. Id. at 60, 784 S.E.2d at 688 ("any possible benefit emanating from the [Arbitration Agreement alone is offset by the [Arbitration Agreement's] requirement that Mother waive her right of access to the courts . . .").

In sum, the circuit court correctly rejected Appellants' equitable estoppel argument because Appellants have not cited or applied the proper elements, cannot show Ms. Nanney obtained any "direct benefit," and base their estoppel claim on their flawed merger argument. As it did in Thompson, Hodge, and Weaver, this Court should reject Appellants' equitable estoppel argument.

3. The Circuit Court Correctly Determined the Arbitration Agreement is Unenforceable Because it Lacks Material Terms and is Unconscionable.

Arbitration is a matter of contract and, since Appellants seek to compel arbitration, they bear the burden of proving the Arbitration Agreement is a valid, enforceable contract. Fici v. Koon, 372 S.C. 341, 642 S.E.2d 602, 604 (2007). This burden is not eased and the substantive requirements of South Carolina contract law are not lessened simply because state law maintains a pro-arbitration policy and the FAA imposes an equal treatment principle for arbitration contracts. See 9 U.S.C. § 2 (stating that arbitration contracts governed by FAA are subject to many of same state-law defenses applicable to other contracts). The Arbitration Agreement did not form a valid contract under South Carolina law because there was no meeting of the minds on its material terms. The Arbitration Agreement includes an inscrutably vague arbitrator selection process and no guidance on how, when, or under what rules arbitration proceedings will be conducted. Moreover, the Arbitration Agreement is unenforceable because it was presented under circumstances that presented no meaningful choice and its one-sided terms effectively force Ms. Nanney and Daughter to walk into the arbitration hearing without any hope of obtaining the evidence needed to prove their claims.

a. Several Material Terms are Absent or Too Vague to Form a Valid Contract.

The Arbitration Agreement purports to be a dispute resolution contract but it provides no useful guidance on who will be tasked with resolving Ms. Nanney and Daughter's claims or how the accompanying proceedings will be conducted. Parties cannot form a valid contract without forming "a meeting of the minds . . . with regard to all essential and material terms." Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009) (citing Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989)). Even if a contract mentions a material term, the contract fails if the term is defined or described in vague terms. Reed v. Boykin, 282 S.C.

614, 320 S.E.2d 68 (Ct. App. 1984) (quoting 1 Corbin on Contracts § 95 (1963) ("Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement have often been held to prevent the creation of an enforceable contract")). These are contract formation requirements, and Appellants bear the burden of proving both that the Arbitration Agreement contains all material provisions and that it describes them in definite terms. Allegro, Inc. v. Scully, 418 S.C. 24, 791 S.E.2d 140 (2016) ("Part of proving that some enforceable contract exists is being able to identify the terms thereof").

Arbitrator selection and the rules governing arbitration proceedings are material terms of an arbitration contract. To determine whether a term is material, South Carolina courts consider the "essence of the agreement" Grant, 383 S.C. at 131, 678 S.E.2d at 439 (citing Ex Parte Warren, 718 So.2d 45, 49 (Ala. 1998)). For example, in a lease contract, essential terms include a description of the boundaries of the leased premises, the lease term, as well as the time and manner of payment. Player, 299 S.C. at 105, 382 S.E.2d at 894. For commercial sales contracts, price, time, and place are all indispensable terms. Ross Electric, Inc. v. Cooler Erectors of Atlanta, Inc., 418 S.C. 424, 429, 794 S.E.2d 382, 385 (Ct. App. 2016) (quoting McPeters v. Yeargin Constr. Co, Inc., 290 S.C. 327, 331, 350 S.E.2d 208, 211 (Ct. App. 1986)). Similarly, for service contracts, essential terms include the scope of the work to be performed and the amount of compensation. Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014).

