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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2021-000714

Orveletta Alston as Personal Representative of the Estate of Willie Earl Alston, Sr.,….Respondent,

v.

Conway Manor, LLC, Raymond Tiller, and John and Jane Does 1-10…..……..Petitioners.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Whether the Court of Appeals correctly held Mrs. Alston-Wood did not have authority to bind Mr. Alston to arbitration where the Adult Health Care Consent Act does not provide authority to agree to arbitration, she is not the person with priority under the Act, and optional arbitration is not a health care decision under the Act?

II. Whether the Court of Appeals correctly held Respondent is not equitably estopped from challenging the validity of the arbitration provision because Respondent's claims do not arise from or rely upon the admission agreement?

III. Whether the Court of Appeals correctly held Mr. Alston is not a third-party beneficiary of the admission agreement because it is an invalid agreement?

IV. Whether the Court of Appeals correctly held the Federal Arbitration Act does not apply when there is no valid arbitration agreement to enforce?

INTRODUCTION

This case arises out of the death of Willie Earl Alston, Sr., while a resident of Conway Manor, LLC's assisted living facility. After his wife, as personal representative, filed an action for survival and wrongful death, the defendants moved to compel arbitration based on an optional arbitration provision in an admission agreement that Mr. Alston's daughter signed without legal authority. The lower court denied the motion to compel arbitration, and the Court of Appeals affirmed in an unpublished opinion. *Alston v. Conway Manor, LLC*, Op. No. 2021-UP-105 (S.C. Ct. App. filed March 31, 2021).

COUNTER STATEMENT OF THE CASE

Mr. Alston was admitted to Conway Manor on December 17, 2015. (R. p. 8). He suffered from a history of stroke and Alzheimer's disease, could not get out of bed, and used a wheelchair for mobility. (R. p. 147). At the time of his admission, two doctors found Mr. Alston could not comprehend the Resident's Right and Responsibilities of the facility and could not make health care decisions. (R. p. 145).

Orveletta Alston, Mr. Alston's wife, made medical decisions for him. (R. p. 182). The Conway Manor admissions coordinator met with Kimberly Alston-Wood, Mr. Alston's daughter, for her to execute the admission paperwork. (R. pp. 141-43). Despite the fact that his wife, Orveletta Alston, was alive and the legal representative for Mr. Alston, Mrs. Alston-Wood signed two documents—an Admission Agreement that contains an optional arbitration provision and a Resident and Facility Binding Arbitration Agreement.

The signature block for the admission agreement has a line for the "Signature of Responsible Party." (R. p. 53). Directly below that line it states "Responsible Party is acting as:" and lists as choices: conservator, power of attorney, relative, or other. *Id.* Mrs. Alston-Wood signed as Responsible Party but did not choose a capacity in which she acted as Responsible Party. *Id.* The last page of the admission agreement states "The legal designee ***shall*** supply the Facility with a copy of the Power of Attorney, Durable Power of Attorney, Guardianship, or other legal document, which permits him/her to act as the legal designee for the Resident." (R. p. 53). Conway Manor never got any such document from Mrs. Alston-Wood, and none exists. (R. pp. 3, 207-08).

The arbitration provision is the last paragraph of the admission agreement. (R. p. 124). It is entitled "***Optional*** Arbitration Clause." *Id.* (emphasis added). It states: "Any action, dispute, claim or controversy of any kind (tort, contract, equitable or statutory, including but not limited to claims of violations of Resident's Rights) now existing or hereafter arising between the parties, in anyway arising from or relating to this Agreement governing the Resident's stay a[t] the Facility, shall be governed by the provisions of the South Carolina Arbitration Code." *Id.* The last sentence is in bold font and states: "OPTIONAL: If the parties do not agree to this Arbitration Clause, please mark with an X to void this clause only. I have X this clause ___ initial." *Id.*

While at Conway Manor, Mr. Alston developed pressure sores. (R. p. 18). The sores became infected and caused pain and suffering, the decline of Mr. Alston's health and, ultimately, his death. (R. pp. 18, 29-30). He died on April 22, 2016, only four months after entering Conway Manor. (R. p. 170).

