

The State of South Carolina
In the Court of Appeals

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Appeal from the Aiken County
Court of Common Pleas
Michael G. Nettles, Circuit Court Judge

SC Court of Appeals

Appellate Case No.: 2020-000584

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, the Place at Pepper Hill, LLC, Pepper
Hill Senior Properties, LLC d/b/a The Place at Pepper Hill.....Defendants,

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

RESPONDENT’S INITIAL BRIEF

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Counter Statement of Issues on Appeal

- I. Whether the circuit court correctly determined that the admission and arbitration agreement was unenforceable?
- II. Whether the circuit court appropriately concluded that Respondent was not equitably estopped from denying the enforceability of the admission and arbitration agreement?
- III. Whether the circuit court correctly determined that Respondent was not a third-party beneficiary as no binding contract existed?
- IV. Whether the circuit court correctly found facts necessary for its determination of Appellants' Motion to Dismiss and Compel Arbitration?

Statement of the Case

On November 12, 2019, Jimmie Foreman, as Personal Representative of the Estate of Katie Dixon (Respondent) filed an action alleging various nursing home entities (Appellants) were negligent in providing nursing home care to Ms. Katie Dixon, who was a resident at Pepper Hill Rehab and Nursing Center (hereinafter “Pepper Hill”) from May 19, 2016, until November 25, 2016. (R. p. ___; Compl. ¶¶ 95, 104). Respondent alleged in his Complaint that as a direct and proximate result of Appellants’ substandard and negligent care, Katie Dixon developed multiple sacral ulcers and contracted sepsis, which ultimately led to her death on November 25, 2016. (R. p. ___; Compl. ¶¶ 104, 105).

On January 21, 2020, Appellants filed a Motion to Dismiss and Compel Arbitration. (R. p. ___; Motion to Dismiss and Compel Arbitration). Appellants also filed a memorandum in support of their motion, which included the following arguments:

(1) the Agreement covering the claim assert[ed] in this suit is binding and enforceable on the [Respondent], who is suing on behalf of Katie Dixon; (2) the [Respondent] is equitably estopped from denying the existence of a valid, enforceable agreement; (3) the decedent was a third-party beneficiary to the Agreement and, thus, arbitration is bound to her estate; (4) the Agreement is governed by the Federal Arbitration Act, which preempts state law; and (5) public policy favors arbitration.

(R. p. ___; Memo In Support, p. 3). The only document Appellants produced in support of their Motion to Dismiss and Compel Arbitration was their admission and arbitration agreement. (R. pp. ___; Memo in Support Exhibit). No other evidence was provided by Appellants.

Respondent filed his Memorandum in Opposition to Appellants’ Motion to Dismiss and Compel Arbitration on February 27, 2020. (R. p. ___; Memo In Opp.). Respondent’s memorandum included the following arguments:

(1) The admission and arbitration agreement is unenforceable because Katie Dixon never signed the admission and arbitration agreement and her daughter – Rhonda Thames – never had authority to execute the document; (2) The admission and

arbitration agreement is an unenforceable adhesion contract; (3) The admission and arbitration agreement is unenforceable because it is unconscionable; (4) Plaintiff should not be equitably estopped from denying the enforceability of the admission and arbitration agreement; (5) Plaintiff cannot be a direct or indirect third-party beneficiary as there was no enforceable contract; and, (6) The Federal Arbitration Act is inapplicable because there was no enforceable contract.

(R. p. ___; Memo in Opp., p. 1). Respondent filed a copy of the admission and arbitration agreement and an affidavit from Rhonda Thames with his memorandum of law in opposition to Appellants' motion. (R. p. ___; Memo In Opp., Ex. A, B). Rhonda Thames was Katie Dixon's biological daughter and the individual who signed Appellants' admission and arbitration agreement. (R. p. ___; Aff. Rhonda Thames).

The circuit court heard the Motion to Dismiss and Compel Arbitration on March 2, 2020. (R. p. ___; Transcript). On March 25, 2020, the circuit court entered an Order Denying Appellants' Motion to Dismiss and Compel Arbitration. (R. p. ___; Order Denying Appellants' Motion to Dismiss and Compel Arbitration). The court held that (1) Appellants' admission and arbitration agreement is unenforceable as Rhonda Thames did not have authority to sign the agreement; (2) Respondent is not equitably estopped from denying the enforceability of the admission and arbitration agreement; (3) Respondent cannot be a third party beneficiary because no valid contract exists; and, (4) The Federal Arbitration Act is inapplicable because no enforceable contract exists. (R. p. ___, Order).

Appellants filed a Motion to Reconsider on March 30, 2020. (R. p. ___; Motion to Reconsider). Appellants' Motion to Reconsider claimed the Order (1) erred in "finding no enforceable contract and that [Appellants] provided no evidence to show that Ms. Thames, the biological daughter of Ms. Dixon, had actual and/or apparently authority" and (2) "erred in finding that [Appellants] failed to provide evidence that Ms. Dixon received a direct benefit under the

contract.” (R. p. ____; Motion to Reconsider, pp. 2, 5). 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).

On April 3, 2020, Appellants timely filed a Notice of Appeal.