Grant identified some essential provisions in a nursing home arbitration contract by recognizing a contract provision stating an exclusive arbitral forum was "integral" to the agreement such that its unavailability rendered the whole contract invalid. 383 S.C. at 131-32, 678 S.E.2d at 438-39. While the Arbitration Agreement does not have an exclusive arbitral forum provision,

Grant helps define what constitutes a material term. Grant found a term in a nursing home arbitration contract is "integral" where it has "wide-ranging substantive implications" on the outcome of the arbitration proceedings. Id. at 132, 678 S.E.2d at 439 (quoting Singleton v. Grade A Market, Inc., 607 F. Supp. 2d 333, 339 (D. Conn. 2009)). Grant found arbitrator selection met this standard because it would affect "the law, procedures, and rules that govern the arbitration, the enforcement of the arbitral award, and the cost of the arbitration." Id. Thus, provisions going to the heart of the substantive law applied and the procedures used during the arbitration process are material because they "may substantially affect the substantive outcome of the resolution" of the dispute. Id. at 132, 678 S.E.2d at 439.[5]

Deeming these absent terms material is also consistent with the practical understanding of the "essence" of an arbitration contract—i.e. opting out of civil litigation in favor of a different dispute resolution process. While arbitration is intended to be different and less thorough than litigation, its "essence" includes the same parameters litigation parties would encounter. In litigation, the general parameters of proceedings include commencement of an action (Rules 3-6, SCRCP), motions and other pre-trial proceedings (Rules 7-16, SCRCP), discovery and other opportunities for parties to develop their claims/defenses (Rules 26-36, SCRCP), and trial matters (Rules 38-52, SCRCP). Respondent is not suggesting arbitration much match or imitate the South Carolina Rules of Civil Procedure, but an arbitration contract that does not clearly address *any* of these matters fails in its essence of describing a recognizable dispute resolution process.

[5] Respondent acknowledges York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 83, 749 S.E.2d 139, 147 (Ct. App. 2013) held that an arbitration contract's lack of rules on discovery, arbitration costs, and arbitration initiation procedures were not material terms. However, while York attributes this holding to Grant, the Supreme Court never suggested in Grant that a complete lack of guidance on procedure and evidence is an ancillary matter. Instead, the court strongly implied "the law, procedure, and rules" of arbitration are all matters "that may substantially affect the substantive outcome" of arbitration proceedings. 383 S.C. at 132, 678 S.E.2d at 439.

Here, the Arbitration Agreement lacks any valid terms on arbitration procedures. There is no guidance on the timetable for arbitration proceedings and no designation of rules to govern procedure or evidence. Appellants suggest the gap is filled by the Arbitration Agreement's reference to the South Carolina Alternative Dispute Resolution/Mediation Rules. But, the only substantive evidentiary and procedural provisions in those rules for arbitration proceedings is Rule 12 which, by its terms, "applies only to non-binding arbitrations." Rule 12(a), SCADR. The Arbitration Agreement states that proceedings under its terms "shall be binding on all parties." (R. p. 151). Moreover, it would not save the Arbitration Agreement for Appellants to argue the parties can negotiate the applicable procedural and evidentiary rules later. Ellis v. Taylor, 316 S.C. 245, 249, 449 S.E.2d 487, 489 (1994) ("A contract leaving material terms open for future agreement is void for indefiniteness").

Similarly, the Arbitration Agreement's arbitrator selection process is too vague to permit enforcement. The process must begin with the parties collaborating on a choice of arbitrator culled from "a panel having experience and knowledge of the health care industry." (R. p. 151). The origin, identity, and composition of this "panel" is not identified in the Arbitration Agreement and is in any no inferable from its language. It is not clear if this panel currently exists or whether the parties must form it. It is not clear how many individuals comprise the panel or how they are chosen. It is not clear whether the "experience and knowledge" requirement requires a medical education or whether it could include attorneys, judges, insurance adjustors, or individuals from other industries. Without any guidance on the panel's composition, it is impossible to implement.[6]

[6] Appellants may also argue the vagueness of the "panel" is immaterial because both the Arbitration Agreement and the FAA provide an alternative mechanism for arbitrator selection. (R. p. 151) (providing for selection by court); 9 U.S.C. § 5. But, by its terms, this alternative mechanism may not be implemented unless the "panel" process fails. (R. p. 151) (allowing judicial selection only if "the parties cannot reach a mutual decision on the selection" through the "panel"

Ultimately, when a contract is indefinite on an important term, the proper judicial response is not to imply or infer a term but rather to refuse enforcement. Ebert v. Ebert, 320 S.C. 331, 339, 465 S.E.2d 121, 126 (Ct. App. 1995) (citing 17A Am. Jur. 2d Contracts § 192 (1991)).

b. The Arbitration Agreement is Unconscionable.

