THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2020-001117

Teresa Dalton, as Personal Representative of the Estate of Ethel Ruckart, …….. Respondent

v.

Mount Pleasant Manor, LLC and, Bruce White, …….. Appellants.

RESPONDENT'S FINAL BRIEF

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COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether Ms. Ruckart's ("Mother") Health Care Power of Attorney, which was limited to actions "necessary" for "health care" decisions, empowered Ms. Dalton ("Daughter") to execute the Arbitration Agreement which, by, its express terms, was not necessary for Mother's admission to Appellants' nursing home or receipt of nursing home services.

2. Whether Appellants can meet their burden to apply equitable estoppel by demonstrating Mother/Respondent have "knowingly exploited" the Arbitration Agreement in filing tort claims against Appellants based on common law principles rather than any contractual provisions.

3. Whether Mother could be an intended third-party beneficiary of the Arbitration Agreement for which she lacked capacity to consent and that was independently invalid.

4. Whether Appellant White may enforce the Arbitration Agreement he did not sign when the Arbitration Agreement's terms limit arbitration to disputes between its "parties."

5. Whether the Federal Arbitration Act "mandates" enforcement of the Arbitration Agreement when the parties' dispute centers on core issues of contract formation.

STATEMENT OF THE CASE

Pursuant to Rule 208(b)(2), SCADR, Respondent does not object to Appellants' "Statement of the Case."

STATEMENT OF THE FACTS

In late-January and early-February 2018, Ethel Ruckart ("Mother") was admitted to Mount Pleasant Manor ("the Facility"), a skilled nursing facility operated by Appellant Mount Pleasant Manor, LLC and managed by Appellant Bruce White as the Facility's administrator. (R. p. 11 ¶¶ 2-5; R. p. 17 ¶ 28). Mother suffered from a number of ailments at the time of her admission including a history of broken bones, osteoporosis, and dementia. (R. p. 84). Mother had been transferred to the Facility from Georgetown Memorial Hospital where she was treated for several days for a urinary tract infection. Id. On January 31, 2018, the Facility presented to Ms. Ruckart's daughter Teresa Dalton ("Daughter") a form contract of adhesion titled "Arbitration Agreement (Optional)." (R. pp. 60-61). Ms. Dalton did not have a guardian or conservator. The Arbitration Agreement purported to require arbitration for claims "now existing or hereafter arising between the parties" related to Mother's stay at the Facility. (R. p. 60). Along with the express statement in its title that its execution was "optional," the Arbitration Agreement (drafted solely by the Facility) went on to state:

> The Resident or Representative acknowledges that this Arbitration Agreement is optional and the Resident's admission, readmission, or the continuation of his or her residence at the Facility is in no way conditioned upon entering into this Arbitration Agreement.

Id. The Arbitration Agreement was signed by Daughter on a line labeled "Resident Representative." (R. p. 61).

Daughter had no power to act on Mother's behalf beyond that granted by a "Health Care Power of Attorney and Advance Directive Regarding a Natural Death" ("HCPOA") Mother executed in September 2013 in North Carolina. The HCPOA designated Daughter as Mother's "health care agent" for the limited purpose of making "health care decisions." (R. p. 77). Later, the HCPOA reiterated Mother authorized Daughter only "to make decisions for me regarding my health care." (R. p. 78 ¶ 4). By its explicit terms, the HCPOA did not allow Daughter to do anything in Mother's stead that was not "necessary" for her health care. (R. p. 78 ¶ 4(H)). Mother expressly stated Daughter was not granted general authority over Mother's "property or financial affairs." Id. One day later (February 1, 2018) at a different sitting, the Facility presented Daughter with the "Admission Agreement" stating the nursing/medical services Appellants offered and Mother's obligation to pay for those services. (R. pp. 62-75). Daughter signed the Admission Agreement on the line designated for the "Resident Representative" and checked a box indicating Daughter was acting in the capacity of Mother's power of attorney when signing the Admission Agreement. (R. p. 75).

Shortly after her admission, Ms. Ruckart developed skin tears on her legs that were allegedly left untreated resulting in an infection and Ms. Ruckart's eventual death on May 21, 2018. (R. p. 17 ¶¶ 29-30; R. p. 205). Daughter, in her role as personal representative of Mother's estate ("Respondent"), initiated this action on August 2, 2019, by filing a Notice of Intent to File Suit and later a Summons and Complaint on March 4, 2020. The Complaint alleged a wrongful death and survival action with claims for negligence, negligence per se, fraud/misrepresentation, and violation of the South Carolina Unfair Trade Practices Act. Specifically, Respondent alleged Appellants violated state regulations and common law nursing standards in planning for Mother's care, monitoring her condition, and responding to her injuries. (R. pp. 19-20 ¶ 40). Appellant White

was included as a defendant since Mother's injuries were also the result of supervisory failures in hiring, supervising, and training the Facility's employees. Id.

One month after answering the Complaint, Appellants filed a motion to compel arbitration and to stay state court proceedings on May 1, 2020. Relying on the Arbitration Agreement Mother did not sign, Appellants argued Respondent must arbitrate rather than litigate Mother's claims. The circuit court denied the motion, finding Daughter's limited authority under the HCPOA did not empower her to enter the Arbitration Agreement on Mother's behalf and that extensive South Carolina precedent rejected Appellants' estoppel and third-party beneficiary arguments. (R. pp. 2-10).

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.

