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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2019-CP-22-00961
Appellate Case No. 2020-001167

Kevin Greene,
as Attorney in Fact for and on Behalf of
Eleanor Greene Wragg, Respondent,

v.

Palmetto Prince George Operating, LLC
d/b/a Prince George Healthcare Center;
Palmetto Health Care, LLC;
Murray Forman, Individually; and
Richard Porter, Individually, Defendants.

Of whom Palmetto Prince George Operating, LLC
d/b/a Prince George Healthcare Center;
Palmetto Health Care, LLC; and
Richard Porter, Individually, are Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court err in denying the Facility[1] and Porter's[2] motions to compel Plaintiff's[3] claims to arbitration and, in turn, in denying PHC's[4] corresponding motion for a stay?[5]

A. Did the circuit court err in finding that the Admission Agreement and the Arbitration Agreement are separate contracts (i.e., in not finding the instruments merged) and in rejecting the Facility's argument that Plaintiff should be equitably estopped to deny the enforceability of the Arbitration Agreement?

B. Did the circuit court err in failing to find that the Arbitration Agreement is enforceable against Plaintiff because it was either validly executed on Ms. Wragg's behalf by her lawful agent (whether via true agency or agency by estoppel) or Ms. Wragg thereafter ratified its execution on her behalf?

II. At a minimum, did the circuit court err in denying the Facility and Porter's alternative request for limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability?

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[1] The "Facility" is Defendant-Appellant Palmetto Prince George Operating, LLC d/b/a Prince George Healthcare Center. It is a skilled nursing facility in Georgetown County. (R. p. 8 ¶ 3.)

[2] "Porter" is Defendant-Appellant Richard Porter.

[3] "Plaintiff" is Plaintiff-Respondent, Kevin Greene, as Attorney in Fact for and on behalf of Eleanor Greene Wragg. "Ms. Wragg" refers to Eleanor Greene Wragg herself.

[4] "PHC" is Defendant-Appellant Palmetto Health Care LLC. Collectively, the Facility, Porter, and PHC are "Appellants."

[5] Out of an abundance of caution, Appellants would make clear that their issues, and corresponding arguments, challenge both the circuit court's ruling on their principal motions (i.e., the Facility and Porter's motions to compel arbitration and PHC's motion to stay) and its ruling on their motion to alter, amend, and/or reconsider its ruling on their principal motions.

STATEMENT OF THE CASE

With the help of her son Wendal Greene ("Mr. Greene"), Ms. Wragg was admitted to the Facility on November 27, 2017. (*See* R. pp. 61–72.) In conjunction with his mother's admission, Mr. Greene signed an Admission Agreement[6] and an Arbitration Agreement[7] on her behalf. By his signature on the Arbitration Agreement, Mr. Greene expressly "represent[ed] that . . . he . . . ha[d] the authority to sign on [Ms. Wragg's] behalf so as to bind [Ms. Wragg] as well as [himself]." (R. p. 30.)

Plaintiff commenced this nursing home malpractice action in Georgetown County on October 4, 2019, in the Court of Common Pleas, alleging deficient care/treatment of Ms. Wragg during her residency at the Facility. (*See* R. pp. 7–17.)

Based on the Arbitration Agreement Mr. Greene signed for Ms. Wragg when she was admitted to the Facility, both the Facility and Porter[8] moved to compel

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[6] (R. pp. 61–72.)

[7] (R. p. 30.) Without question, the Arbitration Agreement is governed by the FAA. It expressly states that the FAA applies. (R. p. 30.) Moreover, our Supreme Court has held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014).

[8] Porter is covered by the Arbitration Agreement as an "agent," "employee," and/or "servant" of the Facility. (*See* R. p. 30 ("This Agreement is made between [the Facility], its agents, employees, and servants, and . . . ."); *see also* R. p. 9 ¶¶ 6–8 (alleging Porter was an agent, employee, and/or servant of the Facility at all relevant times).)

arbitration (the "Motions to Compel Arbitration"). (R. pp. 28–29, pp. 31–32.)[9] PHC moved to stay the action until the arbitrability issue (i.e., the issue raised by the Motions to Compel Arbitration) was finally decided and any and all arbitration proceedings were completed (the "Motion to Stay"). (*See* R. pp. 26–27.)

Following the parties' submission of briefs,[10] the circuit court, the Honorable Benjamin H. Culbertson presiding, denied the Motions to Compel Arbitration and the Motion to Stay by order filed June 17, 2020. (R. pp. 1–4.)