If Ms. Nanney and Daughter are required to proceed under the Arbitration Agreement, they will be forced to walk into an arbitration hearing without the key documents needed to prove their case and with no way to know what testimony key fact witnesses will provide. Appellants, on the other hand, have the relevant documents in their exclusive possession, have an opportunity to learn what the crucial witnesses know, and have even been granted a sneak peek at Ms. Nanney and Daughter's expert witness testimony. In essence, the Arbitration Agreement tilts the process in Appellants' favor and places Ms. Nanney and Daughter at a competitive disadvantage not permitted by South Carolina law.

The Arbitration Agreement does not permit Ms. Nanney and Daughter any right to discovery before an arbitration hearing. Since the Arbitration Agreement is governed by the FAA and is silent on discovery, the practical result is that there will be no discovery unless Appellants choose to allow it. COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 275 (4th Cir. 1999). If this case is removed from the litigation process, there is no mechanism (before an arbitrator or court) for Ms. Nanney and Daughter to compel the production of important information from Appellants, their agents, or third parties. The FAA permits an arbitrator to compel a witness's attendance at the arbitration hearing but "[n]owhere does the FAA grant an arbitrator the authority to order non-

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process). The "panel" process cannot fail (or even commence) because its parameters lack the clarity required to be attempted. See also Grant, 383 S.C. at 131, 678 S.E.2d at 438 (finding "great merit" in the rulings of other courts that deem 9 U.S.C. § 5 inapplicable when an arbitration contract designates an unavailable arbitration forum).

parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during pre-hearing discovery." Id.

A contract that purports to compel arbitration in a nursing home negligence case without the possibility of discovery is unconscionable. Under South Carolina law, unconscionability is "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007) (quoting Carolina Care Plan, Inc. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). The "absence of meaningful choice" requirement "speaks to the fundamental fairness of the bargaining process." Simpson, 3873 S.C. at 25, 664 S.E.2d at 669. The key factors on this element include (1) the nature of the injuries suffered by the plaintiff; (2) whether the plaintiff is a substantial business concern; (3) the relative disparity in the parties' bargaining power; (4) the parties' relative sophistication; (5) whether there is an element of surprise in the inclusion of the challenged clause; and (6) the conspicuousness of the arbitration clause. Id. (citing Carlson v. Gen. Motors Corp., 883 F.2d 287, 293 (4th Cir. 1989)).

Applying these factors to the Arbitration Agreement shows the fundamental unfairness of the bargaining process. Initially, the Arbitration Agreement is an adhesion contract in that it was printed on a standardized form, offered to Son on a take-it-or-leave-it basis, and did not offer any chance to negotiate. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). Adhesion contracts are not per se unconscionable but identifying a document as an adhesion contract is a starting point for analyzing the substantive factors. Simpson, 373 S.C. at 27, 644 S.E.2d at 669. The first factor favors Respondent because Ms. Nanney's injuries were personal

and substantial. Appellants' alleged negligence led to a painful broken leg and other personal injuries.

The other factors also favor Respondent. Son was not a substantial business concern. He was acting only with the aim of obtaining nursing care Ms. Nanney urgently needed. In contrast, Appellants include a sophisticated business entity evidenced in many ways including the complex organization structure they have built to manage the Facility's operations. Finally, the key language of the Arbitration Agreement was not conspicuous relative to any of the other admission paperwork the Facility presented to Son. Plus, the lack of conspicuousness and surprise elements relate not only to how prominently an arbitration provision is featured in a contract but also consider whether the way in which the arbitration provision is drafted imposes substantive limitations that would not be immediately apparent to an unsophisticated person. E.g. Simpson, 373 S.C. at 27-28, 644 S.E.2d at 670 (finding arbitration provision "inconspicuous . . . in light of its consequences" including the deprivation of statutory remedies).

