THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Courtney Clyburn Pope, Circuit Court Judge

Appellate Case No. 2020-001441

Thelma Rudd, as Personal Representative of the Estate of Charles S. Rudd, …….. Respondent,

v.

Pepper Hill Nursing & Rehab Center, LLC d/b/a Pepper Hill Nursing & Rehab Center, The Place at Pepper Hill, LLC, Pepper Hill Senior Properties, LLC n/k/a The Place at Pepper Hill, LLC and Shiloh Management, Company, Inc. …… Defendants,

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

RESPONDENT'S FINAL BRIEF

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2. Whether the circuit court properly determined the "direct benefit" form of equitable estoppel did not apply since Mr. Rudd made no effort to "knowingly exploit" the Admission Agreement's arbitration provision, and the Estate's claims are not dependent on the Admission Agreement's terms.

3. Whether Pepper Hill may bind Mr. Rudd and his Estate to the Admission Agreement's arbitration provision as a third-party beneficiary when the Admission Agreement unsuccessfully attempted to name him as a party and Mr. Rudd never consented to waive his right to a jury trial.

STATEMENT OF THE CASE

Respondent Thelma Rudd, in her role as personal representative of her husband Charles S. Rudd's Estate ("Estate"), filed a Summons and Complaint in the Aiken County Court of Common Pleas on November 13, 2019, that was amended one week later. (R. pp. 1-99). The Amended Complaint alleged negligence, recklessness, corporate negligence and statutory-based claims against Appellants Pepper Hill Nursing & Rehab Center, LLC d/b/a Pepper Hill Nursing & Rehab Center ("Facility"), The Place at Pepper Hill, LLC, Pepper Hill Senior Properties, LLC n/k/a The Place at Pepper Hill, LLC and Shiloh Management, Company, Inc. (collectively "Pepper Hill"). (R pp. 93-99 ¶¶ 221-54). In lieu of an answer, Pepper Hill filed a motion to dismiss and to compel arbitration on March 2, 2020. (R. pp. 100-01). While this motion was pending, Pepper Hill also filed a motion to strike portions of the Estate's memorandum opposing arbitration on May 4, 2020. (R. pp. 270-73).[1]

The Honorable Courtney Clyburn-Pope heard oral arguments on Pepper Hill's arbitration motion on May 5, 2020, and heard Pepper Hill's motion to strike on May 19, 2020. (R. pp. 198-242). On August 13, 2020, the circuit court entered an order denying both motions. (R. pp. 182-86). The circuit court found it "lack[ed] evidence" Pepper Hill had a valid arbitration contract with Mr. Rudd in part because there was no evidence showing Ms. Rudd had any authority to act on Mr. Rudd's behalf when he was admitted to the Facility. (R. p. 183). Citing precedent from several similar South Carolina nursing home cases, the circuit court also rejected Pepper Hill's estoppel and third-party beneficiary arguments. (R. pp. 184-85). The motion to strike was denied because the statements Pepper Hill challenged concerned potentially relevant facts. (R. pp. 185-86).

[1] Also while the motion to dismiss was pending, Pepper Hill answered the Amended Complaint, asserting arbitration as an affirmative defense. (R. p. 173 ¶ 95).

Pursuant to Rule 59(e), SCRCP, Pepper Hill moved for reconsideration of its motion to dismiss and to compel arbitration on August 24, 2020, and the circuit court denied the motion in a Form 4 order on October 29, 2020.[2] Pepper Hill filed a notice of appeal on October 30, 2020.

STATEMENT OF THE FACTS

Mr. Rudd was admitted to the Facility on July 27, 2016, and was known to pose a high risk of falls if improperly supervised. (R. p. 55-56 ¶¶ 17, 21). Early in his admission, Pepper Hill's medical records included notations of Mr. Rudd's fall risk and the need for safety devices when placed in his wheelchair. (R. p. 56 ¶¶ 22-23). Yet, on November 27, 2016, Facility staff discovered Mr. Rudd on the floor. Mr. Rudd had fallen out of his wheelchair and struck his head as he fell to the ground. (R. p. 56 ¶ 25). Mr. Rudd was transferred to Augusta Health University Hospital the following day and a CT scan revealed a brain injury. (R. p. 56 ¶¶ 26). Following his hospitalization, Mr. Rudd was transferred to a rehabilitation facility for treatment but eventually died from his injuries on May 10, 2018 (R. p. 56 ¶ 28; R. p. 99 ¶ 253). The Estate alleges Mr. Rudd's fall was preventable and Pepper Hill's failure to properly supervise him was a product of both negligent supervision by Facility employees and Pepper Hill's overarching failure to properly fund and staff the Facility. (R. pp. 91-92 ¶¶ 213-15).