Statement of Facts

This appeal is Appellants' attempt to bind Katie Dixon and her estate to an arbitration agreement she did not sign. Katie Dixon was admitted as a resident of Pepper Hill Nursing & Rehab Center on May 19, 2016. (R. p. ___; Admission Agreement). As part of the admission process, Appellants' staff required Katie Dixon's biological daughter—Rhonda Thames—to sign their admission and arbitration agreement. (R. p. ___; Admission Agreement, p. 14). The admission agreement contained an arbitration clause within the document. (R. p. ___; Admission Agreement, p. 13). Katie Dixon never signed the admission and arbitration agreement. (R. pp. ___; Admission Agreement). There is no evidence Katie Dixon ever knew the agreement existed or knew it was signed by Rhonda Thames.

On the date of admission, Appellants presented their admission and arbitration agreement to Rhonda Thames on a “take it or leave it” basis where the terms were non-negotiable and the execution of the document was a necessary precondition to Katie Dixon's admission to Pepper Hill Nursing & Rehab Center. (R. p. ___; Thames Aff., ¶ 7). Rhonda Thames signed Appellants' agreement “solely because [her] mother would not be admitted to the Pepper Hill Nursing Home without [her] signature.” (R. p. ___; Thames Aff., ¶ 9).

Instead of presenting the documents to Katie Dixon, Appellants compelled Rhonda Thames to sign the admission and arbitration agreement on the day of her mother's admission to Pepper Hill Nursing & Rehab Center. (R. p. ___; Thames Aff., ¶ 8). Rhonda Thames is not a lawyer and was not provided an opportunity to speak with legal counsel before signing Appellants' admission and arbitration agreement. (R. p. ___; Thames Aff., ¶ 8). There is no evidence in the record that Rhonda Thames did any act beyond signing the admission and arbitration agreement. (R. p. ___; Admission Agreement, p. 14). Appellants assert but have presented no evidence that Thames provided information regarding Katie Dixon's physician, provided Medicare beneficiary status, or

other payment information. The aforementioned information simply appears in the document, without notation as to whether Thames or the admissions staff filled out those blanks. (R. pp. ___; Admission Agreement).

Katie Dixon died intestate. (R. p. ___; Thames Aff., ¶ 9). Katie Dixon never executed a durable power of attorney, healthcare power of attorney, or any other document providing Rhonda Thames with authority to enter into contracts, agreements, or any other documents related to healthcare decisions. (R. p. ___; Thames Aff., ¶ 9).

A brief review of Appellants' admission and arbitration agreement demonstrates that Katie Dixon never signed or initialed the documents. (R. p. ___; Admission Agreement, p. 14). There is no evidence that Katie Dixon was ever presented or was aware of the admission and arbitration agreement. No medical evidence has been presented establishing that Katie Dixon lacked mental capacity on May 19, 2016.

Following her admission, Katie Dixon was the victim of substandard and negligent care. (R. p. ___, Compl. ¶¶ 95-104). Respondent alleges that between July 5, 2016 and November 15, 2016, Katie Dixon developed multiple sacral pressure ulcers, which contributed to the development of sepsis and led to her death. (R. p. ___, Compl. ¶¶ 103-105). A review of Katie Dixon's medical chart reveals multiple late nursing and wound care charting entries that specifically reference skin and wound care treatment as proof of Appellants' substandard and negligent care. (R. p. ___, Compl. ¶ 102).

Respondent filed the Summons and Complaint in this matter on November 12, 2019. Respondent's allegations were based on general negligence and general tort duties owed by Appellants to each resident. (*See* R. p. ___, Compl.). Respondent's Complaint does not rely or mention Appellants' admission and arbitration agreement. (*See* R. p. ___, Compl.).

Appellants then moved to dismiss and compel and compel arbitration. (R. p. ___; Motion to Dismiss and Compel Arbitration). In support of that motion, Appellants only submitted the admissions and arbitration agreement. The circuit court denied that motion and subsequent motion to reconsider. (R. p. ___; Form 4 Order Denying Motion to Reconsider). This appeal followed as Appellants seek to bind Ms. Dixon and her estate to arbitration agreement that she did not sign.

Standard of Review

The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise. *Zabinski v. Bright Acres Assocs*, 346 S.C. 580, 596, 533 S.E.2d 110, 118 (2001). A circuit court's order denying arbitration is immediately appealable. *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 121, 747 S.E.2d 461, 464 (2013). "Arbitrability determinations are subject to de novo review." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 47, 790 S.E.2d 1, 3 (2016). "However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.* at 48, 790 S.E.2d at 3. *See also, York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013). While public policy may at times favor arbitration of disputes, "a party cannot be required to submit to arbitration any dispute he has not agreed to submit." *Int'l Paper Co. v. Scwabedissen Mashinen & Anlagen GMBHI*, 206 F.3d 411, 416 (4th Cir. 2000). Ultimately, arbitration "is a matter of consent, not coercion." *Volt Information Scis., Inc. v. Bd. Of Trs. Or Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

Arguments

The primary issue in this appeal is whether Rhonda Thames had authority to bind Katie Dixon's estate to an arbitration agreement. The circuit court correctly held she did not and that the alleged claims are not subject to arbitration. The estate is not bound by the terms of the arbitration clause because, among other reasons, Katie Dixon did not sign the agreement. Her daughter, who lacked authority, signed the contract. Thus, the claims brought by the estate are not required to be arbitrated, as Katie Dixon did not consent to arbitration and Rhonda Thames lacked authority to bind Kate Dixon to arbitration. No claim is brought to enforce the contract, the estate is not a third-party beneficiary to the contract, and the estate cannot be estopped from arguing the arbitration provision is unenforceable. The circuit court properly reviewed the arguments of the Appellants and correctly decided not to compel arbitration.

I. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE ADMISSION AND ARBITRATION AGREEMENT WAS UNENFORCEABLE.

The circuit court correctly held that Katie Dixon was not bound by the admission and arbitration agreement because there was not sufficient evidence or clearly established facts of an express or implied agency relationship between Katie Dixon and Rhonda Thames. (R. ____, Order, p. 2). Agency may only be established with clear evidence of actual or apparent authority conferred by the principal on the alleged agent. *Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). The party asserting an agency relationship has the burden of proof. *Pee Dee Nursing Home, Inc. v. Florence Gen. Hosp.*, 309 S.C. 80, 85, 419 S.E.2d 834, 837 (Ct. App. 1992). The burden is not to make a mere prima facie showing but rather to show that agency is "clearly established by the facts." *Id.* South Carolina law imposes this weighty burden because a person dealing with an alleged agent has a legal duty of due care to determine the scope of the perceived agent's authority. *Id.* (citing *McCall v. Finley*, 294 S.C. 1, 362 S.E.2d 26 (Ct. App. 1987)).

In South Carolina, there is no presumption of agency between family members. *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 565, 813 S.E.2d 292, 304 (Ct. App. 2018)(quoting *Bankers Tr. of S.C. v. Bruce*, 283 S.C. 408, 423, 323 S.E.2d 523, 532 (Ct. App. 1984)) (“The relationship of agency between a husband and wife is governed by the same rules which apply to other agencies[,] . . . [and] no presumption arises from the mere fact of the marital relationship.”). “The existence of an agency relationship is . . . determined by the relation, the situation, the conduct, and the declarations of the party sought to be charged as principal.” *Id.*(quoting *Langdale v. Carpets*, 395 S.C. 194, 201, 717 S.E.2d 80, 83 (Ct. App. 2011)). “[A]n agency may not be established solely by the declarations and conduct of an alleged agent.” *Id.*(quoting *Cowburn v. Leventis*, 366 S.C. 20, 39-40, 619 S.E.2d 437, 448 (Ct. App. 2005)).

A. Rhonda Thames Did Not Have Actual Authority To Enter Into The Agreement On Katie Dixon’s Behalf.

Because the record does not contain clearly established facts demonstrating that Katie Dixon granted her daughter actual authority, the circuit court appropriately concluded Rhonda Thames lacked actual authority to sign the admission and arbitration agreement on behalf of Katie Dixon. Appellants bear the burden of establishing all required elements to prove an agency relationship. *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996). Appellants had the duty to ascertain the scope, if any, of the purported agent with whom they dealt. *Id.* 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. Savs. & Loan Ass’n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145, 425 S.E.2d 764, 733 (Ct. App. 1992) (citing Restatement (Second) of Agency § 1 (1958)).

In *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, the South Carolina Court of Appeals reviewed the circuit court’s denial of a nursing home’s motion to compel arbitration where

a husband signed the nursing home’s admission and arbitration documents when his wife was competent at the time of admission. *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 550, 813 S.E.2d 292, 296-97 (Ct. App. 2018). The nursing home “argued the evidence showed [the wife] authorized [the husband] to sign on her behalf and they had an actual or apparent agency relationship” and he “was authorized to act on her behalf by ‘allowing’ him to procure her admission to the . . . [nursing home].” *Hodge*, 422 S.C. at 573, 813 S.E.2d at 308. The *Hodge* Court ultimately concluded that the husband’s “signing of the [a]rbitration [a]greement, [a]dmissions [a]greement, and other forms [did] not make him his [wife’s] agent.” *Id.*, 422 S.C. at 573-74, 813 S.E.2d at 308. In finding there was no actual authority, *Hodge* noted that the nursing home was unable to produce evidence that the wife granted any express authority to her husband, the wife was competent during the admission process, and the wife did not have a health care power of attorney. *Id.*

As in *Hodge*, Appellants inappropriately directed a family member to sign the admission and arbitration documents when the resident had mental capacity. (R. p. ____, Transcript of Hearing, pp. 7:20-8:6; 13:9-14). There is no evidence in the record demonstrating that Katie Dixon lacked capacity. (R. p. ____, Transcript of Hearing, pp. 7:20-8:6; 13:9-14)(when specifically asked about Ms. Dixon’s state of mind, Appellants’ counsel replied: “well, my opposing counsel might have a better idea of that.”). There is also no evidence of Katie Dixon granting express authority to sign the Appellants’ admission and arbitration agreement. There are no documents executed by Ms. Dixon that would confer actual authority to Rhonda Thames; no durable power of attorney, healthcare power of attorney, or other document permitting her daughter to enter into contracts exist. (R. p. ____, Aff. of Rhonda Thames, ¶ 9). Likewise, the record is void of evidence reflecting any action taken by Katie Dixon to confer actual authority upon Rhonda Thames.