ARGUMENT

As the circuit court stated, Appellants' motions presented a contract formation question. (R. p. 8). The parties agree Mother did not sign the Arbitration Agreement but dispute whether

Daughter's signature is the equivalent of Mother's consent so as to require arbitration for claims arising from Mother's injuries. The only authority Daughter possessed was pursuant to the HCPOA, a limited instrument that did not empower Daughter to waive Mother's right to a jury trial. Appellants' alternative argument that Mother's admission itself estops her from contesting arbitration assumes a merger of the Arbitration Agreement and Admission Agreement that South Carolina precedent has rejected multiple times in similar cases. Appellants also overlook important precedent from earlier this year holding that a nursing home resident's family pursuing negligence claims is not the type of conduct that supports estoppel even when arbitration and admission are covered by the same contract. In short, while the FAA favors arbitration, it does not displace South Carolina's contract formation requirements, and the circuit court correctly held Appellants have failed to prove a valid arbitration contract.

1. Mother's Health Care Power of Attorney Did Not Authorize Daughter to Execute the Arbitration Agreement.

Appellants contend Daughter was expressly authorized to act as Mother's agent when signing the Arbitration Agreement. (Appellants' Br. at 6-12). However, the instrument Appellants cite for this alleged authority—the HCPOA—designates Daughter only as "health care agent" and constrains her authority to "health care decisions." (R. p. 77). The circuit court correctly determined the HCPOA's language does not extend Daughter's authority to an arbitration contract that concerns only future dispute resolution procedures, not any medical or nursing services Appellants offered. Moreover, South Carolina statutes and precedent hold that the term "health care" cannot be stretched so far as to include the Arbitration Agreement.

a. The HCPOA's Language Limits its Scope to "Health Care" Decisions.

The HCPOA's language expressly states Daughter's limited authority and did not grant her power to sign the Arbitration Agreement on Mother's behalf. Under South Carolina law, an action

to interpret a power of attorney is similar to a contract interpretation action. Watson v. Underwood, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014). Accordingly, contract interpretation principles apply to determine the HCPOA's scope. Stott v. White Oak Manor, Inc., 426 S.C. 568, 577, 828 S.E.2d 82, 87 (Ct. App. 2019) (citing In re Thames, 344 S.C. 564, 571, 544 S.E.2d 854, 857 (Ct. App. 2001)). Contracts (and powers of attorney) must be interpreted to carry out their parties' intent as determined primarily by the language they chose in the document itself. A court may not read terms into a contract or power of attorney or infer the parties intended a meaning inconsistent with the language they expressed. Radalytic Labs, Inc. v. Culver, 329 S.C. 380, 383, 495 S.E.2d 782, 784 (1997) (citing Blakeley v. Rabon, 266 S.C. 68, 72, 221 S.E.2d 767, 769 (1976)).

Starting with its title, the HCPOA defines its limited scope. Mother chose to create only a "health care" power of attorney with a specific eye toward her preferences on life-sustaining end-of-life medical treatments ("Advance Directive Regarding a Natural Death"). (R. p. 77). Daughter was appointed not as Mother's general financial or legal representative but only as a "health care agent . . . to make health care decisions." Id. Later, the HCPOA enumerated Daughter's specific powers but only after reiterating that all such powers must be interpreted as limited to "decisions . . . regarding . . . health care." (R. p. 78 ¶ 4(H)). As Appellants note, Daughter was empowered to admit and withdraw Mother from locations like the Facility offering medical and nursing services. Appellants' Br. at 7 (quoting R. p. 78 § 4(C)). However, that section could not have included authority to execute the Arbitration Agreement because it expressly unlinks Mother's admission from the Arbitration Agreement. (R. p. 60) ("this Arbitration Agreement is optional and the Resident's admission, readmission or the continuation of his or her residence at the Facility ***is in no way conditioned upon entering into this Arbitration Agreement***") (emphasis added).

Appellants' reliance on HCPOA section 4(H) is also misplaced as that section granted Daughter only the authority to take actions "necessary to carry out" her enumerated powers including the power to admit Mother to the Facility. The Arbitration Agreement language quoted above shows that executing the Arbitration Agreement could never be "necessary" for Mother to gain admission to the Facility. The remainder of section 4(H) must be construed in light of this overarching limitation on Daughter's authority. Reading this section to authorize execution of the voluntary, optional Arbitration Agreement would also be inconsistent with the section's final provision. While Daughter had limited power to take actions "necessary" to "health care" decisions, the HCPOA "shall not give [Daughter] general authority over [Mother's] property or financial affairs." Since the Arbitration Agreement is unlinked from admission to the Facility and instead affects the forum, procedures, and potential value for Mother's personal injury claim, executing the Arbitration Agreement is a "financial" and "property"-related matter rather than a "health care" decision.

b. South Carolina Courts Define "Health Care" to Exclude Execution of an Optional Arbitration Contract.

South Carolina appellate courts have also held that "health care" decisions do not encompass arbitration contracts. In Coleman v. Mariner Health Care, Inc., the South Carolina Supreme Court was tasked with determining whether committing a loved one to arbitration was a "health care" decision. 407 S.C. 346, 755 S.E.2d 450 (2014). Coleman considered this key term as it was defined in South Carolina's Adult Health Care Consent Act ('the Act"), holding that the statutory definition of "health care" includes medical procedures, nursing care, placement in a nursing home, and agreeing to pay for nursing home services. Id. at 352, 755 S.E.2d at 453. However, a separate arbitration contract—like the Arbitration Agreement Daughter signed—was not a "health care" matter because it was (1) not required for the resident's admission to the nursing

home; (2) contained no provisions for medical or nursing services; and (3) did not require any financial commitment for medical or nursing services. Id. at 353, 755 S.E.2d at 454. Coleman is directly on point here because, while it construed the term "health care" in the context of the Act, the statute governing health care powers of attorney instructs courts to apply the Act's terms to documents like the HCPOA. S.C. Code Ann. § 62-5-502(c) (stating that generally the Act's provisions "apply to the making of decisions by a health care agent").