On March 2, 2017, Respondent filed a Complaint against Conway Manor, Raymond Tiller, and John and Jane Does 1-10 ("Petitioners") asserting causes of action for wrongful death, survival, negligence, negligence *per se*, fraud and misrepresentation, and violation of the South Carolina Unfair Trade Practices Act. (R. pp. 11-27). Petitioners filed an answer generally denying liability and asserting the case is subject to arbitration. (R. pp. 31-39). Petitioners filed a motion to compel arbitration arguing there is a valid arbitration agreement that Mrs. Alston-Wood had statutory authority to execute on behalf of Mr. Alston under the South Carolina Adult Health Care Consent Act ("the Act"), S.C. Code Ann. §§ 44-66-10, *et seq.*,[1] Respondent should be equitably estopped from challenging the validity of the arbitration provision, and Mr. Alston is a third-party beneficiary to the agreement. (R. pp. 96-111).

Respondent opposed the motion by arguing the arbitration provision is not enforceable because Mrs. Alston-Wood had no statutory authority to sign the admission agreement on Mr. Alston's behalf since his wife, Orveletta Alston, was the person with priority under the Act to make health care decisions. (R. pp. 171, 175-77). Respondent argued Conway Manor's decision to put the arbitration provision in the admission agreement does not change the nature of an arbitration provision from a legal decision to a health care decision under the Act, Respondent is

[1] Petitioners also argued Mrs. Alston-Wood had authority under the South Carolina Bill of Rights for Residents of Long-Term Care Facilities, S.C. Code Ann. §§ 44-81-10, *et seq.* The Court of Appeals found it did not provide any authority, and Petitioners do not challenge that finding in this Court. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance.").

not equitably estopped from challenging the enforceability of the arbitration provision, and Mr. Alston was a third-party beneficiary only as to health care he received and not as to the arbitration provision. (R. pp. 172-74).

The lower court, the Honorable Larry B. Hyman, Jr., denied Petitioners' motion to compel arbitration. The court held that, under the Act, Mrs. Alston and not Mrs. Alston-Wood had priority to make health care decisions for Mr. Alston based on the order of priority stated in the Act. (R. pp. 4-5). The court further found that the Act, even if it conferred authority, does not grant the authority to enter into an arbitration provision because that is a legal and not a health care decision. (R. pp. 5-6). The lower court held Mr. Alston was not a third-party beneficiary of the arbitration provision and Respondent is not equitably estopped from denying the arbitration provision, and the Federal Arbitration Act does not require enforcement of the arbitration provision. (R. pp. 7-10). Petitioners appealed, and the Court of Appeals affirmed in an unpublished opinion. *Alston v. Conway Manor, LLC*, Op. No. 2021-UP-105 (S.C. Ct. App. filed March 31, 2021).

The Court of Appeals held the Act did not confer authority on Mrs. Alston-Wood to agree to arbitration on Mr. Alston's behalf for three, independent reasons. First, the Act "allows a representative to make decisions for a patient regarding medical procedures and the treatment of human disease and ailments; it does not address the capacity of such a representative to bind the patient to an arbitration agreement." *Alston*, Op. No. 2021-UP-105, *5. Second, the Act "designates that a spouse has priority over an adult child, and Mrs. Alston had a living spouse." *Id.* at *6. Third, even if the Act authorized Mrs. Alston-Wood to make health care decisions for Mr. Alston, "the arbitration clause in the Admission Agreement is an optional method for dispute resolution, not a traditional health care decision contemplated by the" Act because "assent to it

was not required for Mr. Alston's admission to the facility or his access to healthcare there." *Id.* at *6-7.

The Court of Appeals held equitable estoppel did not apply because Mrs. Alston "neither relies on duties stated in the Admission Agreement as a basis for her claims nor asserts a breach of the Admission Agreement as a cause of action." *Id.* at *8. "Rather, the causes of action set forth in the complaint in this case rely on alleged breaches of common law, regulatory, and statutory duties." *Id.* at *9.

The Court of Appeals held Mr. Alston was not a third-party beneficiary to an arbitration agreement because there was no valid agreement to arbitrate. *Id.* at *9-10. Finally, the Court held that there is no valid arbitration provision to enforce under the Federal Arbitration Act. *Id.* at *10.