Appellants instead make unfounded arguments that Thames had actual authority, asserting Katie Dixon brought Rhonda Thames “apparently for the purpose of signing for her.” (Appellants’ Initial Brief). In support of this argument, Appellants cite to no evidence, instead only citing the following from the hearing transcript “we believe she had capacity and she would have been the appropriate individual, Ms. Dickson [sic], to sign the admission agreement, however, [the admissions nurse and not Katie Dixon] got her biological daughter, and again, this was presented to her on that day on the take it or leave it basis, the terms were not negotiable and further, she’s not a lawyer.” (R. p. _____. Transcript of Hearing at 14:9-15). Likewise, Appellants rely upon the actions of Rhonda Thames, executing the admission and arbitration agreement, and Katie Dixon’s accepting admission as proof of actual authority. These arguments are disingenuous and invalid.

The facts and evidence here are simple; Appellants only presented the admission and arbitration agreement as evidence in support of their motion to compel arbitration. That agreement does not show actual authority. Actual authority is “expressly conferred upon the agent by the principal.” *Richardson v. PV, Inc.*, 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009). Appellants cannot point to any document showing Katie Dixon conferred authority to Rhonda Thames. No such document exists. (R. p. _____. Aff. Rhonda Thames ¶ 9) (“[Katie Dixon] never signed a durable power of attorney or any other document allowing me to enter into contracts or formal agreements. She never signed a healthcare power of attorney.”). Appellants had the burden of proof to establish actual authority through clearly established facts. *Pee Dee Nursing Home, Inc. v. Florence Gen. Hosp.*, 309 S.C. 80, 85, 419 S.E.2d 834, 837 (Ct. App. 1992). They failed to do so. Therefore, the circuit court’s holding that Rhonda Thames lacked actual authority is supported by the record and should be affirmed on appeal.

B. The South Carolina Adult Health Care Consent Act Did Not Confer Authority to Rhonda Thames.

The Adult Health Care Consent Act (“the Act”) did not confer authority to Rhonda Thames and the circuit court properly concluded that Respondent is not bound to the admission and arbitration agreement under the Act’s provisions. The Act’s primary purpose is to identify and authorize individuals to make “decisions concerning . . . health care” on behalf of a person “unable to consent.” S.C. Code Ann. § 44-66-30(A). The Act intends “to insure that the patient’s wishes concerning her medical treatment are honored whenever possible.” *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 353, 755 S.E.2d 450, 454 (2014). The Act expressly limits the decision-making power of an individual to only “health care” decisions. S.C. Code Ann. § 44-66-30(A).

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

In the present case, there is no evidence that Katie Dixon lacked capacity or the ability to sign the admission and arbitration agreement. The record does not reflect and Appellants have not demonstrated that two physicians examined Katie Dixon prior to her admission and certified that she (1) was unable to consent to her own healthcare decisions and (2) was unable to personally sign Appellants’ admission and arbitration agreement. Without the certification of two examining physicians, Appellants’ agreement is not enforceable under the South Carolina Adult Health Care Consent Act. *See Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450

(2014)(quoting S.C. Code Ann. § 44-66-20). Moreover, the Act does not confer authority to waive a patient's right to a jury trial. Its scope is limited to health care decisions. *See generally, Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 353, 755 S.E.2d 450, 454 (2014).

Appellants' reliance on the Bill of Rights for Residents of Long-Term Care Facilities (*See* R. pp. ___; Appellants' Memorandum in Support) was likewise unfitting as S.C. Code Ann. § 44-81-10 et. seq. confers no authority on family members or next of kin to execute contracts or make healthcare decisions. *Compare* S.C. Code Ann. § 44-66-20 (providing that when a person is unable to consent, certain persons may be able to make healthcare decisions on their behalf), *with* S.C. Code Ann. § 44-81-40 (requiring notice be sent to resident and representative). In the present matter, the South Carolina Adult Health Care Consent Act provides the governing authority and guidelines as to when family members may execute documents concerning health care decisions. *See* S.C. Code Ann. § 44-66-20. Its competency determination requirements were not met, and thus the Act does not apply.

Because there is no evidence in the record that Katie Dixon lacked the requisite capacity to sign the admission and arbitration agreement, Rhonda Thames had no authority to sign that agreement under the South Carolina Adult Health Care Consent Act. Respondent respectfully requests this Court affirm the order of the circuit court on this issue.

C. The Record Does Not Reflect Any Clearly Established Facts Proving That Rhonda Thames Had Apparent Authority To Enter Into Any Agreement.

Appellants have failed to produce sufficient evidence establishing the necessary elements of apparent authority. Apparent authority is based on “. . . representations made by the principal to [a] third party and reliance by the third party on those representations.” *Young v. S.C. Dept. of Disabilities & Special Needs*, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). “Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he

should realize that his conduct is likely to create such belief.” *Thompson v. Pruitt Corp.*, 416 S.C. 43, 55, 784 S.E.2d 679, 685 (Ct. App. 2016)(quoting *Froneberger v. Smith*, 406 S.C. 37, 47, 748 S.E.2d 625, 630 (Ct. App. 2013)).