Appellants overlook Coleman and instead argue other precedent supports their claim that a health care power of attorney can extend to an optional arbitration contract signed by a nursing home resident's family member. Appellants' Br. at 8-11 (citing Stott and Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018)). But, Hodge actually held the opposite:

> Even whe[n] a health care power of attorney was present, courts have concluded that the [signatory relative] lacked authority to sign the arbitration agreement . . . because a health care power of attorney granted for medical decisions does not confer authority to sign an arbitration agreement waiving legal rights.

422 S.C. at 569-70, 813 S.E.2d at 306 (citing Curto v. Illini Manors, Inc., 940 N.E.2d 229, 233 (Ill. App. 2010)).

Plus, Stott neither holds nor implies that a health care power of attorney covers an optional arbitration contract. 426 S.C. at 576, 577, 828 S.E.2d at 86 (citing 12 S.C. Jur. *Death and Right to Die* § 14 (2019) and S.C. Code Ann. § 62-5-504(B)(1) (defining "health care power of attorney" as "an instrument in which an individual known as the principal authorizes another person known as the attorney-in-fact, or agent, to make health care decisions on his behalf"). Stott affirmed the denial of a motion to compel arbitration, finding a durable financial power of attorney was invalid because it had not been recorded as required by statute and a health care power of attorney was inoperable because the nursing home resident was competent when admitted to the nursing home.

426 S.C. at 573-78, 828 S.E.2d at 85-88. Appellants suggest Stott implies health care powers of attorney may be used to execute an optional arbitration contract when the resident is incompetent (Appellants' Br. at 11), but Stott says no such thing. Reaching that conclusion would have required the Court to grapple with Coleman's contrary language cited above. It also would have been unnecessary to its holding. Thus, Appellant's Stott argument is based on even less than dicta. Appellants err in asking the Court to draw an inference from what Stott does not say on an issue it was not asked to address to reach a conclusion at odds with Coleman. In total, South Carolina appellate courts have consistently held that signing a voluntary arbitration contract near the time of a nursing home resident's admission is not a "health care" decision and is not encompassed by a health care power of attorney.

c. Persuasive Authority Supports the Circuit Court's Ruling.

A number of other jurisdictions have also refused to extend the notion of "health care" to arbitration contracts and have held a health care power of attorney does not authorize an agent to enter an arbitration agreement on a nursing home resident's behalf. Several of these courts have expressly held that by its nature agreeing to arbitrate cannot reasonable be considered a "health care" decision. See e.g. Manor Oaks, Inc. v. Campbell, 276 So.3d 830, 834 (Fla. App. 2019) (citing Blankfeld v. Richmond Health Care, Inc., 902 So.2d 296, 300 (Fla. App. 2005) ("waiving the right to sue for damages in the courts for violations of [state nursing home statute] or common law negligence is not a health care decision"); Cook v. GGNSC Ripley, LLC, 786 F. Supp. 3d 1166, 1170 (N.D. Miss. 2011) (holding that "since the arbitration agreement was not a health care decision," the agent "did not have the authority to bind [the resident] to arbitration"); Texas Cityview Care Ctr., L.P. v. Fryer, 227 S.W.3d 345, 352 (Tex. App. 2007) (finding arbitration contract was a "legal, as opposed to health care decision[]")).

Even when a health care power of attorney contains a broad grant of power to the listed agent, many courts have held that authority cannot be stretched so far as to cover an arbitration contract. For these courts, the key factor was the disconnect between admission and arbitration. See e.g., Fiala v. Bickford Sr. Living Group, LLC, 32 N.E.3d 80, 92 (Ill. App. 2015) ("where the arbitration provision is optional or otherwise not necessary to gain admission to a long-term care facility, the agent acting pursuant to a health-care power of attorney is not authorized to sign the arbitration provision"); Testa v. Emeritus Corp., 168 F. Supp. 3d 1103 (N.D. Ill. 2016) (applying Fiala rule); Life Care Ctrs. of Am. v. Smith, 681 S.E.2d 182, 185-86 (Ga. App. 2009). In other words, even if admitting a resident to a nursing home is a "health care" decision, agreeing to arbitration cannot be where the arbitration contract expressly states that it is not required for admission. Primmer v. Healthcare Indus. Corp., 43 N.E.3d 788, 795 (Ohio App. 2015) ("The decision to sign a free-standing arbitration agreement is not a health care decision if the patient may receive health care without signing the arbitration agreement"); State ex rel. AMFM, LLC v. King, 740 S.E.2d 66, 75 (W. Va. 2013); see also Morton v. Grace Health & Rehab. of Grenada, LLC, Civil Action No. 4:14-cv-00169-GHD-JMV, 2015 WL 2163827 (N.D. Miss. May 7, 2015). On its face, the Arbitration Agreement Daughter signed states that it is not required for admission. (R. p. 60). Therefore, the circuit court followed both South Carolina and persuasive authority in finding the Arbitration Agreement's execution was not a "health care" decision covered by the HCPOA.