Petitioners filed a petition for rehearing, which the Court of Appeals denied. This Court should deny the petition for writ of certiorari because the Court of Appeals correctly decided the issues before it.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD MRS. ALSTON-WOOD DID NOT HAVE AUTHORITY TO BIND MR. ALSTON TO ARBITRATION.

Petitioners' challenges to the Court of Appeals' three independent bases for finding Mrs. Alston-Wood lacked authority to bind her father to arbitration are without merit, and the Court should deny the petition.

A. <u>The Act does not provide authority to any person to bind a patient to arbitration.</u>

The Court of Appeals held the Act allows a representative to make medical decisions but does not address a representative's capacity to bind the patient to arbitration. *Alston*, Op. No. 2021-UP-105, *5. Petitioners' sole argument on this issue is that the optional arbitration provision is in the admission agreement rather than being a separate arbitration agreement. (Pet. for Cert. pp. 4-

6). They do not cite to a single case that holds the Act provides authority for a representative to bind the patient to an optional arbitration provision when it is included in the admission agreement but does not provide authority when it is a separate agreement.

Petitioners' reliance on *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014), for its argument is misplaced. In *Coleman*, the patient's sister signed an admission agreement and a voluntary arbitration agreement. *Id.* at 353, 755 S.E.2d at 454. The Supreme Court addressed "the nature and scope of authority granted a surrogate by the Adult Health Care Consent Act." *Id.* at 350, 755 S.E.2d at 453. It held "[t]hat the Act contemplates that the surrogate's authority extends primarily to traditional health care decisions, and only secondarily to the financial decisions necessitated by those decisions." 407 S.C. at 353, 755 S.E.2d at 454. Because the arbitration agreement in that case "concerned neither health care nor payment, but instead provided an optional method for dispute resolution", the surrogate "did not have capacity to bind Decedent to this voluntary arbitration agreement." *Id.* at 354, 755 S.E.2d at 454.

Petitioners attempt to distinguish this case from *Coleman* because, in this case, an arbitration provision is in the admission agreement rather than a separate document. (Pet. for Cert. pp. 5-6). It is noteworthy that Petitioners got Mrs. Alston-Wood to sign a separate arbitration agreement—the Resident and Facility Binding Arbitration Agreement (R. pp. 75-77)—but do not attempt to enforce that agreement, presumably because they know that it is unenforceable under the Act and *Coleman*. If Mrs. Alston-Wood had no authority to sign a separate, voluntary arbitration agreement under the Act, then the Act also does not confer authority to bind Mr. Alston to an optional arbitration provision in the admission agreement. Any other conclusion defies this Court's reasoning in *Coleman*.

The *Coleman* decision did not turn on whether the voluntary arbitration agreement was a separate agreement or a provision in an admission agreement. It turned on the substance of the arbitration agreement, specifically its lack of relation to health care or payment, and the fact that it was optional.

> Assent to this contract [the admission agreement] was a condition for Decedent's admission to Facility. On the other hand, the ***AA was not required for Decedent's admission, contained no provision for medical, nursing, or health care services to be provided for Decedent, and did not require any financial commitment to pay for such services***. The scope of Sister's authority to consent to decisions concerning Decedent's health care extended to the admission agreement, which was the basis upon which Facility agreed to provide health care and Sister agreed to pay for it. The separate ***arbitration agreement concerned neither health care nor payment***, but instead provided an optional method for dispute resolution between Facility and Decedent or Sister should issues arise in the future. Under the Act, Sister did not have the capacity to bind Decedent to this voluntary arbitration agreement.

Coleman, 407 S.C. at 353-54, 755 S.E.2d at 454 (internal quotation marks omitted).

The arbitration provision in this case concerns neither health care nor payment. It is optional and, therefore, assent to it was not required to make any health care decision for Mr. Alston. Regardless, the provision is severable. (R. p. 122 (severability provision in admission agreement)). Because the arbitration provision concerned neither health care nor payment, the Act does not confer authority on Ms. Alston-Wood or any other person to bind Mr. Alston to it.

The Court of Appeals correctly held that the Act does not confer authority to agree to an optional arbitration provision.