The burden of establishing agency is upon the party asserting a principal-agent relationship exists. *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996). “It is the duty of the one dealing with the agent to use due care to ascertain the scope of the agent’s authority.” *Justus v. Universal Credit Co.*, 189 S.C. 487, 495, 1 S.E.2d 508, 511 (1939). The party seeking to establish apparent authority must prove “. . . (1) the purported principal consciously or impliedly represented another to be his agent; (2) the proponent relied on the representation; and (3) there was a change of position to the [proponent’s] detriment.” *Thompson*, 406 S.C. at 54, 748 S.E.2d at 685 (quoting *Froneberger v. Smith*, 406 S.C. 37, 47, 748 S.E.2d 625, 630 (Ct. App. 2013)). South Carolina law states that an agency relationship cannot be established solely by the words and actions of the purported agent. *Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). “The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent, but on that between the principal and the third party.” *R&G Constr., Inc. v. Lowcountry Reg’l Transp. Auth.*, 343 S.C. 424, 432-33, 540 S.E.2d 113, 118 (Ct. App. 2000)(citing *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991)). None of the authorities cited by Appellants dispute this principle. However, the only evidence Appellants presented was the admission and arbitration agreement containing a single signature of Rhonda Thames. Appellants offered no affidavits or other evidence as to statements, representations, writings, or actions of Katie Dixon, the purported principal.

Thus, in the present case, there is no evidence that Katie Dixon consciously or impliedly made any representations to Appellants' staff that Rhonda Thames was her agent for purposes of executing the admission and arbitration agreement. Appellants were required to determine the scope of any agent's authority. There is no evidence that Katie Dixon made any representations to the Appellants, was ever aware of the execution of the admission and arbitration agreement or knew of its existence. In fact, there is no evidence that Katie Dixon was present during the signing of the contract or that Appellants had any dealing with Katie Dixon during that process. Appellants argue that Katie Dixon being accompanied by Rhonda Thames, allowing Rhonda Thames to sign paperwork, and staying at the facility conferred authority. (Appellants' Brief pp. 6-8). This is erroneous and insufficient as a matter of law. The fact Rhonda Thames accompanied Katie Dixon is of no consequence. Appellants have presented no evidence that Dixon expected, asked, or conferred authority to Thames to do anything more than accompany her to the nursing home during the process. Likewise, Appellants have presented no evidence that Katie Dixon was aware of the agreement or had any knowledge that it was signed by Thames. Her remaining at the facility, therefore, could also not be acquiescence to the terms of the agreement, as there is no evidence she even knew it existed. Without proof of representations made by Katie Dixon as to Rhonda Thames' authority, Appellants' admission and arbitration agreement is not enforceable under a theory of apparent agency because the necessary elements have not been satisfied. *Thompson*, 406 S.C. at 54, 748 S.E.2d at 685 (quoting *Froneberger v. Smith*, 406 S.C. 37, 47, 748 S.E.2d 625, 630 (Ct. App. 2013)).

Nevertheless, and despite the law cited by Appellants stating that principal representations determine apparent authority, they rely upon unsupported claims that Rhonda Thames identified Dixon's attending physician, checked a box regarding Medicaid payments, signed the agreement,

and has not denied authority to execute the agreement. Beyond the fact that these claims cannot satisfy the elements of apparent authority, Appellants have also offered no proof as to who provided information about Ms. Dixon’s physician or how that physician is related to facility. Instead, they conclusively state that Rhonda Thames provided that information but without evidence of such. Additionally, Rhonda Thames specifically notes in her affidavit that Katie Dixon never signed any document conferring upon her the authority to execute the admission and arbitration agreement. (R. p. _____. Aff. Rhonda Thames ¶ 9).

In essence, Appellants have failed to meet their burden to prove actual or apparent agency through clearly established facts. In support of their claims, they rely solely on the admission and arbitration agreement, which is insufficient to establish agency. Because Appellants failed to produce sufficient evidence of clearly established facts from which the circuit court could determine Rhonda Thames had actual or apparent authority to execute the admission and arbitration agreement on Katie Dixon’s behalf, the court properly found no agency relationship existed. Respondent respectfully requests this Court to affirm.

II. THE CIRCUIT COURT APPROPRIATELY CONCLUDED THAT RESPONDENT WAS NOT EQUITABLY ESTOPPED FROM DENYING THE ENFORCEABILITY OF THE ADMISSION AND ARBITRATION AGREEMENT.

The circuit court correctly decided Respondent is not equitably estopped from denying the enforceability of the arbitration agreement. Appellants assert the circuit court erroneously conflated direct benefits estoppel with a traditional estoppel analysis. This is untrue, as the court specifically found Appellants “failed to produce sufficient evidence that Mrs. Dixon received a direct benefit under their contract.” (R. p. ___; Order Denying Appellants’ Motion to Dismiss and Compel Arbitration). Moreover, direct benefits estoppel is not a distinct form of estoppel, but instead a simple framework for applying estoppel arguments to arbitration disputes. *Wilson v. Willis*, 426 S.C. 326, 339-340, 827 S.E.2d 167, 174-175 (2019). In either case, however, Appellants’

arguments are unsuccessful, as Respondent is not estopped under either framework, as explained below.

A. Appellants Are Unable To Satisfy The Elements Of Direct Benefits Estoppel.

Appellants cannot satisfy the elements of direct benefits estoppel. South Carolina recognizes that “[w]hen ‘a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine [of equitable estoppel] estops the non-signatory from claiming that he is not bound to the arbitration agreement when he receives a “direct benefit” from a contract containing an arbitration clause.’” *Thompson v. Pruitt Corp.*, 416 S.C. 43, 59, 784 S.E.2d 679, 688 (Ct. App. 2016). In the arbitration realm, direct benefits estoppel “estops a nonsigner from refusing to comply with an arbitration provision of a contract if (1) the nonsigner’s claim arises from the contractual relationship, (2) the nonsigner has exploited other parts of the contract by reaping its benefits, and (3) the claim relies solely on the contract terms to impose liability.” *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 231, 847 S.E.2d 268, 272 (Ct. App. 2020) (citing *Wilson v. Willis*, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019)). “Direct benefits estoppel is not implicated simply because a claim relates to or would not have arisen but for a contract’s existence.” *Id.* at 230-231, 847 S.E.2d at 172.