When Mr. Rudd was admitted to the Facility on July 27, 2016, a Facility employee presented Ms. Rudd with a contract entitled "Admission Agreement." The Admission Agreement

[2] While Pepper Hill's Rule 59(e), SCRCP, motion was pending, the Estate filed a motion for leave to file a second amended complaint that would name as defendants several individuals associated with Pepper Hill. (R. pp. 274-85). The Estate argued these amendments were necessary because the Estate learned the existing defendants lacked insurance and these individuals were attempting to hide assets. (R. p. 283). Before the circuit court ruled on this motion, it denied Pepper Hill's Rule 59(e) motion and Pepper Hill filed its notice of appeal. Since the motion to amend remained unresolved, the Estate filed a motion to lift the automatic stay imposed by Rule 241, SCACR on November 20, 2020. (R. pp. 426-30). The circuit court denied that motion on March 16, 2021, and denied a timely Rule 59(e) motion on June 16, 2021. (R. pp. 431-38).

listed Mr. Rudd as "Resident" and Ms. Rudd as "Responsible Party." (R. p. 102). The line designation for Ms. Rudd's "Legal Designation" was left blank. Id. Ms. Rudd was not Mr. Rudd's power of attorney. On the Admission Agreement's final page, Ms. Rudd signed on a line labeled "Representative." (R. p. 115). The Admission Agreement contained a number of terms related to the medical and nursing services Pepper Hill provided as well as Mr. Rudd's payment obligations. (R. pp. 103-06). Pepper Hill also included provisions designed to lessen its legal exposure in case Mr. Rudd was injured while a Facility resident. In a "Limitations of Liability" section, Pepper Hill inserted language stating it "shall not be liable for personal injuries" or "death" suffered by Mr. Rudd even if caused by Pepper Hill negligence. (R. p. 112 ¶ A). This section also claimed Pepper Hill would not be liable for causing property destruction or financial damage to Mr. Rudd under any circumstances. (R. p. 112 ¶ C).

Tucked deep into the Admission Agreement was a provision purporting to require arbitration for all disputes between the Facility and Mr. Rudd. (R. p. 114). The remaining Appellants were not named in the Agreement or are signatories. Unlike the Admission Agreement's medical and financial terms, the arbitration provision includes a separate signature block seeking the initials of Mr. Rudd or his "Responsible Party" and the Facility if each side opted for arbitration. Id. Ms. Rudd initialed this section. Id. However, at the time of Mr. Rudd's admission, Mr. Rudd did not have a power of attorney, and Ms. Rudd had not otherwise been appointed as his agent. (R. p. 133).

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

Charles Rudd did not sign the Admission Agreement or initial its arbitration option when he became a Facility resident in July 2016. He also did not have a power of attorney authorizing anyone to sign contracts on his behalf. Without the assent of Mr. Rudd or someone holding legal authority to act for him, the circuit court correctly found insufficient evidence of a valid arbitration contract. Pepper Hill's estoppel and third-party beneficiary arguments were also properly rejected because South Carolina's appellate courts have rejected both theories under similar circumstances. Finally, two additional sustaining grounds support the circuit court's ruling including the fact that the Admission Agreement's dispute resolution provisions include grossly inequitable terms and an attempted liability waiver that violate South Carolina public policy.

1. Pepper Hill Failed to Offer Evidence of a Valid Arbitration Contract.

Before any person may be compelled to forgo a jury trial in favor of arbitration, the arbitration proponent must first present a valid arbitration contract. A valid contract requires the mutual assent of its proposed parties. Consignment Sales LLC v. Tucker Oil Co., 391 S.C. 266, 271, 705 S.E.2d 73, 76 (Ct. App. 2011). Pepper Hill sought to compel Mr. Rudd's estate to arbitrate tort claims arising from injuries Mr. Rudd suffered while a resident of the Facility. However, the

parties agree Mr. Rudd never signed an arbitration contract with Pepper Hill, and the circuit court rejected Pepper Hill's claim that Ms. Rudd could assent on Mr. Rudd's behalf as either a statutory or common law agent. The circuit court's ruling was largely evidentiary. Pepper Hill could not compel arbitration because it offered no evidence to support any of its agency theories. (R. p. 183) ("The Court finds that it lacks evidence at this time to determine that Ms. Thelma Rudd had legal authority to bind Mr. Rudd" to arbitration). That deficiency continues on appeal. Pepper Hill argues Ms. Rudd was a statutory agent without offering any evidence the Adult Health Care Consent Act (S.C. Code Ann. § 44-66-10 to -80) ("AHCCA") even applies here. Similarly, Pepper Hill's common law agency argument contains no evidence Mr. Rudd took any action that would confer on Ms. Rudd actual or apparent authority to make future litigation decisions in his stead.

a. The AHCCA Did Not Apply to Mr. Rudd's Admission, and the Admission Agreement's Optional Arbitration Provision was not a "Health Care" Decision.