On June 29, 2020, pursuant to Rule 59(e), SCRCP, Appellants timely moved the circuit court to alter, amend, and/or reconsider its decision on their respective motions. (R. pp. 111–14.) The motion was denied by order filed July 16, 2020. (R. pp. 4–6.)

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[9] Without question, Plaintiff's claims against the Facility and Porter are within the scope of the Arbitration Agreement. Its plain language clearly embraces the subject matter of Plaintiff's claims. (*See* R. p. 30 ("It is the intention of the parties to this [Arbitration] Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of [Ms. Wragg]."), p. 30 ("It is . . . understood that in the event of any controversy or dispute between the parties arising out of or relating to [the] Facility's Admission Agreement, or breach thereof, or relating in any way to [Ms. Wragg's] stay at [the] Facility, or to the provisions of care or services to [Ms. Wragg] . . . and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration . . . .").) But even if there were "any doubts concerning the scope of arbitrable issues[,] [they] should be resolved in favor of arbitration . . . ." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999).

[10] (R. pp. 33–51, pp. 73–101, pp. 106–10.)

By notice served August 17, 2020, this appeal timely follows. (*See* R. pp. 115–19.)

STANDARD OF REVIEW

A circuit court's determination of whether a claim is subject to arbitration is reviewed de novo on appeal. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). This includes de novo review of the determination of whether an arbitration agreement is enforceable against a nonsignatory. *Wilson v. Willis*, 426 S.C. 326, 334, 827 S.E.2d 167, 172 (2019). "Under de novo review, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Id.* Issues of law, however, are reviewed without any particular deference to the lower court. *See, e.g., Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 782 S.E.2d 590 (2016). Even where a ruling is on a matter within trial court's discretion, if the ruling is based on a misunderstanding of the law, rather than upon the exercise of discretion, the question presented on appeal is one of law. *See Bain v. Self Mem'l Hosp.*, 281 S.C. 138, 152, 314 S.E.2d 603, 611 (Ct. App. 1984).

ARGUMENT

I. The circuit court erred in denying the Motions to Compel Arbitration and, in turn, in denying the corresponding Motion to Stay.

The relationship between the Motions to Compel Arbitration and the Motion to Stay is such that, insofar as the circuit court was concerned, the denial of the former mooted the latter. The fates of these motions (or, more precisely, the fates of the appeals taken from the circuit court's rulings thereon) are likewise intertwined in this Court: whether the Motion to Stay is properly viewed as moot depends on whether the Motions to Compel Arbitration were properly denied—which, most respectfully, the Facility and Porter contend they were not.

Accordingly, in showing that the circuit court erred in denying the Motions to Compel Arbitration, the argument below also shows the court's error in denying the corresponding Motion to Stay, which is not properly viewed as moot and should have been (or, alternatively, on remand should be) granted. *See* 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties *stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such

arbitration.") (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) ("[The] FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties."); *see also Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) ("The fact that Federal is not a party to an arbitration agreement does not prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement. However, the Circuit Court included in its order the requirement that all parties be included in one arbitration proceeding. Federal has signed no arbitration agreement and cannot be forced into compulsory arbitration. We feel it was erroneous to condition the relief to which respondents are plainly entitled upon the voluntary submission of Federal to arbitration proceedings. This provision has been deleted from the foregoing Order of the lower court.").

A. The circuit court erred in rejecting Appellants' merger/equitable estoppel argument, i.e., it erred in failing to find that the Admission Agreement and the Arbitration Agreement merged and that Plaintiff is estopped to deny the Arbitration Agreement's enforceability.

First off, to be clear, Appellants' merger/equitable estoppel argument is not an argument *for the enforceability* of the Arbitration Agreement but rather an argument *for Plaintiff to be estopped to deny the enforceability* of the Arbitration

Agreement. In short, the idea is that the Admission Agreement (the enforceability of which, it should be noted, Plaintiff does not dispute[11]) and the Arbitration Agreement merged, and Ms. Wragg having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Arbitration Agreement merged therewith. Accordingly, any counterarguments aimed at denying the Arbitration Agreement's enforceability (e.g., that, under the common law of agency and/or under the Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80, Mr. Greene lacked authority to sign the Arbitration Agreement on behalf of Ms. Wragg) are beside the point and unavailing.

Re: Merger

South Carolina recognizes numerous potentially viable theories under which a nonsignatory can be bound to an arbitration agreement. *Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 ("South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel.").