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

[The resident] received no benefit from the Arbitration Agreement, equitable estoppel would only apply if documents were merged. The only agreement

from which [the resident] even arguably received a benefit was the Admission Agreement because [the resident] was admitted to the Facility as a result of it. However, because the Facility allegedly caused [the resident's] injuries that later led to her death, we find it difficult to find she benefited even from being admitted. [The residents] are not seeking to enforce the Arbitration Agreement nor have they previously tried to do so. Further, even if the Admission Agreement and Arbitration Agreement merged, because [the residents] are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement. Therefore, the circuit court did not err in finding equitable estoppel did not bar [Plaintiffs'] claims.

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

Appellants assert the *Hodge* conclusion related to estoppel is purely dicta and further argue that this Court did not understand the term “benefit” as it applies to South Carolina direct benefits estoppel. However, this Court recently cited *Hodge* favorably and specifically noted *Hodge* “declin[ed] to apply equitable estoppel against Respondent nonsignatories to arbitration agreement between nursing home and decedent” and cited the same statements noted above. *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 233, 847 S.E.2d 268, 273 (Ct. App. 2020). The *Weaver* Court went further noting the plaintiff had “not ‘attempted to procure any direct benefit’ from the residency agreement ‘while attempting to avoid its arbitration provision.’” *Id.* at 233, 847 S.E.2d at 273-274 (Citing *Wilson*, 426 S.C. at 345, 827 S.E.2d at 177). The same is also true here. Respondent is not seeking to procure any benefit from the contract, has not sued upon the contract, and does not mention the contract in his complaint.

Appellants claim that Respondent should be equitably estopped solely because Katie Dixon was admitted as a resident on May 19, 2016, and remained at Pepper Hill until she died in November of 2016. Appellants have failed to identify sufficient benefits that Katie Dixon received under the admission and arbitration agreement. *See generally, Id.; Hodge*, 433 S.C. at 563, 813 S.E.2d at 302. If this Court accepts Appellants’ position, every resident admitted to a nursing home would be

estopped from denying the enforceability of any admission contract. This would be unfair and inequitable as a general premise.

In essence, the elements of direct benefit estoppel cannot be met in this case. Regarding element one, arising from the contractual relationship, Appellants cannot show these claims arose from a contractual relationship, beyond stating that Katie Dixon would not have been harmed “but for” the contract’s existence. Likewise, they cannot show that Katie Dixon or Respondent in any way “exploited” other parts of the contract. There is no evidence Katie Dixon even knew the contract existed. The only “benefit” she received was substandard care. Lastly and most clearly, Appellants cannot show “the claim relied solely on the contract terms to impose liability.” As noted above, this claim does not rely, to any degree, on the contract terms to impose liability. The claims brought by Respondent sound solely in tort.

Therefore, the circuit court correctly addressed and applied the law to Appellants’ direct benefit estoppel argument and properly declined to estop Respondent from arguing the arbitration provision does not apply. As such, Respondent respectfully requests this Court affirm the circuit court’s ruling on direct benefits estoppel.

B. Appellants Are Unable To Satisfy The Elements Of Traditional Estoppel.

Likewise, Appellants are unable to satisfy the necessary elements of estoppel under a traditional framework. Under South Carolina law, the elements of equitable estoppel are:

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

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

As mentioned above, there has been no evidence that Katie Dixon made any representations to the Appellants or knew that the admission and arbitration agreement ever existed. Appellants have produced no evidence that Katie Dixon concealed material facts, formed any intent as to her conduct towards the Appellants, or had any knowledge as to the existence of the admission and arbitration agreement. *See Thompson*, 416 S.C. at 60, 784 S.C.2d at 688-89 (quoting *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006)). As explained above, Katie Dixon received no “benefits” under the contract.

Therefore, Appellants are unable to assert that Ms. Dixon is equitably estopped from denying the enforceability of the admission and arbitration agreement solely because she was admitted. As in *Hodge*, Appellants cannot claim that she received a direct benefit from being admitted to their facility because Pepper Hill allegedly caused her injuries that later led to her death. (*See* R. p. ____ . Compl.). The Complaint does not reference or mention the admission and arbitration agreement. (*Id.*). Respondent’s allegations are based in tort and are not seeking to enforce or recover under Appellants’ agreement, which is consistent with *Hodge*. 433 S.C. at 563, 813 S.E.2d at 302.

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

Accordingly, this Court should reject Appellants' contention that Respondent is estopped from asserting that the arbitration agreement is not valid. The Court should affirm the circuit court's ruling on this issue.

III. THE CIRCUIT COURT CORRECTLY DETERMINED THAT RESPONDENT WAS NOT A THIRD-PARTY BENEFICIARY AS NO BINDING CONTRACT EXISTED.