The AHCCA confers limited authority on a limited group for the limited purpose of making another person's health care decisions. The AHCCA effectively separates critical medical decision making power from the individual receiving medical care and, as a result, the AHCCA must be read narrowly with its requirements construed strictly. Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 353, 755 S.E.2d 450, 454 (2014) (holding that AHCCA's purpose is to "insure the patient's wishes are honored . . . whenever possible" and that "decision making by the surrogate is a ***last resort***") (emphasis added). To ensure the AHCCA is properly limited, the statute imposes three prerequisites to its application:

1) The individual whose health care is at stake must be "unable to consent," a defined term requiring substantial incapacitation and physician verification. S.C. Code Ann. § 44-66-20(8); § 44-66-30(A).

2) The "surrogate" proposed to make another's health care decisions must have priority to serve in that capacity as delineated by statute. S.C. Code Ann. § 44-66-30(A)(1)-(10).

3) The matter in question must be a "health care" decision, defined to include primarily medical choices and placement of the individual in a medical or nursing facility. S.C. Code Ann. § 44-66-20(1).

See also Coleman, 407 S.C. at 351-52, 755 S.E.2d at 454. Neither the first nor the third prerequisite are met in this case, and the circuit court properly concluded the AHCCA does not apply.

i. Pepper Hill Offers No Evidence Mr. Rudd was an Individual "Unable to Consent."

Since the AHCCA is meant to offer authority to a surrogate only as a "last resort," the statute demands a substantial showing that an individual is not in position to make decisions for himself. S.C. Code Ann. § 44-66-30(A) (providing that a surrogate may act only "[w]hen a patient is unable to consent"). "Unable to consent" means an individual cannot "appreciate the nature and implications" of his condition such that he either cannot (1) "make a reasoned decision concerning the proposed health care"; or (2) "communicate that decision in an unambiguous manner." S.C. Code Ann. § 44-66-20(8). Whether these criteria are met is not to be determined by a court, the individual, a proposed surrogate, or any other lay person. Instead, two physicians[3] who have examined the patient must certify his inability to consent. Id. The physician certification must offer details on the medical condition causing the incapacity as well as its extent and likely duration. Id.

Pepper Hill cannot show Mr. Rudd qualified as a person "unable to consent" under these strict standards. In fact, just as it did at the circuit court, Pepper Hill's brief largely glosses over the issue. Appellants' Br. at 8 (stating in conclusory terms that Ms. Rudd had AHCCA authority without any reference to evidence in the record). Pepper Hill cites no physician certifications or medical record of any kind. There is nothing in the record the court could use to determine the

[3] In emergency situations, a single "health care provider responsible for the care of the patient" may make the required certification but only after stating in writing that the emergency conditions would make the standard two physician certification process harmful to the patient's health. S.C. Code Ann. § 44-66-20(8).

specific condition Pepper Hill claims rendered Mr. Rudd incapacitated, when it was diagnosed, its extent, or its expected duration. The AHCCA places the burden on a provider like Pepper Hill to investigate the AHCCA prerequisites before a potential surrogate acts. See e.g. S.C. Code Ann. § 44-66-30(A)(10) (requiring provider make "good faith efforts" to determine whether a proposed surrogate is proper). By jumping immediately to the AHCCA without attempting to meet its physician certification requirements, Pepper Hill fails to heed the AHCCA's plain terms or Coleman's warning that AHCCA authority may be invoked only as a matter of "last resort."

Pepper Hill argues the AHCCA's first prerequisite is met because the Estate has conceded the issue. Pepper Hill points to statements by the Estate's counsel noting Mr. Rudd suffered some cognitive decline. Appellants' Br. at 3 (citing R. p. 139). Pepper Hill also asks the court to infer Mr. Rudd was "unable to consent" from the Estate's acknowledgment that Mr. Rudd was a "vulnerable adult" under a different South Carolina statute. Appellants' Br. at 3 (citing R. p. 54 ¶ 9). None of these statements meet the AHCCA's incapacitation and physician certification requirements. The general reference to cognitive decline offers no specifics as to whether Mr. Rudd could "appreciate the nature and implications" of being admitted to a nursing home or whether he was capable of "mak[ing] a reasoned decision" concerning admission. S.C. Code Ann. § 44-66-20(8). Plus, Pepper Hill cites no examinations conducted to evaluate Mr. Rudd's capacity to consent, and points to no physician certifications as the AHCCA requires.[4]

[4] Pepper Hill may also cite Estate counsel's statement during the circuit court hearing noting Mr. Rudd's history of a stroke. (R. p. 225). However, this portion of Mr. Rudd's medical history was referenced to show his functional limitations created an elevated fall risk that Pepper Hill failed to heed on the day he suffered the fall underlying this litigation. As with the other statements Pepper Hill cites, this single reference to a previous stroke does not show Mr. Rudd met the AHCCA's incapacitation or physician certification requirements at the time of his Pepper Hill admission.