B. Mrs. Alston, as the patient's wife, had priority over Mrs. Alston-Wood, an adult child.

The Court of Appeals held the Act designates that a spouse has priority over an adult child and, since Mr. Alston had a living spouse, she had priority to make his medical decision. *Alston*, Op. No. 2021-UP-105, *6. Petitioners make two arguments on this issue—(1) the Act did not require them to determine who had priority, and (2) arbitration is enforceable even without a

signature because Mr. Alston was admitted to the facility and paid for services. (Pet. for Cert. pp. 7-8). Neither argument is a basis for reversal.

As to priority, Petitioners notably do not dispute that Mrs. Alston—**not** Mrs. Alston-Wood—had priority. They do not dispute the Court of Appeals' finding that "pursuant to the plain language of the AHCCA, Daughter lacked authority to enter the contracts addressing Mr. Alston's health care." *Alston*, Op. No. 2021-UP-105, *6. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance."). Therefore, the Court may affirm the Court of Appeals' opinion as to the validity of the agreement, third-party beneficiary, and the Federal Arbitration Act on the basis that the law of the case is that Mrs. Alston-Wood lacked authority under the Act to execute the admission agreement.

Even if the Court does not affirm based on the unappealed ruling that Mrs. Alston-Wood did not have priority under the Act, Petitioners' only argument on this point is that they had no obligation to determine priority. (Pet. for Cert. p. 7). The Court of Appeals did not rely or rule on any obligation of Petitioners to determine priority. Instead, it relied on the plain language of the Act, which does not provide authority to Mrs. Alston-Wood. Petitioners' argument on this point is irrelevant and cannot be a basis to reverse the Court of Appeals.[2]

As to the enforceability of a contract without a party's signature, Petitioners' argument on this point is unpreserved and meritless. Petitioners raised this argument for the first time in the petition for rehearing, and it was not addressed by either the lower court or the Court of Appeals. Therefore, it is unpreserved. *Herron v. Century BMW*, 395 S.C. 461, 469, 719 S.E.2d 640, 644

[2] Petitioners put in place their own requirement to verify a Responsible Party's authority to act on behalf of the patient (R. p. 53) but failed to get Mrs. Alston-Wood to state the capacity in which she acted on behalf of her father or provide a copy of a document evidencing her authority.

(2011) ("And although the issue of preemption was raised in Appellant's rehearing petition, such an attempt was untimely and improper as ***a party may not raise an issue for the first time in a petition for rehearing***." (emphasis added)).

Even if the Court considers the issue, it is meritless. It is undisputed that Mrs. Alston-Wood never had authority to execute the arbitration agreement on Mr. Alston's behalf. It is undisputed that Mr. Alston did not have capacity to contract at the time he entered the facility (R. p. 145), and there is no evidence that he ever regained capacity to contract while at the facility. This case is not about the absence of a signature but about the absence of anyone with capacity or authority to contract with Petitioners and bind Mr. Alston to the waiver of his right to a trial by jury. None of the cases cited by Petitioners address the absence of authority or capacity to contract.

The Court of Appeals correctly held that Mrs. Alston-Wood did not have priority under the Act to execute the admission agreement on behalf of Mr. Alston.

C. <u>The optional arbitration provision is not a health care decision under the Act.</u>

The Court of Appeals held the optional arbitration provision in the admission agreement is not a traditional health care decision under the Act. *Alston*, Op. No. 2021-UP-105, *6-7. Petitioners do not argue that the optional arbitration provision is a traditional health care decision. Instead, they argue that the cases the Court of Appeals relied upon are ones involving "standalone arbitration agreements" rather than an arbitration provision in an admission agreement, and appear to argue that the Court singled out the arbitration provision and treated it differently than other provisions in violation of federal law. (Pet. for Cert. pp. 8-9).

The Court of Appeals' holding that the optional arbitration provision is not a traditional health care decision is the law of the case because Petitioners do not challenge it. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed

ruling is the law of the case and requires affirmance."). Regardless, the fact that the arbitration provision is part of the admission agreement does not bring it within the decisions that the Act grants a surrogate the authority to make on behalf of a patient. Whether it is a provision in an admission agreement or a separate agreement, the nature of the arbitration decision is the same—it is a voluntary dispute resolution provision that does not relate to medical care and is not necessary for the patient's admission to the facility. Further, the majority opinion in *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014), specifically addressed and rejected the notion that it singled out arbitration in violation of federal law. *See id.* at 354 n.4, 755 S.E.2d at 454 n.4 (noting the dissent's "view of the issue leads the dissent to conclude the majority's analysis somehow runs afoul of the rule that arbitration agreements cannot be singled out for special treatment when, in fact, it is the dissent which treats arbitration differently").