As a fallback position, Appellants argue Rhonda Thames entered the admission and arbitration agreement with the nursing home entities and Respondent is bound to the agreement, asserting Katie Dixon was a third-party beneficiary. There are three reasons why this court must affirm the circuit court's order refusing Appellants' third-party beneficiary argument: (1) there can be no third-party beneficiary in the absence of a valid contract and there is no valid contract here; (2) Respondent does not seek to enforce the contract; and, (3) even if Rhonda Thames was a party to the arbitration Agreement, Katie Dixon was not a third-party beneficiary to the agreement because the agreement's parties did not intend to benefit her *as a third party*.

A. There Is No Valid Contract To Which Katie Dixon Could Have Been A Third-Party Beneficiary.

Appellants' third-party beneficiary argument must fail because there can be no third-party beneficiary in the absence of a valid contract. *Hardaway Concrete Co., v. Hall Contracting Co.*, 374 S.C. 216, 225, 647 S.E.2d 488, 492 (Ct. App. 2007). "A third-party beneficiary is a party that the contracting parties intend to directly benefit." *Thompson v. Pruitt Corp.*, 416 S.C. 43, 57, 784 S.E.2d 679, 687 (Ct. App. 2016)(*quoting Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005)). "However, there can be no third-party beneficiary unless a valid contract exists." *Thompson*, 416 S.C. at 57, 784 S.E.2d at 687 (*citing Dickerson v. Longoria*, 885 A.2d 721, 742 (Md. Ct. App. 2009) ("Before one can enforce a contract, however, whether as a party to the contract or as a third-party beneficiary, there must be a contract to enforce.")). "A

third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the agreement.” *Thompson*, 416 S.C. at 57, 784 S.E.2d at 687.

Since Katie Dixon did not sign the arbitration agreement and Rhonda Thames lacked actual or apparent authority to enter into the admission and arbitration agreement on Katie Dixon’s behalf, there is no contract to arbitrate between Respondent and Appellants. Correspondingly, the evidence also shows there was no valid contract between Rhonda Thames and Appellants. Appellants did not intend for Thames to be a party to the admission and arbitration agreement in her individual capacity. Throughout the admission and arbitration agreement, Thames is identified only as “representative” or “Responsible Party,” never in her individual capacity. (R. pp. ___; Admission Agreement). The only language relating to Thames’ duties under the purported contract is a subheading titled “Obligations or Representative” which only provide that the Representative acknowledges her duties and responsibilities as representative, which are not further defined. (R. p. ___; Admission Agreement, p. 12). There is no contract, thus there can be no third-party beneficiary.

B. Respondent Is Not Attempting To Enforce The Agreement.

Because Respondent is not attempting to enforce the agreement, the estate cannot be bound to the admission and arbitration agreement as a third-party beneficiary. “[A] third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement.” *Thompson*, 416 S.C. at 57, 784 S.E.2d at 687 (citing *Dickerson v. Longoria*, 995 A.2d 721, 736-37 (Md. Ct. App. 2010)). Here, Respondent has asserted no claims to enforce the contract and has alleged no violation of the terms of the contract. (R. pp. ___; Complaint). Because Respondent is not

attempting to enforce the contract, even if Katie Dixon was a third-party beneficiary, Respondent cannot be required to arbitrate on that basis.

C. Appellants Did Not Intend For Katie Dixon To Benefit From The Arbitration Agreement As A Third Party.

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

When the admission and arbitration agreement was presented to Rhonda Thames on the day of admission, Appellants intended to make Katie Dixon a party to the contract. As discussed above, this was not done successfully, as they failed to obtain the assent of Katie Dixon, and Thames lacked authority to act on Dixon's behalf. Appellants only seek to deem Katie Dixon a third-party beneficiary because their efforts to deem her a party to the contract have been unsuccessful. Appellants intent to make Katie Dixon a party to the contract means they cannot prove a material element required to bind Respondent to the agreement as a third-party beneficiary. *See e.g., Dickerson v. Longoria*, 995 A.2d 721, 742 n. 21 (Md. Ct. App. 2010) (rejecting nursing home's third-party beneficiary argument when combined with home's attempt to bind resident to

contract as party and findings “inconsistency belies [home’s] arguments”). Because Katie Dixon was not an intended third-party beneficiary, the admission and arbitration agreement cannot be enforced on that theory. Therefore, the circuit court correctly held Katie Dixon was not a third-party beneficiary to the contract and appropriately refused to enforce the purported agreement on that basis.

IV. THE CIRCUIT COURT CORRECTLY FOUND FACTS NECESSARY FOR ITS DETERMINATION OF APPELLANTS’ MOTION TO DISMISS AND COMPEL ARBITRATION.

The circuit court’s fact finding was both procedurally and factually correct and supported by the record. As a threshold note, Appellants take a contradicting approach in their objections to the facts noted in circuit court’s order denying their motion to compel arbitration. Appellants argue they were prejudiced in some way by the findings of the court, while also arguing the findings were premature and not relevant to the legal findings of the circuit court. Likewise, Appellants argue the findings were disputed and were made without sufficient discovery, while also referring to evidence and the transcript to support their arguments.