Mr. Rudd's status as a "vulnerable adult" also falls far short of showing he was "unable to consent." "Vulnerable adult" is a defined term in South Carolina's Omnibus Adult Protection Act (S.C. Code Ann. § 43-35-10(11)) ("APA") and it covers a far broader group than those included in the AHCCA. There is a distinct difference between these two concepts. While the AHCCA's "unable to consent" designation focuses on the capacity to understand and make decisions, the APA's "vulnerable adult" term refers to any resident of a nursing home. No physician certifications are required for an individual to be designated a "vulnerable adult" because that designation serves a very different purpose than the "unable to consent" label. Instead of empowering a surrogate to make medical decisions, the APA's goal is to protect the elderly from abuse, neglect, and exploitation. S.C. Code Ann. § 43-35-5 (Editor's Note stating APA's legislative purpose). Finally, "vulnerable adult" is certainly a broader term than "unable to consent" because "vulnerable adult" applies to *every* nursing home resident. S.C. Code Ann. § 43-35-10(11) ("A resident of a facility is a vulnerable adult"). Thus, taken to its natural end, Pepper Hill's attempt to equate "vulnerable adult" with "unable to consent" would mean every nursing home resident—regardless of mental or physical functionality—is covered by the AHCCA. Reading the AHCCA that broadly again violates Coleman's admonition that the AHCCA is a "last resort."

Thus, Pepper Hill's reliance on the AHCCA as granting Ms. Rudd authority to enter an arbitration contract fails at its initial hurdle. The AHCCA applies only to a narrow group of people who are "unable to consent," and Pepper Hill has not made the evidentiary showing required to place Mr. Rudd in that group.

ii. The Admission Agreement's Optional Arbitration Provision was not a "Health Care" Decision.

Even if Mr. Rudd's condition placed him within the AHCCA's reach, Pepper Hill cannot meet the third prerequisite to the AHCCA's application. The AHCCA's limited scope extends only

to "health care" decisions (S.C. Code Ann. § 44-66-30(A)), and any act by Ms. Rudd on the Admission Agreement's arbitration provision would not be within her purported AHCCA authority.

The AHCCA defines "health care" to include (1) diagnostic medical procedures; (2) the provision of nursing services; and (3) placement in or removal from a facility that provides these forms of care. Coleman, 407 S.C. at 352, 755 S.E.2d at 453 (citing S.C. Code Ann. § 44-66-20(1)). Coleman held the AHCCA also implicitly includes some financial authority by allowing the surrogate to accept payment terms for medical or nursing services. Id. However, a surrogate's authority extends "primarily to traditional health care decisions," and nothing in the AHCCA states or implies a surrogate has authority to make decisions concerning arbitration. Id. at 353, 755 S.E.2d at 454; see also Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018) (quoting Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016) (finding authority to make health care or financial decisions "does not encompass executing an agreement to resolve claims by arbitration")).

In fact, Pepper Hill points to no South Carolina precedent citing the AHCCA as authority to bind a nursing home resident to arbitration. The only cases to consider the issue have found no valid arbitration contract. Coleman, 407 S.C. at 353-54, 755 S.E.2d at 453-54; Thompson, 416 S.C. at 49-50, 784 S.E.2d at 683. In all but the exceptional case, the AHCCA term "health care" cannot be stretched so far as to include matters related to potential future legal disputes. A surrogate's AHCCA authority goes beyond its primary purpose of addressing medical decisions only when an additional matter is not ancillary or optional but rather "a necessary part of the decision regarding which institution the patient should be placed in." Coleman, 407 S.C. at 352-53, 755 S.E.2d at 454 (considering whether arbitration was "required for [the resident's]

admission"). South Carolina's appellate courts have found that a nursing home's arbitration proposal was not necessary to admission and not covered by a surrogate's AHCCA authority as evidenced by the nursing home's choice to place arbitration and admission in separate contracts. Coleman, 407 S.C. at 353-54, 755 S.E.2d at 454; Thompson, 416 S.C. at 49-50, 784 S.E.2d at 683.

While separate contracts is certainly one way to show that agreeing to arbitration is not required for admission, it is not the only way. Even when an arbitration provision is integrated into an admission contract, other factors can show the arbitration term is not essential to admission. For example, the arbitration provision can be offered as an opt-in, with the resident or surrogate given the option to choose or reject arbitration with a separate signature than the one required to secure the resident's admission. That is how Pepper Hill structured the Admission Agreement. Following its arbitration provision, there is a signature block where both Pepper Hill and Mr. Rudd or a purported "Responsible Party" could choose whether disputes arising from Mr. Rudd's admission would be subject to arbitration. (R. pp. 114-15). The signature that procured Mr. Rudd's admission to the Facility was in a completely separate signature section at the bottom of the page. (R. p. 115).[5] Thus, as Pepper Hill drafted the Admission Agreement, either of its parties was free to choose an arbitration-free admission by signing the bottom of the contract while declining to initial the separate arbitration section. As such, arbitration was not necessary to Mr. Rudd's admission, and Ms. Rudd's initials in the Admission Agreement's arbitration section were not a valid exercise of any AHCCA authority Pepper Hill claims she held.

[5] This separate signature selection for the Admission Agreement's arbitration provision cannot be explained away as simply a means of highlighting the arbitration term or protecting Pepper Hill against claims of unconscionability. It may be common practice to seek a consumer's initials on potentially objectionable terms in form adhesion contracts, but not to ***require the corporate drafter's initials*** as well. By requiring both parties' initials to assent to arbitration, Pepper Hill was providing both parties the choice to either opt-in or opt-out of arbitration.