The Arbitration Agreement's discovery bar also meets the second unconscionability requirement because its terms are decidedly oppressive and unfair to Respondent. This Court has signaled its refusal to tolerate arbitration contracts with such extensive discovery restrictions. In Lucey v. Meyer, 401 S.C. 122, 143, 736 S.E.2d 274, 285 (Ct. App. 2012), the court found an employment arbitration contract was not unconscionable, rejecting the "oppressive terms" factor only after finding the contract "places no apparent restrictions on the introduction of depositions of witnesses into arbitration proceedings." The restrictions lacking there are present here. The inescapable reality of the Arbitration Agreement is that Ms. Nanney and Daughter will have no opportunity to conduct depositions. South Carolina's federal district court has found an arbitration contract unconscionable because of "severe discovery limitations." Hooters of Am., Inc. v.

Phillips, 39 F. Supp. 2d 582, 614 (D.S.C. 1998). In Hooters of America, the employer went too far when it limited its employee to noticing one deposition unless the arbitrator found a "substantial need" for more. Id. at 601. The Arbitration Agreement poses a far more restrictive view of discovery by excluding all depositions. Several rulings from other jurisdictions have likewise refused to allow nursing homes to shut their former residents out of discovery.[7]

Appellants may argue a zero-discovery process is acceptable because it applies with equal force to Appellants. This argument fails for multiple reasons. First, an arbitration proceeding amounting to trial by ambush is hardly consistent with the South Carolina Rules of Alternative Dispute Resolution the Arbitration Agreement purports to incorporate. See Rule 1, SCADR (stating that arbitration "shall be construed to secure the *just*, speedy, inexpensive *and collaborative* resolution" of disputes) (emphasis added). Second, while a zero-discovery rule may seem like an equal burden for both sides, its effects are unequally detrimental to a plaintiff in a nursing home case. Nursing home negligence occurs almost exclusively on the nursing home's property, recorded in documents within the home's exclusive control, and performed or witnessed by individuals in the home's employ. If Appellants want to visit the scene, review video of an incident, or speak to the allegedly at-fault individual, they can do so without limitation.

But, without the ability to send a request for production or notice of deposition, Ms. Nanney and Daughter's counsel will have none of this information when the arbitration hearing begins.

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[7] See e.g. Estate of Ruszala v. Brookdale Living Communities, Inc., 1 A.3d 806, 821 (N.J. Super. App. 2010) (limiting plaintiff to expert depositions is "palpably egregious" and "clearly intended to thwart' plaintiffs' ability to prosecute a case involving resident abuse"); Ostroff v. Alterra Healthcare Corp., 433 F. Supp. 2d 538, 540, 545 (E.D. Pa. 2006) (discovery limitations were unconscionable when they allowed expert depositions but barred deposition of NH employees or other fact witnesses); Prieto v. Healthcare & Retirement Corp. of Am., 919 So.2d 531, 533 (Fla. App. 2005) (reversing order compelling arbitration since contract included unconscionable discovery restrictions).

Appellants have no duty to provide documents or to permit inspections. Even attempting to speak with Appellants' employees would present a potential ethical violation. See Rule 4.2, RPC, Rule 407, SCACR. This case shows just how vast the information disparity can be and what a hurdle it poses to a plaintiff's efforts to investigate her claim. Ms. Nanney and Daughter claim part of Appellants' wrongdoing was in failing to protect Ms. Nanney from falls during her admission. (R. p. 29 ¶ 17). A fall resulted in an acute injury to Ms. Nanney, but the Facility did not document any of the details of how the incident occurred. Id. It is imperative Respondent's counsel be permitted to speak with the Facility's employees on duty on the date of injury, but the Arbitration Agreement does not provide any mechanism for doing so