This rule applies even to a health care power of attorney with language very similar to the HCPOA. In Estate of Irons v. Arcadia Healthcare, L.C., a Florida appellate court held the broad scope of the health care power of attorney before it did not extend to an arbitration contract. 66 So.3d 396 (Fla. App. 2011). The governing document was titled "Health Care Power of Attorney"

and identified the empowered family member as "health care surrogate," which led the court to find its provisions were intended to be limited to decisions that "relate to the direct provision of medical care." Id. at 400. An instrument that so affirmatively limits its scope to health care matters does not extend to matters of "property rights or potential litigation with" a nursing home. Id. To rule otherwise, Irons held, would strain the principal's intent when she executed the health care power of attorney. Id. Similarly, the HCPOA was limited to "health care" decisions in its title and appointed Daughter only as "health care agent." (R. p. 77). Reading the HCPOA to extend Daughter's authority to the optional Arbitration Agreement would strain Mother's intent when she executed the HCPOA and would be inconsistent with substantial South Carolina and persuasive authority.

d. As an Additional Sustaining Ground, the HCPOA is Invalid Because it was not Recorded as Required by Statute.

As an additional sustaining ground, the HCPOA did not grant Daughter authority to agree to arbitration on Mother's behalf because the HCPOA was invalid on its face. As this Court held in Stott, a durable power of attorney is valid only after it is recorded with the register of deeds. 426 S.C. at 574, 828 S.E.2d at 86 (citing former S.C. Code Ann. § 62-5-501(C) (2013) which provided that a durable power of attorney "must be recorded in the same manner as a deed in the county where the principal resides at the time the instrument is recorded"); see also S.C. Code Ann. § 62-8-403(c) (current statute imposing same requirement)). This requirement applies to any health care power of attorney. S.C. Code Ann. § 62-5-502(a) (stating that statutory requirements for durable powers of attorney apply equally to health care powers of attorney). The same requirement applies to a durable power of attorney executed in another jurisdiction later used in South Carolina. Before it becomes effective in this state, an out-of-state durable power of attorney must be recorded in the principal's current South Carolina county of residence. S.C. Code Ann. § 62-8-109(d) (permitting

a power of attorney executed in another jurisdiction to be recorded in South Carolina); former S.C. Code Ann. § 62-5-501(D)(2) (2013) (imposing recording requirement). Mother's HCPOA does not bear a recording stamp and was never recorded with the Charleston County Register of Deeds. Therefore, regardless of any powers it purports to grant Daughter, the HCPOA is invalid.

2. Mother's Residence in Appellants' Facility does not Estop Respondent from Opposing Arbitration.

At its core, Appellants' equitable estoppel argument is that, since Mother was admitted to the Facility and obtained nursing home services as a resident, she (through her personal representative) may not refuse to arbitrate claims based on Appellants' allegedly negligent care. South Carolina appellate courts have rejected this argument four separate times in the last seven years. These precedents establish two crucial principles. First, there is nothing inconsistent about receiving nursing home services while challenging the formation of a separate, optional arbitration contract. Second, since Respondent's claims are not grounded in or dependent on the Admission Agreement, equitable estoppel would not apply here even if the Admission Agreement and Arbitration Agreement were a single, merged contract.

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. Appellants' estoppel argument should fail because it does not cite or attempt to apply these required elements. Whether Mother is bound to the Arbitration Agreement is a matter of state law

and the Strickland factors Appellants overlook are the governing standard for their equitable estoppel argument. See Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630-31 n. 5 (2009).

Appellants instead rely exclusively on federal court precedent, suggesting their focus is on what courts call "direct benefits" estoppel. E.g. Wilson, 426 S.C. at 340, 827 S.E.2d at 175. This doctrine holds that a party may not refuse to comply with an arbitration clause while receiving a "direct benefit from a contract containing an arbitration clause." Id. (quoting International Paper Co. v. Scwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000)). Thus, this form of estoppel only applies if (1) the benefit received by the party to be estopped arises from the same contract containing the arbitration provision; (2) the benefit is the type of "direct" benefit recognized in precedent as sufficient to prevent a party from opposing arbitration. Appellants cannot meet either the "same contract" or "direct" benefit requirements to apply estoppel.

a. The Admission Agreement and Arbitration Agreement are Separate Contracts that do not Merge.

The first "direct benefits" estoppel element is not met because the contract Appellants argue Mother benefitted from is different from the contract under which Appellants seek arbitration. Mother/Respondent cannot be estopped from denying arbitration unless the arbitration requirement and her alleged direct benefit are in the "same contract." Id. When nursing home admission and arbitration of a resident's claims are governed by separate agreements, the "same contract" requirement is not met and direct benefit estoppel does not apply. Thompson v. Pruitt Corp., 416 S.C. 43, 60, 784 S.E.2d 679, 688 (Ct. App. 2016) (finding alleged benefit of admission "of no moment" for estoppel claim when admission and arbitration agreements were separate contracts); see also Hodge, 422 S.C. at 558, 813 S.E.2d at 300 (citing Thompson). Appellants do not dispute that the arbitration provision they seek to enforce is not in Mother's Admission Agreement but rather the Arbitration Agreement. Despite this, Appellants contend the two

instruments still meet the "same contract" requirement because they merged into a single contract. Appellants' Br. at 12 (citing Klutts Resort Realty, Inc. v. Down'round Development Corp., 268 S.C. 80, 232 S.E.2d 20 (1977)). South Carolina courts have three times refused merger arguments for nursing home admission and arbitration contracts, and Appellants' argument should be rejected as well. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 49-52, 784 S.E.2d at 683-84; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

The Klutts "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." Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (quoting Klutts, 268 S.C. at 88, 232 S.E.2d at 24). Even then, merger does not apply if there is "*anything* indicating a contrary intention." Id. (emphasis added). Thus, multiple 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.

i. Appellants Cannot Meet the Prerequisites for Merger.