Rather than address this established line of South Carolina appellate court rulings, Pepper Hill asks the court to apply two unreported district court orders. Appellants' Br. at 7-9 (citing THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert, Civil Action No. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. March 19, 2015) and THI of S.C. at Columbia, LLC v. Wiggins, C/A No. 3:11-888-CMC, 2011 WL 4089435 (D.S.C. Sept. 13, 2011)). But Gilbert and Wiggins both explicitly state the AHCCA was not part of their rulings. Gilbert, 2015 WL 1268185 at * 2 (finding issue of whether individual who signed contract had authority was "simply not relevant"); Wiggins, 2011 WL 4089435 at * 6 n. 13 (declining to address statutory authority argument). By expressly noting its irrelevance, Gilbert showed any later reference it made to Coleman's AHCCA discussion was dicta. Therefore, these non-precedential, unreported district court orders offer no support for Pepper Hill's statutory authority argument.

In sum, the circuit court correctly concluded there was inadequate evidence to support Pepper Hill's contention that Ms. Rudd had AHCCA authority to act on Mr. Rudd's behalf or to find that any such authority included the power to bind Mr. Rudd to arbitration. Pepper Hill has not offered any evidence to show Mr. Rudd was a person "unable to consent" as the AHCCA requires and no legal authority to suggest any statutory authority Ms. Rudd held could extend to the Admission Agreement's optional arbitration provision.

b. Pepper Hill did not Establish a Principal-Agent Relationship between Mr. Rudd and Ms. Rudd.

Agency is a legal relationship allowing an individual (principal) to choose a trusted person (agent) to act in the principal's stead and to interact with third parties on the principal's behalf. Principals control agency. They decide when an agent is appointed and how far his/her authority extends. Fronberger v. Smith, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (holding that an agent is always "subject to the principal's control"). An agency relationship cannot exist without

the purported principal doing something intentional or knowing to sanction it. Pepper Hill presents nothing to show Mr. Rudd appointed Ms. Rudd as his agent to sign away his jury trial rights or that Mr. Rudd took any intentional/knowing action to represent Ms. Rudd as his agent.

An agency relationship may be established with clear evidence of actual or apparent authority conferred by the purported principal on the purported agent. Cowburn v. Leventis, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). Actual authority is "expressly conferred upon the agent by the principal." Richardson v. PV, Inc., 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009). Apparent authority is based on "representations made by the principal to the third party and reliance by the third party on those representations." Young v. S.C. Dep't of Disabilities & Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). Since Pepper Hill asks the court to find an agency relationship between Mr. and Ms. Rudd, Pepper Hill bears the burden to show all agency requirements were met at the time the Admission Agreement was presented for signature. Hodge, 422 S.C. at 556, 813 S.E.2d at (quoting McCall v. Finley, 294 S.C. 1, 6, 362 S.E.2d 26, 29 (Ct. App. 1987) (imposing burden of proof on agency proponent and stating proof of agency "must be clearly established by the facts")). Agency is never presumed from the marriage relationship. Bankers Tr. of S.C. v. Bruce, 283 S.C. 408, 423, 323 S.E.2d 523, 532 (Ct. App. 1984).

To prove apparent authority, a party must show (1) purported principal consciously or impliedly represented another to be his agent; (2) reliance on the representation by a third party; and (3) change in position by third party in reliance on the representation. Cowburn, 366 S.C. at 39-40, 619 S.E.2d at 448. For apparent authority to exist, "[e]ither the principal must intend to cause the third person to believe the agent is authorized to act for him, or he should realize his conduct is likely to create such belief." R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000).

Multiple South Carolina appellate opinions have rejected agency arguments to enforce arbitration contracts signed by a nursing home resident's family member, and these cases show the flaws in Pepper Hill's arguments. Most of the conduct Pepper Hill cites as evidence of an agency relationship were things Ms. Rudd allegedly did. Appellants' Br. at 11-12. Pepper Hill asks the court to imply an agency relationship from the fact that Ms. Rudd accompanied Mr. Rudd to the Facility, and the fact that Ms. Rudd signed the Admission Agreement on a line designated for a "representative." Appellants Br. at 11.[6] However, South Carolina courts have consistently held that an agency relationship may not be created solely from the acts of the purported agent. Hodge, 422 S.C. at 566, 813 S.E.2d at 304 (citing Cowburn, 366 S.C. at 39-40, 619 S.E.2d at 448). Hodge also specifically held that signing a contract as a nursing home resident's "authorized representative" does not create an agency relationship. 422 S.C. at 571, 813 S.E.2d at 307 (quoting Ashburn Health Care Ctr., Inc. v. Poole, 648 S.E.2d 430, 433 (Ga. App. 2007)).