The Court of Appeals correctly held the Act, even if it applied, did not provide Mrs. Alston-Wood with authority to bind Mr. Alston to arbitration because it was not a traditional health care decision.

II. THE COURT OF APPEALS CORRECTLY HELD RESPONDENT IS NOT EQUITABLY ESTOPPED FROM CHALLENGING THE VALIDITY OF THE ARBITRATION PROVISION.

The Court of Appeals held that equitable estoppel did not apply in this case because Respondent did not assert a cause of action for a breach of the admission agreement or rely on any duties stated in the agreement as a basis for her claims. *Alston*, Op. No. 2021-UP-105,*8-9. Petitioners make three arguments of error—(1) the Court of Appeals relied on "dicta" in *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), (2) this case meets the elements of equitable estoppel, and (3) the Court should have relied on an unpublished decision of the District Court of South Carolina. (Pet. for Cert. pp. 9-12). None of these arguments provide a basis to reverse the Court of Appeals' decision.

As to *Hodge*, the Court of Appeals cited to it for the proposition that a party not suing for a breach of the admission agreement is not attempting to enforce it and, therefore, cannot be estopped from denying it. *Alston*, Op. No. 2021-UP-105, *8-9. In *Hodge*, the Court of Appeals addressed a facility's equitable estoppel argument by finding that the arbitration and admission agreements did not merge and, even if they did merge, the plaintiff was not suing for a breach of the admission agreement and not attempting to enforce it. *Hodge*, 422 S.C. at 563, 813 S.E.2d at 302. This holding was not dicta, as Petitioners argue.[3] Instead, it was part of the Court's reasoning for affirming the lower court's finding that equitable estoppel did not apply. The Court of Appeals correctly relied upon its holding in *Hodge*.[4]

As to the merits of equitable estoppel, the Court of Appeals held that Respondent's causes of action "rely on alleged breaches of common law, regulatory, and statutory duties." *Alston*, Op. No. 2021-UP-105, *9 (citing *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 230, 847 S.E.2d 268, 272 (Ct. App. 2020) (explaining equitable estoppel "estops a nonsigner from refusing to comply with an arbitration provision of a contract if (1) the nonsigner's claim arises from the contractual relationship, (2) the nonsigner has 'exploited' other parts of the contract by reaping its benefits, and (3) the claim relies solely on the contract terms to impose liability")). Petitioners argue the elements listed in *Weaver* are satisfied because they admitted Mr. Alston based on the admission agreement, Mr. Alston "utilized" the agreement "to receive care", and his claims "rely on duties arising from the admission agreement." (Pet. for Cert. pp. 9-10). This is incorrect.

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[3] *But see Gordon v. Lancaster*, 425 S.C. 386, 393 n.6, 823 S.E.2d 173, 177 n.6 (2018) ("Those who disregard dictum, either in law or in life, do so at their peril." (internal alteration and quotation marks omitted)).

[4] To the extent Petitioners argue the Court of Appeals erred in relying on *Hodge* because it involved a separate arbitration agreement, that is not a relevant distinguishing factor because it does not change the fact that Respondents' claims do not arise out of or rely on the admission agreement.