By drafting a contract that prevents discovery, Appellants have made sure Ms. Nanney and Daughter's counsel will have no access to this information and made it far less likely Appellants could face the prospect of punitive damages for alleged reckless misconduct. Finally, the disparity in pre-hearing information is exacerbated further by how South Carolina law required Respondent to initiate the current claims. Pursuant to S.C. Code Ann. § 15-79-125, these claims began not with a Summons and Complaint but rather a Notice of Intent to File Suit which required Respondent to provide an expert affidavit at the earliest possible stage. Thus, Appellants knew the identity of Respondent's expert and an outline of her opinions before the Complaint was even filed. If the Arbitration Agreement is enforced, Ms. Nanney and Daughter will enter the final arbitration hearing known nearly nothing about Appellant's expert witnesses.

In sum, the Arbitration Agreement was an adhesion contract offered to the unauthorized family member of an elderly woman in desperate need of nursing home services under circumstances that deprived her of any meaningful choice. Moreover, the Arbitration Agreement imposes severe discovery restrictions that tilt the arbitration process and outcome dramatically in

Appellants' favor. As several other courts have held, contracts like the Arbitration Agreement are unconscionable.

4. Appellants were not Denied the Opportunity to Conduct Discovery and May Not ask the Courts to Preemptively Rule on Waiver.

Finally, Appellants suggest the circuit court unreasonably tied their hands in discovery and prevented them from accessing essential information to support arbitration.[8] That argument could wield a measure of intuitive heft except that Appellants' right to conduct discovery was never threatened and is not really what they seek here. Instead, what Appellants sought from the circuit court was a prophylactic assurance that choosing to engage in discovery would not later lead the circuit court to find Appellants waived their right to pursue arbitration. This was a request Appellants were not permitted to make.

Neither the procedural rules nor their opponent's conduct prevented Appellants from conducting discovery. Appellants had the right to serve written discovery requests and to notice depositions from the moment Respondent filed her Complaint with the Spartanburg 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).[9] The rules specifically provide that a party need not seek a court's permission before serving discovery requests. Rule

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[8] Regardless of the justiciability issues and substantive flaws discussed below, the Court should dismiss this argument 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).

[9] In fact, in this instance Appellants had the right to seek discovery requests *before* the complaint was filed. See S.C. Code Ann. § 15-79-125(B) (allowing parties to medical malpractice claims to serve subpoenas during pre-filing "notice of intent" stage of the litigation).

33(a), SCRCP; Rule 34(b), SCRCP. Plus, it is not as if Appellants tried and failed or were somehow thwarted in seeking information. The record contains no discovery requests Respondent ignored and no subpoenas to which she objected. Appellants lack the information they claim now to need only because Appellants never asked for it.

Appellants' brief hints that they do not really contest that it was fully within their power to obtain information from Respondent or others before moving to compel arbitration. Instead, Appellants' concerns relate to the possible consequences of pursuing discovery. Appellants' Br. at 28 (noting Appellants' fear of "being vulnerable to [Respondent's] argument that it waived its arbitration" claim by engaging in discovery). South Carolina law holds that a party waives 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 Appellants now calls their request for discovery was actually an improper effort to eliminate their uncertainty at Respondent's expense. Appellants sought assurances from the circuit court that choosing to conduct discovery would not expose them to a waiver argument. This request does not present an issue any court could resolve in Appellants' favor. No 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. 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). Justiciability specifically considers a party's eligibility for pursuing the claim as well as the suitability of the dispute for resolution. Courts may not address claims that are unripe, moot, or seek an advisory opinion. Jowers v. S.C. Dep't of Health & Envtl. Control, 423 S.C. 343, 815 S.E.2d 446 (2018).