Appellants cannot show the Admission Agreement and Arbitration Agreement were executed at the same time for the same purpose. While the Arbitration Agreement was presented to Daughter on January 31, 2018, the Admission Agreement was presented at a different sitting on February 1, 2018. Moreover, the two contracts were not entered for the same purpose. The Admission Agreement was formed to admit Mother to the Facility. (R. p. 63 ¶ 2). That purpose is borne out in the Admission Agreement's fourteen pages. The Facility agreed to provide medical

and other ancillary personal services common to a nursing home (R. pp. 63-64 ¶ 3) to Mother who, in turn, agreed to pay all fees and charges for those services. (R. pp. 66-68 ¶ 9). The Admission Agreement's provisions referred to Medicaid eligibility, room assignments, safekeeping of a resident's personal valuables, 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. 60). These two contracts cannot have the same purpose because, as the Arbitration Agreement expressly states, it was not a pre-condition for admission. Id.

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

Even if the Court were to find 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. Hodge is the key precedent here because it builds on Coleman and Thompson to provide the Court's most recent and complete illustration of the type of contract language or structure showing parties do not intend multiple agreements to be interpreted as one. For example, 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. Hodge, 422 S.C. at 562, 813 S.E.2d at 302; 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 and required separate signatures. Hodge, 422 S.C. at 562, 813 S.E.2d at 302; see also Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1. 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.

Appellants argue Hodge, Thompson, and Coleman are all distinguishable. Appellants' Br. at 15 n. 4. However, by rejecting or discounting the factors cited in Hodge, Appellants are arguing against well-established, recent precedent without offering the Court any reason why it should so dramatically and quickly reverse course. All 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.

iii. 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 here use very similar terms. The Admission Agreement chose South Carolina substantive law and the Arbitration Agreement expressly disclaimed South Carolina law in favor of the FAA. Compare (R. p. 73 ¶ 22(c)) *with* (R. p. 60) (adopting FAA as governing law); see also Appellants' Br. at 19 (arguing FAA applies to Arbitration Agreement). Hodge found the differing choice of law provisions were evidence rebutting any presumption of merger. 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. The contracts' termination provisions are just as inconsistent here as in those cases. As drafted 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" so long as the resident provides three-days' written notice (R. p. 66 ¶ 7). Thus, the Arbitration Agreement and Admission Agreement have inconsistent choice of law and termination provisions that rebut any argument the parties intended these two separate contracts merge into one.

iv. 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, 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. Appellants 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 Admission Agreement and Arbitration Agreement required separate signatures.

v. Admission is not Dependent on Arbitration Agreement.

Appellants' merger argument is also rebutted by the Arbitration Agreement's express language. An arbitration contract is far less likely to merge with an admission contract if the nursing home admits arbitration is not required for admission. 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. As noted above, the Arbitration Agreement includes a very similar provision stating that Mother's admission was "in no way conditioned upon entering into this Arbitration Agreement." (R. p. 60).

In sum, the Arbitration Agreement and Admission Agreement have the same indicators South Carolina courts have cited in the past to find simultaneously-executed contracts were not intended to merge into one. Moreover, any uncertainty about these indicators must be resolved in Respondent's favor. As Coleman demonstrates, 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 indicators discussed above but to prove all are absent here. Second, since Appellants drafted these form contracts of adhesion, any ambiguities must be construed against Appellants. 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 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. Since Appellants

inextricably link their estoppel argument to merger (Appellants' Br. at 12), the lack of merger means Appellants cannot prevail on estoppel.

b. Mother's Common Law Negligence Claims are not Grounded in or Reliant on the Admission Agreement.

Appellants' estoppel argument should fail even if the Court construes the Admission Agreement and Arbitration Agreement as a single, merged contract. The second essential component of "direct benefit" estoppel is evidence Mother received a "direct" benefit from the contract containing an arbitration provision that would render it inequitable for her to oppose arbitration. Specifically, Appellants must show Mother has "consistently maintained that other provisions of the same contract should be enforced to benefit her" and that Mother has "knowingly exploit[ed]" the contract in question to her benefit. Wilson, 426 S.C. at 340, 827 S.E.2d at 175 (quoting Int'l Paper, 206 F.3d at 418 and Belzberg v. Verus Invs. Holdings, Inc., 999 N.E.2d 1130, 1134 (N.Y. 2013)). Appellants suggest this element is met because Respondent's claims are all "dependent on duties which arise from the Admission Agreement" and, as a result, allowing her claims to remain in litigation would be Respondent taking advantage of one portion of a contract while avoiding unfavorable provisions in that contract (Appellants' Br. at 13). However, Appellants misconstrue Respondents' claims and the governing law. Along with Coleman, Thompson, and Hodge, this Court's most recent estoppel case in the nursing home context specifically rejects Appellants' argument. See Weaver v. Brookdale Senior Living, Inc., 431 S.C. 223, 847 S.E.2d 268 (Ct. App. 2020).

In Weaver, this Court refused to apply direct benefits estoppel to force a nursing home resident's family to arbitrate claims related to the resident's gruesome death. Since the arbitration provision was part of the resident's admission contract, the "same contract" element was met. However, the nursing home could not meet the second element by showing the resident or her

family were trying to enforce the contract or exploit its provisions in their favor simply by filing tort claims against the home. Weaver reached two important holdings. First, direct benefits estoppel is not implicated simply because a nursing home resident's claim would not exist but for the existence of a contract containing an arbitration provision. 431 S.C. at 230-31, 847 S.E.2d at 272 (quoting Wilson, 426 S.C. at 343, 827 S.E.2d at 176). Second, a nursing home's admission contract does not supplant common law duties imposed by the law of ordinary negligence. Weaver, 431 S.C. at 231, 847 S.E.2d at 272.