Indeed, in *Coleman v. Mariner Health Care, Inc.*, even though our Supreme Court found against merger on the *particular facts* then before it, the Court

[11] (R. p. 42 n.8 ("[T]he enforceability of the Admission Agreement is

nonetheless confirmed the validity of the general proposition of *law* on which the *Coleman* appellants based their merger/equitable estoppel argument:

> Appellants contend that even if Sister lacked capacity to execute the AA under the Act, she is nevertheless equitably estopped to deny the AA's enforceability. The circuit court held there was no estoppel here, and we agree.
>
> Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the AAs merged. In South Carolina,
>
> > The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.
>
> *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).
>
> Here, *the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction*. *Unless there is a contrary intention, appellants are correct that there was a merger*.

407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (emphasis added).

There are material differences between the facts and arguments involved in the instant case and those that controlled (or were simply not addressed in)

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not at issue . . . .").)

Coleman and its progeny, *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

The merger question examines whether, "where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,"[12] as indeed the Admission Agreement and the Arbitration Agreement were here,[13] there is evidence to upset the *presumption* *in favor of* *merger*, i.e., the presumption that the contracting parties intended the instruments to be construed together as effectively one contract. This is a question of the parties' intention. *Id.* at 355, 755 S.E.2d at 455 ("in the absence of anything indicating a contrary *intention* . . ."") (emphasis added). "[I]n attempting to ascertain th[e] [parties'] intention," the Court "endeavor[s] to determine the situation of the parties, as well as their purposes, at the time the contract was entered into." *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

For the merger presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the

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[12] *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

[13] As the *Coleman* Court expressly observes regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), "the documents were [indeed] executed at *the same time, by the same parties, for the same purposes, and*

concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties' intention was contrary to merger. *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation."). No such inference can be drawn here. Indeed, it does not even make sense that the parties would have intended the Admission Agreement and the Arbitration Agreement not to merge

Unlike the arbitration agreements at issue in *Coleman*, *Hodge*, and *Thompson*, all of which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), the instant Arbitration Agreement has no such disclaimer/revocation provision. (*See* R. p. 30.) Moreover, while the instant Admission Agreement does contain an "Entire Agreement" clause, it does not reference the Arbitration Agreement as a separate contract. (R. p. 72.) Indeed, the "Entire Agreement" clause in the instant Admission Agreement expressly states that other admissions materials are deemed a part of the Admission Agreement. (R. p. 72.) Without question, the Arbitration Agreement is among the admissions materials.

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in the course of the same transaction." 407 S.C. at 355, 755 S.E.2d at 455

To be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required to gain admission to the Facility. (R. p. 104 ¶ 9.) But all this means is that it did not have to be agreed to for Ms. Wragg to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was in fact agreed to. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

Moreover, while it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: the Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only*

(emphasis added).

makes sense together with the Admission Agreement, which is its (the Arbitration Agreement's) sole reason for being. (*See* R. p. 30 (providing for arbitration of "any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident . . . ."), p. 30 ("This [Arbitration] Agreement shall remain in effect for all care rendered at Facility . . . .").)

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Ms. Wragg's relationship with the Facility: the Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission. (*Compare* R. pp. 61–72 (setting forth the terms of Ms. Wragg's admission to the Facility) *with* p. 30 (providing for arbitration of disputes arising out of Ms. Wragg's admission in the Facility).)

Also absent here is the type of discrepancy the *Hodge* Court pointed out with respect to the respective provisions of the admission and arbitration agreements before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare* R. p. 70 (providing "This Agreement will be governed by and construed in

accordance with applicable Federal regulations and those laws of the State in which Facility is located.") *with* p. 30 (providing that, "because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action," but also providing that arbitration shall be "as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules").) Essentially, both instruments provide that South Carolina law applies except where displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, the fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger.

And to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that *merger is the default position*, i.e., it is presumed, and that this presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our courts will consider and construe the documents together *unless* there is evidence of a contrary intention. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence "indicating [(i.e., affirmatively showing)] a contrary intention." 407 S.C. at 355, 755 S.E.2d at 455. To allow the merger presumption to be upset based on evidence that is merely ambiguous—i.e., that does not even go so far as to clearly indicate a contrary intention, but at most might (or might not) reflect a contrary intention—is to allow the exception to devour the rule.

Respectfully, the circuit court should have found that the Arbitration Agreement merged with the Admission Agreement. The instruments were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, the whole of which related to Ms. Wragg's

admission to the Facility and would not have been done at all but for her admission to the Facility. Any finding against merger improperly relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties' intent.