Here, Appellants lacked standing to assert a discovery argument that was both unripe and sought an advisory opinion. Appellants argue they were denied their "request" for discovery (Appellants' Br. at 26-28) but they lack standing to assert this claim. Under South Carolina law, standing may be acquired 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). Appellants cannot meet those requirements for their 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)). Appellants have not suffered any concrete and particularized injury. The rules authorized the precise action—serving discovery requests—Appellants claim they were denied. Rules 30(a)(1), 33(a), and 34(b), SCRCP. Appellants cannot claim to be injured by their own decision to forego a right the law unconditionally provided.

Appellants also cannot meet the remaining constitutional standing requirements. There is no causal connection between the proposed injury (i.e. a lack of discovery) and either Respondent's conduct or the circuit court's order. Neither denied Appellants the right to conduct discovery before filing their motion to compel arbitration. Nor can Appellants meet the redressability requirement. Given the rules' repeated statements that discovery requests may be made "without leave of court,"[10] it is not at all clear it would ever be appropriate for a party in Appellants' position to ask a circuit court to grant leave to conduct discovery.

When the true nature of Appellants' request is revealed, other justiciability issues arise. In one portion of their brief, Appellants admit it was their fear of the potential consequences, not any conduct by the Facility or any ruling by the circuit court, that kept Appellants from exercising their discovery rights. Appellants' Br. at 28 (noting Appellants' fear of "being vulnerable to" waiver argument); at 29 (claiming that to conduct discovery was undesirable to Appellants because they would "risk[] waiving" an arbitration argument). Nothing in Appellants' request to the circuit court was about getting discovery they were allegedly denied; it was all about making Appellants more comfortable in opposing any argument of waiver by seeking assurance from the circuit court that conducting some amount of discovery would not amount to waiver.

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 Appellants sent their first discovery request. A claim is not ripe if it is "contingent, hypothetical, or abstract." 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, Appellants would have to conduct whatever discovery they planned, file a later motion to compel arbitration, and then Respondent could raise

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

a waiver argument citing prejudice Appellants' discovery course may have caused her. Without those progressions in the litigation, the circuit court could have no basis to rule on the future viability of Respondent's potential waiver argument. Alternatively, Appellants' discovery argument may have been an attempt to get some guidance from the circuit court on just how far they could go in discovery before seriously risking waiver. But, 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); Dodge v. Dodge, 332 S.C. 401, 420, 505 S.E.2d 344, 354 (Ct. App. 1998). In other words, the waiver issue was not only unripe, Appellants 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).

Beyond the justiciability flaws, Appellants' discovery argument is incorrect on the merits. Hodge addressed a similar argument, affirming a circuit court's refusal to compel a deposition that would add nothing probative for determining whether a nursing home resident's family member functioned as her agent. 422 S.C. at 578, 813 S.E.2d at 310. Moreover, the Facility 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., 416 S.C. at 536, 787 S.E.2d at 495). Thus, the circuit court's findings were all supported by the facts and the law, and the circuit court acted within its discretion in denying Appellants' discovery request.[11]

[11] Regarding Appellants' Issue No. 3, Respondent disagrees with Appellants' suggestion that the circuit court's order purports to resolve Appellant Winn's separate motion to dismiss but does not oppose the notion that Ms. Winn is entitled to a ruling on the motion's merits.

CONCLUSION

Based on the arguments stated above, Respondent respectfully requests the Court affirm the circuit court's order denying Appellants' motion to compel arbitration. Ms. Nanney never agreed to the Arbitration Agreement and Son lacked legal authority to bind her to arbitration. Additionally, Appellants' request for discovery was flawed on its merits and presented a non-justiciable request the circuit court correctly denied.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

RECEIVED
Oct 29 2020
SC Court of Appeals

Grace Gilchrist Knie, Circuit Court Judge

Appellate Case No. 2020-000500

Betty Nanney, by and through her Attorney-in-Fact, Leslie Nanney, …………….. Respondent

v.

THI of South Carolina at Spartanburg, LLC, d/b/a Magnolia Manor-Spartanburg, Rusty Flathmann, Laura Anne Winn, and Olishia Gaffney, ……………….. Appellants.

CERTIFICATE OF COUNSEL

Pursuant to Rule 211(a), SCACR, Respondent's counsel hereby certifies that her final brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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