That Petitioners may have admitted Mr. Alston because someone signed the admission agreement does not mean that Respondent's claims arise out of the agreement. Respondent does not rely on duties stated in the admission agreement for the claims asserted in the Complaint and does not assert a breach of contract claim but, instead, relies on the common law and regulatory and statutory duties. (R. pp. 18-19). The admission agreement itself (drafted by Petitioners) acknowledges that it owes duties to residents that are independent of the admission agreement. It states "The Facility is required by law to exercise reasonable care toward the Resident." (R. p. 49). Petitioners do not even argue Mr. Alston received a benefit from the agreement but only that he "utilized" it to "receive care." The allegations in this case are that Petitioners failed to provide him with care. As this court noted in *Hodge*, "because the Facility allegedly caused [the decedent]'s injuries that later led to her death, we find it difficult to find she benefited even from being admitted." 422 S.C. at 563, 813 S.E.2d at 302. The existence of an admission agreement and subsequent admission of a patient to a facility is not sufficient to impose equitable estoppel. The Courts have refused to apply an equitable estoppel defense in cases where an admission agreement existed. *See, e.g.*, *Hodge*, 422 S.C. at 563, 813 S.E.2d at 302; *Thompson v. Pruitt Corp.*, 416 S.C. 43, 62, 784 S.E.2d 679, 690 (Ct. App. 2016).

Finally, Petitioners argue the Court of Appeals should have relied on an unpublished decision of the District Court of South Carolina in *THI of S.C. of Columbia, LLC v. Wiggins*, 2011 WL 4089435, Case No. 3:11-888-CMC (Sept. 13, 2011).[5] (Pet. for Cert. pp. 10-11). In *Wiggins*, the decedent's daughter signed an admission contract that included an arbitration provision. *Id.* at *1. After her father died, she filed suit as his personal representative, and the facility sought to

[5] Rule 268(d)(2), SCACR ("[U]npublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved.").

compel arbitration. *Id.* The daughter argued there was no evidence of her authority to bind her father to arbitration, and the facility argued the decedent (and by extension his personal representative) was equitably estopped from denying the contract formation. *Id.* at *17-20. The Court made a specific finding that the decedent "received the benefit of the Contract" but did not analyze or find whether the claims arose out of or relied upon the contract. *Id.* at *20-21.

Here, the Court of Appeals found that the claims do not arise out of or rely on the admission agreement. Therefore, equitable estoppel does not apply because Respondent is not relying on the agreement in one instance and repudiating it in another. Respondent is not relying on the agreement at all. *Wiggins* does not mention or analyze this component of equitable estoppel. Therefore, the Court of Appeals correctly did not cite to or rely upon *Wiggins* in its decision.

The Court of Appeals correctly held that equitable estoppel does not apply.

III. THE COURT OF APPEALS CORRECTLY HELD MR. ALSTON IS NOT A THIRD-PARTY BENEFICIARY.

The Court of Appeals correctly held that Mr. Alston was not a third-party beneficiary because the admission agreement was never valid. *Alston*, Op. No. 2021-UP-105, *9-10. "[T]here can be no third-party beneficiary unless a valid contract exists." *Thompson v. Pruitt Corp.*, 416 S.C. 43, 57, 784 S.E.2d 679, 687 (Ct. App. 2016) ("Here, Son was not authorized to execute the AA on Mother's behalf. Therefore, she could not be the third-party beneficiary of the alleged AA between herself and Appellants."). While this alone is sufficient to deny the Petition, the Petitioners are also incorrect on the merits.

Because Respondent does not seek to enforce the admission agreement, the third-party beneficiary argument fails. "[A] third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement." *Thompson*, 416 S.C. at 57, 784 S.E.2d at 687 (internal quotation marks

omitted). In *Thompson*, this Court held because the personal representative, "is not attempting to enforce the AA on behalf of Mother's estate[but] Rather, she has asserted tort claims against Appellants arising out of the patient-provider relationship created by the separate Admission Agreement", the "estate cannot be bound by the AA." 416 S.C. at 57, 784 S.E.2d at 687. The same result is warranted in this case.

Petitioners rely on the unpublished District Court order in *THI of S.C. at Columbia, LLC v. Wiggins*, 2011 WL 4089435 (D.S.C. Sept. 13, 2011), for their third-party beneficiary argument. (Pet. for Cert. p. 12). South Carolina appellate courts have addressed third-party beneficiary arguments in the context of arbitration since *Wiggins* was filed in 2011, and no state appellate court cites to it. *See, e.g.*, *Thompson*, 416 S.C. at 56-58, 784 S.E.2d at 686-87. Regardless, the case does not support a finding that Mr. Alston is bound as a third-party beneficiary.