Re: Equitable Estoppel

In *Wilson*, our Supreme Court favorably discussed the framework of the so-called "direct benefits" test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals' earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which the Facility and Porter contend Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Ms. Wragg received direct benefits (in the form of her admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement was merged. *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner's alternative argument based on the application of the state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., "[t]he traditional test referenced by [the] [p]etitioners," "has been analyzed most-often in *non*-arbitration cases") (emphasis added). In other words, *Wilson*—as well as logic

itself—supports the use of the direct benefits test to answer the question of equitable estoppel in an arbitration case like this.

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Ms. Wragg received the benefit of her admission to the Facility, including, without limitation, the room, board, care, and treatment she received therein. To deny her receipt of such benefits is illogical. It would require wholly discounting every single aspect of her residency (every meal, every instance of care/treatment delivered, essentially every moment at the Facility). Not even Plaintiff has alleged this. (*See* R. pp. 8–17.)

Respectfully, the circuit court should have found that the Arbitration Agreement merged with the Admission Agreement and that Plaintiff is estopped to deny the Arbitration Agreement's enforceability, Ms. Wragg having effectively embraced/directly benefitted from the Admission Agreement for the purpose of her admission only to later, via Plaintiff, attempt to repudiate the Arbitration Agreement with which the Admission Agreement was merged.[14]

[14] Although the dispute here is about the Arbitration Agreement, as opposed to the Admission Agreement—and, again, Plaintiff does not dispute the enforceability of the Admission Agreement (R. p. 42 n.8 ("[T]he enforceability of the Admission Agreement is not at issue . . . .”))—to the extent there were any question about the enforceability of the Admission Agreement, the Facility and Porter's equitable estoppel argument applies with equal force to the Admission Agreement.

B. The circuit court erred in failing to find that the Arbitration Agreement is enforceable against Plaintiff because it was either validly executed on Ms. Wragg's behalf by her lawful agent (whether via true agency or agency by estoppel) or Ms. Wragg thereafter ratified its execution on her behalf.

A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth*., 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)). "An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties." *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145–46, 425 S.E.2d 764, 773 (Ct. App. 1992). The doctrine of apparent authority provides that a principal may be bound by the acts of it agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

Moreover, "[w]hen a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances." *R & G Const.*, 343 S.C. at 433, 540 S.E.2d at 118 (Ct. App. 2000).

Additionally, authority can be supplied to an agent retroactively by express or implied ratification. *See Brazell Bros. Contractors v. Hill*, 245 S. C. 69, 74, 138 S.E.2d 835, 837 (1964) ("Ratification, as the term implies, is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been bound but for his subsequent assent."). "Ratification, as it relates to the law of agency, may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into on his behalf by another who at the time assumed to act as his agent." *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S. C. 75, 89, 124 S.E.2d 602, 608 (1962). It is not necessary for a principal to be present at the time of the commission of his agent's act in order for him to ratify that act. *See State v. Waldrop*, 73 S. C. 60, 52 S.E. 793, 795 (1905) ("The presiding judge ruled that he could ratify the act of the agent, whether he was present or not, and in this we see no error.").

Plaintiff's opposition to the Motions to Compel Arbitration did not include any affidavits or declarations. (*See* R. pp. 33–51.) As attested to by Angela Burns ("Ms. Burns"), the Facility's Admissions Director at the time of Ms. Wragg's admission, whose declaration is the only evidence in the record on the points addressed therein, Ms. Burns reviewed and explained each of the admissions documents to Mr. Greene, including the Arbitration Agreement; she believed Mr. Greene had the authority to sign the same; and Ms. Wragg never repudiated or invalidated Mr. Greene's act of singing the Arbitration Agreement and never indicated to Ms. Burns that he lacked the authority to sign on her behalf. (*See* R. pp. 103–05.)

Of course, for a principal to create an agency relationship, the principal must have the mental capacity to contract. *In re Thames*, 344 S.C. 564, 570, 544 S.E.2d 854, 856 (Ct. App. 2001). It is, however, the party alleging incompetence who bears the burden of proving incapacity at the time of the transaction by a preponderance of the evidence. *Id.* at 572, 544 S.E.2d at 858. And Plaintiff proved no such thing.