Appellants make both the arguments Weaver rejects. First, Appellants argue estoppel applies because "[w]ithout the Admission Agreement, there would have been no relationship between the parties." (Appellants' Br. at 13). This sort of "but for" relationship between the contract and Respondent's claims is insufficient to support estoppel. Wilson, 431 S.C. at 230-31, 847 S.E.2d at 272 (quoting Wilson, 426 S.C. at 343, 827 S.E.2d at 176). Appellants then argue Respondent's claims "are dependent on duties which arise from the Admission Agreement." (Appellants' Br. at 13). However, like the nursing home in Weaver, Appellants confuse contractual obligations with Appellants' common law tort duties as medical provider to their patient. Respondent's claims allege negligence-based and other tort claims based on violations of duties imposed by the common law, statute, and state regulations. (R. pp. 19-20 ¶ 40). None of Respondent's claims arise from or are dependent on duties imposed by contract. As a result, Weaver holds, Mother/Respondent have not exploited the Admission Agreement as required to estop Respondent from opposing arbitration. Weaver continues a long line of cases rejecting the estoppel arguments Appellants raise here. Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455;

Thompson, 416 S.C. at 59-60, 784 S.E.2d at 687-88; Hodge, 422 S.C. at 556-57, 813 S.E.2d at 299-300.[1]

3. Mother was not a Third-Party Beneficiary of any Alleged Agreement Between Appellants and Daughter.

As a fallback position, Appellants seem to argue Daughter entered an Arbitration Agreement with the Facility and Respondent is bound to the Arbitration Agreement since Mother was a third-party beneficiary. Thompson rejected attempts to use the third-party beneficiary doctrine in this manner. 416 S.C. at 56-58, 784 S.E.2d at 687; see also Hodge, 422 S.C. at 574, 813 S.E.2d at 308 (noting nursing home conceded that Thompson "extinguished their third-party beneficiary argument"). Consistent with Thompson, there are three reasons why this Court should 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 between Mother and Appellants or between Daughter and Appellants; (2) even if Daughter was a party to the Arbitration Agreement, Mother was not a third-party beneficiary to the Agreement because the Agreement's parties did not intend to benefit her *as a third-party*; and (3) Mother never consented to arbitration and a non-consenting person cannot be bound to arbitrate.

[1] Instead of this voluminous South Carolina precedent, Appellants rely in error on one unreported federal district court order. Appellants' Br. at 14-15 (citing THI of S.C. at Columbia, LLC v. Wiggins, Civil Action No. 3:11-888-CMC, 2011 WL 4089435 (D.S.C. Sept. 13, 2011)). Wiggins preceded the South Carolina line of precedent beginning with Coleman and ending with Weaver that states a comprehensive summary of the limits of direct benefits estoppel in the nursing home admission context and provides the binding precedent for this case that an unreported federal district court order never could. See Chase Home Fin., LLC v. Risher, 405 S.C. 202, 213, 746 S.E.2d 471, 477 (Ct. App. 2013) (noting federal district court rulings are persuasive at most).

a. There is No Valid Contract to Which Mother can be 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. Thompson, 416 S.C. at 57, 784 S.E.2d at 687 (citing Dickerson v. Longoria, 995 A.2d 721, 742 (Md. 2010)). Since Mother did not sign the Arbitration Agreement and Daughter lacked authority to enter the Arbitration Agreement on Mother's behalf, there was no contract to arbitrate between Mother and Appellants. The evidence also shows there was no valid contract between Daughter and Appellants. Appellants did not intend for Daughter to be a party to the Arbitration Agreement in her individual capacity. Throughout the agreement, Daughter is identified only as "Resident Representative," never in her individual capacity. Daughter signed the agreement in a signature block labeled "Resident Representative." (R. pp. 60-61). Without a valid underlying contract, Mother cannot be a third-party beneficiary.

b. Appellants did not Intend for Mother to Benefit from the Arbitration Agreement as a Third Party.

Additionally, the third-party beneficiary doctrine does not apply to the Arbitration Agreement because it was not the purported parties' intent to benefit Mother 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 intend to benefit that person as a non-party. To determine Appellants' intent for the Arbitration Agreement, this Court must look beyond Appellants' current statements to the moment when the purported contract was formed. Laser Supply & Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009).

When the Arbitration Agreement was presented to Daughter on January 31, 2018, Appellants intended to make Mother a party. For the many reasons discussed above, Appellants failed to effectuate this intent by obtaining the assent of Mother or one authorized to act on her behalf. Appellants only seek to deem Mother a third-party because their efforts to label her a party do not comply with South Carolina contract law. The letter and spirit of that law would be severely undermined if Appellants succeed. Appellants' intent to make Mother a party to the contract means Appellants cannot prove a material element required to bind Respondent to the agreement as a third-party beneficiary.

The circuit court's rejection of Appellants' third-party beneficiary argument is supported by Thompson and by rulings from other jurisdictions. 416 S.C. at 57, 784 S.E.2d at 687; see also Dickerson, 995 A.2d at 742 n. 21 (rejecting nursing home's third-party beneficiary argument when combined with home's attempt to bind resident to contract as party and finding "inconsistency belies [home's] arguments") Barbee v. Kindred Healthcare Operating, Inc., No. W2007-00517-COA-R3-CV, 2008 WL 4615858 at *10 n. 3 (Tenn. App. Oct. 20, 2008).

c. Mother Never Consented to Arbitrate Claims against Appellants.