Pepper Hill points to no actions taken by Mr. Rudd that would support actual agency or apparent authority. Pepper Hill relies mostly on the notion that Mr. Rudd "passively permitted" Ms. Rudd to act on his behalf in agreeing to the Admission Agreement's arbitration provision. Appellants' Br. at 11-12. But, Pepper Hill offers no evidence to support that conclusion. Pepper Hill did not even offer an affidavit from the employee who presented the Admission Agreement for signature. There is no evidence to even establish Mr. Rudd was present at that time. A nursing

[6] Pepper Hill also argues Ms. Rudd's status as Mr. Rudd's agent for purposes of arbitration should be inferred from the fact that she now serves as the Estate's personal representative. Appellants' Br. at 11. However, the role of personal representative, which arose only after Mr. Rudd's death, serves distinct, limited roles in probate and to bring legal claims on the Estate's behalf. S.C. Code Ann. § 15-51-20; § 62-3-703. Ms. Rudd's current status as personal representative does nothing to suggest Ms. Rudd was Mr. Rudd's agent for purposes of the disputed arbitration contract. Thompson, 416 S.C. at 61, 784 S.E.2d at 689 (quoting Dickerson v. Longoria, 995 A.2d 721, 743 (Md. 2010) (finding fact that signer of arbitration contract is now decedent's personal representative "is of no moment" and will not be held against the estate).

home resident who is absent when an arbitration contract is presented cannot confer apparent authority on a family member to sign it on his behalf. Hodge, 422 S.C. at 571, 813 S.E.2d at (quoting Poole, 648 S.E.2d at 433); Thompson, 416 S.C. at 48, 784 S.E.2d at 682 (noting resident was not present at nursing home when contract was presented to her son).

Thompson also rejected a similar "passive permission" argument for reasons that expose the inconsistency of Pepper Hill's position. 416 S.C. at 55, 784 S.E.2d at 686. A nursing home resident cannot even passively present a family member as his/her agent if the resident is either not present when the disputed contract was signed or lacked the mental capacity to appreciate his/her surroundings. Id. Here, Pepper Hill argues Mr. Rudd's faculties were so diminished that the AHCCA applied to his admission while at the same time making an agency argument that would be precluded by Mr. Rudd's alleged incapacity. Moreover, the agency argument Pepper Hill raises is far weaker than the one rejected in Thompson. There, the nursing home presented deposition testimony showing a son who signed his mother's admission documents had been handling the mother's finances for years. Thompson, 416 S.C. at 55, 784 S.E.2d at 686. However, not even an established history of delegating authority for medical or financial decisions was sufficient to create an agency relationship for an arbitration contract. Id. (finding authority conveyed for financial or health care decisions "does not encompass executing an agreement to resolve legal claims by arbitration). Here, Pepper Hill offers no evidence to show a history of Ms. Rudd acting in Mr. Rudd's stead and nothing to suggest Mr. Rudd appointed or represented Ms. Rudd as his agent to make arbitration-related decisions.

2. The Estate is not Estopped from Opposing an Arbitration Provision in an Admission Agreement Mr. Rudd did not Sign or "Knowingly Exploit."

Pepper Hill would have the court hold that, even though Mr. Rudd did not sign the Admission Agreement or authorize anyone else to sign, his Estate is estopped from contesting the

Admission Agreement's arbitration provision. South Carolina law actually presumes Mr. Rudd and his Estate *are not* bound to arbitrate. Wilson, 426 S.C. at 337-38, 827 S.E.2d at 173 ("a presumption *against* arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate") (emphasis in original). Plus, Pepper Hill does not apply the required elements for the "direct benefits" variety of equitable estoppel or acknowledge this court's recent precedent refusing to apply equitable estoppel to a nursing home arbitration contract.

Pepper Hill asks the court to apply "direct benefits" estoppel but fails to cite the elements required for its application. Since Pepper Hill admits Mr. Rudd is a nonsignatory to the Admission Agreement (Appellants' Br. at 3), direct benefits estoppel can only bind his Estate to the Admission Agreement's arbitration provision if Pepper Hill shows (1) the Estate's claim arises from the contractual relationship; (2) Mr. Rudd/the Estate has "exploited" other parts of the contract by reaping its benefits; and (3) the Estate's claim relies solely on the contract terms to impose liability. Weaver v. Brookdale Senior Living, Inc., 431 S.C. 223, 847 S.E.2d 223 (Ct. App. 2020); see also Wilson, 426 S.C. at 344-45, 827 S.E.2d at 177 (requiring proof that nonsignatory "knowingly exploited" contract containing arbitration provision). Pepper Hill never explains how Mr. Rudd or his Estate have "knowingly exploited" the Admission Agreement, and precedent rejects Pepper Hill's contention that the Estate's claim "relies solely" on the Admission Agreement.