"Mere infirmity of mind or body, not amounting to an incapacity to understand the nature and consequence of the act done" is insufficient to show incapacity. *In re Nightingale's Estate*, 182 S.C. 527, 189 S.E. 890, 896 (1937). Moreover, "[t]he mere fact that a person's mind has been weakened by old age,

accident, or disease is not sufficient to show that he or she lacks mental capacity." *Ballenger v. City of Inman*, 336 S.C. 126, 131, 518 S.E.2d 824, 827 (Ct. App. 1999) (citing *Lewis v. Lewis*, 199 S.C. 490, 20 S.E.2d 107 (1942). Instead, "mental incompetence is established by credible evidence that the subject, because of mental impairment, has become incapable of managing his own affairs." *Grapner v. Atl. Land Title Co.*, 307 S.C. 549, 551, 416 S.E.2d 617, 618 (1992).

All Plaintiff cited below to support the assertion that Ms. Wragg lacked capacity to confer agency authority on Mr. Wragg or consent to the Arbitration Agreement was a single report stating that she was "moderately impaired." This lone observation from nursing staff—which was not in fact directed at the particular legal question of Ms. Wragg's contractual capacity—is insufficient to support a reasonable and non-speculative finding that she lacked capacity.

Plaintiff having not proved that Ms. Wragg lacked contractual capacity, the only evidence in the record is such that the circuit court erred in failing to find that the Arbitration Agreement is enforceable against Plaintiff because it was either validly executed on Ms. Wragg's behalf by her lawful agent (whether via true agency or agency by estoppel) or Ms. Wragg thereafter ratified its execution on her behalf.

II. At a minimum, the circuit court erred in denying the Facility and Porter's alternative request for limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability.

The Arbitration Agreement is valid on its face, containing Mr. Greene's express representation of authority to bind his mother. (*See* R. p. 30.) The only notion to the contrary comes from Plaintiff's opposition to the Motions to Compel Arbitration.

Assuming, *arguendo*, the circuit court did not err in denying the Facility and Porter's primary request for relief (as argued above), the interests of justice required that it allow them to conduct targeted discovery on the Arbitration Agreement's enforceability based on agency or related concepts. Otherwise, they are left in the impossible Catch-22 of, on the one hand, being vulnerable to Plaintiff's argument that they have not presented sufficient evidence to prove the Arbitration Agreement is enforceable (whether by true agency, agency by estoppel, or ratification, each a fact-intensive inquiry), while, on the other hand, being vulnerable to Plaintiff's argument that they waived their arbitration rights by making use of the tools of litigation (i.e., discovery) to prove them.

It cannot be the case that the proponents of arbitration (who, it must be remembered, may well be attempting to vindicate valid rights to arbitrate that the arbitration opponent has wrongfully denied) have the burden to establish that right in a fact-based judicial proceeding in which they are disallowed use of the fact-

finding tools (discovery procedures) available in other judicial proceedings. Obviously, if this were an action to determine the validity of a contract other than an arbitration agreement there would be no question about the Facility and Porter's ability to conduct discovery relevant to the facts/circumstances bearing on the contract's validity. To force them into a situation where they cannot conduct relevant discovery to vindicate their arbitration rights without risking a waiver of those very rights is not only patently unjust but also a violation of the FAA's requirement that arbitration agreements must be placed on equal footing with other contracts. *See AT&T Mobility, L.L.C. v. Concepcion*, 563 U.S. 333, 339 (2011).

CONCLUSION

For the foregoing reasons, Appellants ask this Honorable Court to reverse the circuit court, specifically, to compel Plaintiff's claims against the Facility and Porter to arbitration (or, alternatively, to remand the case to the circuit court with instructions that it do so) and to stay this action as to PHC until any and all arbitration proceedings are completed (or, alternatively, remand the case to the circuit court with instructions that it either do so or conduct any further proceedings necessary to decide the PHC's motion to stay on the merits).

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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April 12, 2021

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2019-CP-22-00961
Appellate Case No. 2020-001167

Kevin Greene,
as Attorney in Fact for and on Behalf of
Eleanor Greene Wragg, Respondent,

v.

Palmetto Prince George Operating, LLC
d/b/a Prince George Healthcare Center;
Palmetto Health Care, LLC;
Murray Forman, Individually; and
Richard Porter, Individually, Defendants.

Of whom Palmetto Prince George Operating, LLC
d/b/a Prince George Healthcare Center;
Palmetto Health Care, LLC; and
Richard Porter, Individually, are Appellants.

APPELLANTS' CERTIFICATION FOR FINAL BRIEF

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I, Russell G. Hines, do hereby certify that the **Final Brief of Appellants** complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

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