Appellants' third-party beneficiary argument is also flawed because it would force a person to enter arbitration for claims for which she never consented to arbitrate. South Carolina contract law generally precludes enforcement of a contract's terms against a person failing to manifest assent. Laser Supply & Servs., Inc., 382 S.C. at 334, 676 S.E.2d at 143-44. More specifically, Thompson holds that the third-party beneficiary cannot be used to force arbitration on a nursing home resident who did not assent to it and lacked the mental capacity to do so. 416 S.C. at 57, 784 S.E.2d at 687 (citing Drury v. Assisted Living Concepts, Inc., 262 P.3d 1162, 1166 n. 5 (Or. App. 2011) ("[U]nless the third-party beneficiary in some way assents to a contract containing an

arbitration clause, the contracting parties have waived the beneficiary's right to a jury trial without her consent"). Like the resident in Thompson, the parties here agree Mother lacked mental capacity at the time the Arbitration Agreement was presented to Daughter. (Appellants' Br. at 7).

In sum, Appellants may not rely on the third-party beneficiary theory to require arbitration for Mother's claims because the underlying contract (i.e. Arbitration Agreement) was not a valid contract. Moreover, as recognized in Thompson, labeling Mother a third-party beneficiary to the Arbitration Agreement is inconsistent with its stated intent and would improperly bypass the requirement that a person bound to arbitrate must assent to arbitration.

4. Appellant White May not Enforce the Arbitration Agreement as a Non-Party Because it is Limited to Claims Between its Narrowly-Defined Parties.

Appellant White is the Facility's administrator (R. p. 11 ¶ 3) but is not a party to the Arbitration Agreement. South Carolina law presumes a contract's duties and benefits are exclusive to its parties, and the circuit court correctly determined Respondent's claims do not meet the limited circumstances when a non-party can enforce contract provisions. To make White a third-party beneficiary with enforcement rights, the Arbitration Agreement would have to unambiguously extend its benefits to White and unambiguously subject to arbitration Respondent's claims against White. Since the Arbitration Agreement's language does not meet these requirements, the circuit court's ruling should be affirmed.

By its very nature, a contract is a voluntary agreement between (usually) two specifically identified parties. What separates contractual duties from their statutory or tort-based counterparts is that they are imposed only on parties that affirmatively manifest assent to them. Accordingly, South Carolina law presumes contracts may only be enforced by their parties. Touchberry v. City of Florence, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988). This presumption may be overcome only if the contract's language unambiguously extends its benefits to third parties. Thompson, 416

S.C. at 57, 784 S.E.2d at 687. Here, the Arbitration Agreement does not extend to third persons because it limits the scope of arbitrable claims to its narrowly defined "parties." As presented to Daughter, the Arbitration Agreement only extends to claims "now existing or hereafter arising **between the parties**." (R. p. 60) (emphasis added).

Since the Facility chose to limit the Arbitration Agreement's scope to disputes between the "parties," allowing White to force Respondent to arbitrate her claims could lead to a grossly unfair outcome at odds with core arbitration principles. Wilson, 426 S.C. at 337, 827 S.E.2d at 173 (citing E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 294 (2002) (holding that arbitration "is a matter of consent, not coercion")). Appellants argue White is granted the right to compel arbitration by a rule this Court adopted in South Carolina Public Service Authority. v. Great Western Coal, 312 S.C. 559, 437 S.E.2d 22 (Ct. App. 1993). Appellants' Br. at 17-18. Culled from an out-of-circuit federal court opinion, the rule is designed to prevent an arbitration contract's party from wholly avoiding arbitration by naming a non-party and proceeding in litigation rather than arbitration. Great W. Coal, 312 S.C. at 563, 437 S.E.2d at 25 (citing Arnold v. Arnold Corp., 920 F.2d 1269 (6th Cir. 1990) ("a party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint . . . because this would nullify the rule requiring arbitration")).

But the Arnold rule has a crucial limit that makes it inapplicable here. The Arnold court only allowed a nonsignatory to force arbitration because language in the arbitration contract "indicates that the parties' basic intent was to provide a single arbitral forum to resolve all disputes arising" from their transaction ***even if those disputes involved non-parties***. 920 F.2d at 1282. Thus, the parties knew going into the transaction that they may be required to arbitrate with non-parties and each party's signature on the arbitration contract was express assent to that expansive view of

the individuals who may force arbitration. When the arbitration contract does not extend its scope to non-parties, the Arnold rule does not apply.[2] See e.g., McCarthy v. Azure, 22 F.3d 351, 357 (1st Cir. 1994) (finding the Arnold principle should not apply when "the arbitration clause fails to indicate the corporate signatory's intention to protect employees through arbitration"). This limitation on the rule assures that the contract parties' intent is upheld. Westmoreland v. Sadoux, 299 F.3d 462, 466 (5th Cir. 2002) ("an agent or employee of a signatory cannot invoke an arbitration clause unless the parties intended to bring them into the arbitral tent").

Since the Facility chose to limit the Arbitration Agreement to disputes between its parties, this purported contract does not indicate its parties intended to permit non-party enforcement and Daughter would have no reason to expect an individual like Appellant White could force her out of litigation and in to arbitration. In fact, to grant White enforcement rights the Court would have to rewrite the Arbitration Agreement to expand its scope, and doing so would violate another long-standing contract interpretation rule. Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010) (quoting MailSource, LLC v. M.A. Bailey & Assoc., 356 S.C. 363, 369, 588 S.E.2d 635, 639 (Ct. App. 2003) (rejecting party's interpretation that would require disputed contract to be rewritten because that is "a service the courts of South Carolina do not perform").