The only basis Pepper Hill offers for imposing estoppel is the fact that Mr. Rudd was admitted to the Facility and received nursing home services as a resident. (Appellants' Br. at 15). When a nursing home residency ends in the home's alleged misconduct leading to the resident's death, this court has been skeptical that the residence received any "benefit" at all. Hodge, 422 S.C. at 563, 813 S.E.2d at 302. More importantly, Wilson held that the "direct benefit" required to support estoppel would require Pepper Hill to show Mr. Rudd knowingly exploited both the

relationship created by the Admission Agreement *and* the Admission Agreement itself. 426 S.C. at 343, 827 S.E.2d at 176. Pepper Hill argues the Estate's claims all arise out of Mr. Rudd's residency (Appellants' Br. at 15), but, even if true, that does not constitute a "direct" benefit or meet estoppel's "knowing exploitation" requirement.

The key question is not whether the Estate's claims arise out of Mr. Rudd's admission but whether they arise out of and are dependent on the Admission Agreement. There is no direct benefits estoppel where a nonsignatory's claim is based on "[g]eneral principles of South Carolina law" rather than specific provisions of the contract containing an arbitration provision. Wilson, 426 S.C. at 342, 827 S.E.2d at 176. It is not enough for Pepper Hill to claim the Estate's claims would not arise but for Mr. Rudd's residency at the Facility and that Mr. Rudd's residency would not have been possible but for the Admission Agreement. Id. at 343, 827 S.E.2d at 176 (citing Jody James Farms, JV v. Altman Grp., Inc., 547 S.W.3d 624, 637 (Tex. 2018) ("direct benefits estoppel is not implicated simply because a claim relates to or would not have arisen 'but for' a contract's existence")). The Estate's claims are not based on contractual duties but instead arise out of South Carolina common law principles of negligence, fiduciary duties, and the equitable doctrine of unjust enrichment. (R. p. 55 ¶ 15).

Weaver applied these key Wilson principles in the nursing home context. The plaintiff in Weaver alleged her grandmother died as a result of the defendant nursing home's negligent supervision. 431 S.C. at 227-28, 847 S.E.2d at 271. The plaintiff had not signed the grandmother's admission contract containing an arbitration provision, and this court held direct benefits estoppel could not be used to force the plaintiff to arbitrate her negligent supervision claim. Id. at 233-34, 847 S.E.2d at 274. The nursing home failed to meet the "knowing exploitation" element because, while the claims may have arisen from the grandmother's nursing home admission, they "rel[ied]

on general tort duties," not any provision of the admission contract. Id. at 232, 847 S.E.2d at 273. Nursing home contracts do not supplant common law duties imposed by the law of ordinary negligence or inherent to the medical provider-patient relationship. Id. at 231, 847 S.E.2d at 272.

By overlooking Willis and Weaver, Pepper Hill fails to apply the current law governing direct benefit estoppel. Instead, Pepper Hill asks the court to rely on Gilbert and Wiggins—unreported federal district court orders entered several years before Willis set the current standard. Neither order considered whether the party to be estopped "knowingly exploited" the contract containing an arbitration provision as Willis and Weaver now require. Plus, both were decided before this court's ruling in Hodge. Gilbert and Wiggins suggested estoppel might work differently when arbitration and admission are combined in a single contract as opposed to two distinct contracts. Three years after Wiggins, Hodge held that estoppel does not apply even to single-contract cases unless the nonsignatory's claim actively sought to enforce contractual promises. 422 S.C. at 563, 813 S.E.2d at 302 (finding that "even if the Admission Agreement and Arbitration Agreement merged," estoppel did not apply because plaintiffs were "not attempting to enforce that agreement").

Thus, Pepper Hill mistakenly relies on outdated, non-precedential decisions rather than applying current South Carolina law. Willis and Weaver support the circuit court's order finding direct benefits estoppel does not apply to the Estate's claims. Mr. Rudd did nothing to knowingly exploit the Admission Agreement, and the Estate's tort claims are not an attempt to enforce the Admission Agreement.

3. Mr. Rudd was not a Third-Party Beneficiary of any Alleged Arbitration Contract.

Finally, Pepper Hill argues Mr. Rudd and his Estate are bound to the Admission Agreement's arbitration provision since Mr. Rudd was a third-party beneficiary. However, Willis

raises serious questions as to whether a nonsignatory can ever be forced to arbitration using this doctrine. 426 S.C. at 338-39 n. 7, 827 S.E.2d at n. 7 (citing Comer v. Micor, Inc., 436 F.3d 1098, 1102 (9th Cir. 2006)). Thompson also 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").[7] 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 concerning arbitration; (2) Mr. Rudd was not a third-party beneficiary to the Admission Agreement's arbitration provision because that provision did not intend to benefit her *as a third-party*; and (3) Mr. Rudd never consented to arbitration and a non-consenting person cannot be bound to arbitrate.