In *Wiggins*, the District Court noted the admission agreement "refer[red] to benefits and responsibilities of the resident, the facility, and the fiduciary party." 2011 WL 4089435, *18. Here, the admission agreement does not refer to any benefits of the resident but, instead, almost exclusively refers to payment and refund in different scenarios, treatment by outside providers, and indemnification or limitation of the facility's liability. (R. pp. 114-24). Further, while care was ***a*** purpose of the admission agreement, it was not the essential purpose as there are far more terms discussing payment to Petitioners than any care they are supposed to provide to Mr. Alston. Therefore, *Wiggins* does not support a third-party beneficiary finding in this case.

The Court of Appeals correctly held a third-party beneficiary theory does not apply.

IV. THE COURT OF APPEALS CORRECTLY HELD THE FAA DOES NOT APPLY WHEN THERE IS NO VALID ARBITRATION PROVISION TO ENFORCE.

The Court of Appeals held the Federal Arbitration Act does not apply where there is no valid arbitration provision to enforce because Mrs. Alston-Wood did not have authority to execute

the admission agreement on Mr. Alston's behalf. *Alston*, Op. No. 2021-UP-105, *10. As explained above, the Court of Appeals correctly held Mrs. Alston-Wood lacked authority and, therefore, there is no valid agreement to arbitrate.

Even if the Court could find a valid arbitration agreement existed, the FAA still does not mandate enforcement because Respondent's claims do not fall within the scope of the arbitration provision. "[A]rbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). The "Optional Arbitration Clause" states:

> Any action, dispute, claim, or controversy of any kind (tort, contract, equitable or statutory, including but not limited to claims of violations of Resident's Rights) now existing or hereafter arising between the parties, in anyway arising from or relating to this Agreement governing the Resident's stay a[t] the Facility, shall be resolved by binding arbitration.

(R. p. 124). "[E]ven the most broadly-worded arbitration agreements still have limits founded in general principles of contract law." *Aiken v. World Fin. Corp.*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007). "[C]ourts generally hold that broadly-worded arbitration agreements apply to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained." *Id.* at 149, 644 S.E.2d at 708 (internal quotation marks omitted) (finding no significant relationship existed between a loan agreement and claims based on defendant's employees' use of plaintiff's personal information to embezzle money).

In this case, there is no significant relationship between Respondent's claims and the admission agreement. Respondent's claims arise out of tortious conduct leading to severe suffering and death. (R. pp. 11-27). The parties could not have intended, at the time they executed the admission agreement, to agree to arbitrate a claim related to such conduct because it was not foreseeable that Petitioners would mistreat Mr. Alston. *See Aiken*, 373 S.C. at 151, 644 S.E.2d at

709 (stating our courts "will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings").

Petitioners cite to no law for the argument that the claims fall within the scope of the arbitration provision but state only that Respondent's causes of action "stem from the care and treatment received by Mr. Alston under the Admission Agreement." (Pet. for Cert. pp. 14-15). This is an insufficient basis on which to order arbitration. *See Hatcher v. Edward D. Jones & Co., L.P.*, 379 S.C. 549, 554, 666 S.E.2d 294, 297 (Ct. App. 2008) (affirming the denial of a motion to compel arbitration as to a negligence claim based on the impermissible withdrawal of money from plaintiff's retirement account because "although these claims are factually related to the performance of the contract, each action is legally distinct from the contractual relationship between the parties, and therefore, was not within the contemplation of the parties' agreement to arbitrate). That the admission agreement was executed for Mr. Alston to enter the facility does not make every claim between the parties subject to arbitration.

Finally, Petitioners' argument as to interstate commerce is not preserved. There is no ruling by the lower court or the Court of Appeals as to whether interstate commerce exists in this case, and Petitioners failed to file a Rule 59(e), SCRCP, motion asking for a ruling. *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) ("Post-trial motions . . . are used to preserve those that have been raised to the trial court but not yet ruled upon by it.").

The Court of Appeals correctly held there is no valid arbitration provision to enforce under the FAA.

CONCLUSION

None of the "character of reasons" for the Court to grant certiorari are present in this case. Rule 242(b), SCACR. For the reasons stated herein, the Court should deny Petitioners' request for a writ of certiorari.

Respectfully submitted this 26th day of July, 2021.

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