Appellants' conception of the Great Western Coal/Arnold rule has one final flaw. The rule holds that a party cannot avoid arbitration altogether by naming a non-party to an arbitration

[2] While their validity is questionable, some nursing homes choose to include in their arbitration contracts language suggesting the contract's terms may be enforced by the home's employees, agents, or related entities. E.g. Weaver, 431 S.C. at 228, 847 S.E.2d at 271 (noting nursing home's arbitration contract purported to "bind[] third parties not signatories to this Arbitration provision"). The fact that the Facility chose not to include this language even further demonstrates its intent to limit enforcement of the Arbitration Agreement to its parties.

contract. That is not what Respondent has done here. Respondent named White as a defendant not in an effort to avoid arbitration with the Facility but because, as administrator, White's conduct substantially contributed to the losses Mother sustained. Respondent opposes arbitration with the Facility because, as discussed above, the Arbitration Agreement cited by the Facility is invalid. Even if the Court were to reject that argument and compel arbitration of the Respondent-Facility dispute, White should not be permitted to ride the Facility's coattails to compel arbitration of the claims against him. Arbitration always remains a matter of contract and White offers no colorable argument he has an arbitration contract with Mother/Respondent.[3]

5. The FAA Does Not "Mandate" Arbitration Here and its Pro-Arbitration Policy Does Not Supplant South Carolina Contract Formation Requirements.

Appellants argue the FAA "mandates" the Court reverse the circuit court's order and compel arbitration. Appellants' Br. at 18. However, Appellants attempt to extend the federal pro-arbitration policy far beyond its recognized bounds. In the wake of judicial disdain for legitimately created arbitration contracts, the FAA was intended to raise the status of arbitration contracts **but only** to the level of contracts regarding any other subject matter. Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 67 (2010) (finding that the FAA's savings clause—9 U.S.C. § 2—"places arbitration on equal footing with other contracts"); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 414 n. 12 (1967) (finding FAA's purpose was "to make arbitration agreements as enforceable as other contracts, but not more so").

[3] Thus, in the event the Court were to grant the Facility's motion to compel arbitration, Respondent's claim against White should continue in litigation. The U.S. Supreme Court acknowledges the need for parallel dispute resolution processes where one defendant may claim the benefit of an arbitration contract and another may not. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co., 460 U.S. 1, 20 (1983).

Federal policy does not compel this Court to construe the Arbitration Agreement as valid or to interpret Daughter's signature as binding on Mother's estate. Courts often note that doubts concerning arbitrability should be resolved in favor of arbitration. However, those cases are limited to questions regarding an arbitration agreement's scope, i.e. whether the parties' dispute is encompassed within an arbitration agreement's language. Landers v. Federal Deposit Ins. Corp., 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) ("doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"). Here, the issue is more fundamental. Respondent does not dispute that her claims would be covered by the Arbitration Agreement's scope. Instead, Respondent's position is that no valid arbitration agreement exists between the parties.

This is a contract formation issue, and the FAA expressly reserves it to arbitration-neutral state contract law. 9 U.S.C. § 2 (arbitration agreement may be invalidated "upon such grounds as exist at law or in equity for the revocation of any contract"); Goldberg v. C.B. Richard Ellis, Inc., Civil Action No. 4:11-cv-02237, 2011 WL 6817908 *2 (D.S.C. Dec. 28, 2011) (finding FAA "does not displace state law on the general principles governing formation of the contract itself"); Lawrence v. Blue World Pools, Inc., C.A. No. 8:11-1099-JFA, 2011 WL 2491367 *2 (D.S.C. June 22, 2011) ("whether a party agreed to arbitrate a particular dispute is a question of state law governing contract formation"). Appellants' erroneous reference to pro-arbitration policy is evident from Wilson where the Supreme Court held that the presumption in favor of arbitration is limited to the scope of arbitrable issues and does not apply to either the existence of a valid arbitration agreement or the individuals or entities bound by an arbitration contract. 426 S.C. at 337, 827 S.E.2d at 173 (quoting Carr v. Main Carr Dev., LLC, 337 S.W.3d 489, 496 (Tex. App. 2011)). In fact, when the party opposing arbitration is a non-signatory, there is a presumption against arbitration. Wilson, 426 S.C. at 337-38, 827 S.E.2d at 173 (citing Global Pac., LLC v.

Kirkpatrick, 88 N.E.3d 431, 435 (Ohio App. 2017)). Weaver also cautioned against reflexive citations to FAA policy in contract formation disputes. 431 S.C. at 229, 847 S.E.2d at 271 ("The policy does not kick in until the court determines a valid agreement to arbitrate exists").

As the party seeking arbitration, Appellants bore the burden of proving they entered a valid arbitration contract with Mother and her estate. Appellants were entitled to no presumptions on this point, and federal pro-arbitration policy does not decide the issue. The circuit court properly applied South Carolina contract formation law and the line of nursing home cases ranging from Coleman to Weaver to deny Appellants' motion to compel arbitration.[4]

CONCLUSION

Based on the arguments stated above, Respondent respectfully requests the Court affirm the circuit court's order denying Appellants' motion to stay and compel arbitration. The Arbitration Agreement is invalid because Mother did not consent to its terms and Daughter's limited authority under the HCPOA did not extend to a separate, optional arbitration contract. Also, Appellants' estoppel and third-party beneficiary arguments have been rejected on multiple occasions by South Carolina appellate courts. Finally, without a valid arbitration contract, the FAA's pro-arbitration policy and stay provision offer no support to Appellants' arguments.

[4] Appellants' citation to the FAA in seeking a stay of court proceedings is wholly dependent on first establishing a valid arbitration contract. Appellants' Br. at 21-22. A stay is only appropriate for litigation covering an "issue referable to arbitration under an agreement in writing for such arbitration." 9 U.S.C. § 3. Thus, Respondent incorporates by reference her contract formation arguments above in opposition to Appellants' request for a stay. Similarly, Appellants' argument to reverse the circuit court's discovery ruling should fail because it is dependent on Appellants' faulty contract formation argument. Appellants' Br. at 22. Moreover, 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).

Respectfully submitted,

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