Contrary to the argument of the Appellants, the circuit court did not issue a “premature grant of summary judgment as to material issues.” (Appellant Brief p. 20). The court simply viewed the facts presented to it for the purpose of the then pending motion. Appellants had the same opportunity as Respondent to acquire and present affidavits and other supporting documents in support of their motion. They failed to present any evidence beyond the agreement itself. Correspondingly, Appellants failed to raise any objection to the “Facts” section in their Rule 59(e), SCRCF motion to reconsider.

Moreover, the circuit court did not engage in extensive fact finding, instead, the court simply included in its order less than one page noting:

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

Prior to May 19, 2016, Rhonda Thames was never provided a copy of [Appellants'] admission and arbitration agreement. She was presented [Appellants'] admission and arbitration agreement for the first time on May 19, 2016 on a "take it or leave it basis" where the terms were not negotiable and the execution of the document was a necessary precondition to her mother's admission to Pepper Hill Nursing & Rehab Center. Ms. Thames was provided the agreement without any meaningful choice, and she was not provided with an opportunity to discuss the significance of the agreement with a lawyer. Rhonda Thames is not an attorney, and she did not understand the meaning of arbitration on May 19, 2016.

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

(R. p. ___; Order Denying Appellants' Motion to Dismiss and Compel Arbitration). The court did not rule on summary judgment and did not grant summary judgment; its simply viewed the evidence presented to it and ruled based on that evidence. The court's conclusions as to the facts, as presented, are supported by sufficient evidence. Appellants did not dispute these facts and presented no evidence contrary to these facts.

To address the concerns specifically noted by Appellants, the court's statement that Ms. Thames was presented the admission and arbitration agreement 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 is supported by Rhonda Thames affidavit. (R. p. ___; Thames Aff., ¶ 7). When asked by the circuit court "I imagine someone probably said sign here, sign here. What do you think"? Counsel for Appellants was unable to point to any

contrary evidence in the record beyond noting Thames “had to fill out Medicare Beneficiary information.”¹ (R. p. ___; Transcript of Hearing at 21-22).

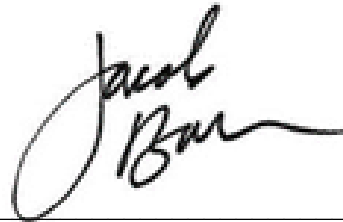
Correspondingly, Ms. Thames stated in her affidavit that “the terms were not negotiable,” which supports the court’s statement that “Ms. Thames was provided the agreement without any meaningful choice.” Appellants have never disputed or presented any evidence to the contrary, instead only noting that Katie Dixon could have gone to different facility. The same is true for the court’s statement that “Ms. Thames was provided with the agreement without an opportunity to discuss the significance with a lawyer.” Finally, the court noted Ms. Thames did not understand the meaning of arbitration on May 19, 2016. She stated such in her affidavit and no evidence to the contrary was presented by the Appellants. In fact, on the whole, Appellants did not oppose the fact determinations of the circuit court, as they presented little evidence and made no arguments as to the facts; however, they now dispute the facts for first time in this appeal. In essence, the court made a short statement of the facts as viewed for purposes deciding the Appellants’ motion. Those facts were based upon the affidavit presented to it, and Appellants presented no contrary evidence. Therefore, this court should affirm.

¹ Appellants have presented no evidence to support their argument that Thames, and not a nursing home representative, filled in this information.

Conclusion

Based on the arguments stated above, Respondent respectfully requests this Court affirm the circuit court's denial of Appellants' Motion to Compel Arbitration in its entirety and remand this matter for trial by jury. Katie Dixon did not sign the admission and arbitration agreement and Rhonda Thames lacked authority to do so. The circuit court correctly concluded the same and correctly rejected the Appellants' secondary and tertiary arguments. Therefore, the circuit court's ruling should be affirmed.

November 12, 2020



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The State of South Carolina
In the Court of Appeals

Appeal from the Aiken County
Court of Common Pleas
Michael G. Nettles, Circuit Court Judge

RECEIVED
Nov 12 2020
SC Court of Appeals

Appellate Case No.: 2020-000584

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, the Place at Pepper Hill, LLC, Pepper
Hill Senior Properties, LLC d/b/a The Place at Pepper Hill.....Defendants,

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

Proof of Service

The undersigned hereby certifies that on November 12, 2020, he served counsel for Appellants with Respondent’s *Initial Brief* and *Designation of Matters to be Included in the Record on Appeal* by emailing a copy of the same to Mark V. Gende, Esq. and Brandon Robert Gottschall, Esq. to their respective email addresses as maintained in the Attorney Information System, pursuant to the Supreme Court’s Amended Order Re: Operation of the Appellate courts During the Coronavirus Emergency section (g)(3).

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November 12, 2020



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November 12, 2020

VIA OneDrive Only

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter St.
P.O. Box 11629
Columbia, South Carolina 29211

RECEIVED

Nov 12 2020

SC Court of Appeals

Re: Jimmie Foreman v. Shiloh Management Company, Inc.
Appellate Case No.: 2020-000584

Dear Ms. Kitchings:

Submitted with this letter please find the following documents for filing regarding the above referenced matter:

1. Respondent's Initial Brief;
2. Respondent's Designation of Matters to be Included in the Record on Appeal;
3. Proof of Service.

Thank you for your assistance in this matter.

Very truly yours,

James D. George, Jr.
jgeorge@csa-law.com
(803) 929-3600

Enclosures

cc: Mark V. Gende
Brandon R. Gottschall