First, Pepper Hill's 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, 995 A.2d at 742). Since Mr. Rudd did not sign the Admission Agreement and Ms. Rudd lacked authority to assent to it (or at least its arbitration provision) on Mr. Rudd's behalf, there was no valid contract to arbitrate to which Mr. Rudd could be a third-party beneficiary. Second, the third-party beneficiary doctrine does not apply to the Admission Agreement's because the contract's intent was not to benefit Mr. Rudd as a third-party. The third-party beneficiary doctrine is an exception to the rule barring enforcement of a contract by or against

[7] Again, Pepper Hill overlooks this South Carolina precedent in favor of the outdated, non-precedential rulings in Wiggins, Gilbert, and McCutcheon v. THI of S.C. at Charleston, LLC, No. 2:11-CV-02861, 2011 WL 6818575 (D.S.C. Dec. 15, 2011). (Appellants' Br. at 16). All of these district court orders have been displaced by Thompson/Hodge's rejection of the third-party beneficiary theory in the nursing home context and the substantial doubt Willis casts on whether the theory can ever be used to compel a nonsignatory to arbitration.

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 Pepper Hill's intent for the Admission Agreement, this court must look beyond Pepper Hill's 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 Admission Agreement was presented to Ms. Rudd, Pepper Hill intended to make Mr. Rudd a party. For the many reasons discussed above, Pepper Hill failed to effectuate this intent by obtaining the assent of Mr. Rudd or one authorized to act on his behalf. Pepper Hill only seeks to deem Mr. Rudd a third-party because their efforts to label him a party do not comply with South Carolina contract law. The letter and spirit of that law would be severely undermined if Pepper Hill succeed. Pepper Hill's intent to make Mr. Rudd a party to the contract means it cannot prove a material element required to bind the Estate to the agreement as a third-party beneficiary. The circuit court's rejection of Pepper Hill's 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).

Third, Pepper Hill's third-party beneficiary argument is flawed because it would force a person to enter arbitration for claims for which he 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. 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").

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

4. As Additional Sustaining Grounds, the Admission Agreement's Unconscionable Dispute Resolution Provisions Violate South Carolina Public Policy and do not Apply to the Wrongful Death Claim.

The Admission Agreement's dispute resolution provisions suffer from crucial flaws beyond those identified in the circuit court's order. Rules 208(b)(2) and 220(c), SCACR; I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (allowing appellate court to consider any "additional sustaining ground" in appellate record including grounds not presented to circuit court). Pepper Hill drafted onerous limitations of liability terms to avoid accountability for its own negligent care or financial malfeasance in violation of South Carolina public policy. Moreover, at the very least, Pepper Hill may not force arbitration on the wrongful death claim because that claim belongs to Mr. Rudd's statutory beneficiaries who never consented to waive their right to a jury trial.

a. The Admission Agreement's Unconscionable Dispute Resolution Provisions Violate South Carolina Public Policy.

In conjunction with its flawed arbitration provision, the Admission Agreement attempts to alter the dispute resolution process in other ways. Pepper Hill devotes nearly an entire page to five "Limitations of Liability" purporting to eliminate or devalue an injured nursing home resident's right to redress. For example, Pepper Hill drafted the Admission Agreement to provide that, in most instances, it could not face liability for injuring or causing the death of Facility residents. Despite accepting elderly individuals as residents into its skilled nursing facility, Pepper Hill claims it "shall not be liable for personal injury [,] death or other conditions of any kind suffered by resident while under the care of" Pepper Hill unless its errors rise to the level of "gross negligence" or a "willful criminal act." (R. p. 112 ¶ (A)). Pepper Hill also sought to immunize itself from liability for any property or financial loss Mr. Rudd, his estate, or his family members may suffer regardless of how egregious Pepper Hill's conduct may have been in creating that loss. (R. p. 112 ¶ (C)). This purported liability waiver is so broad that it would eliminate any civil remedy even if Pepper Hill maliciously appropriated Mr. Rudd's funds.

South Carolina law strongly disfavors this form of contract. Maybank v. BB&T Corp., 416 S.C. 541, 574, 787 S.E.2d 498, 515 (2016); Cooke v. Allstate Mgmt. Corp., 741 F. Supp. 1205, 1208 (D.S.C. 1990) (noting "extremes to which the South Carolina courts have gone to avoid a broad reading of an exculpatory clause"). In fact, a pre-injury exculpatory provision is void as a matter of law if it violates public policy or is unconscionable. Maybank, 416 S.C. at 574, 787 S.E.2d at 515 (citing Pride v. Southern Bell Tel. & Tel. Co., 244 S.C. 615, 138 S.E.2d 155 (1964)).

Allowing a medical services provider to compel a sick patient to waive any future legal claims arising from poorly-provided nursing home care is contrary to South Carolina public policy. The South Carolina Supreme Court holds that public policy bars contract provisions purporting to

waive liability for a duty of public service, when a public duty is owed, when public interests are involved, when the public interest requires the performance of a private duty, or when the parties are not on roughly equal bargaining terms. Pride, 244 S.C. at 619-20, 138 S.E.2d at 157. Additionally, it is against public policy to attempt a pre-injury immunity provision when the duty arises independently of the contract purporting to confer immunity. Murray v. Texas Co., 172 S.C. 399, 174 S.E. 231, 232 (1934) ("a person cannot by contract relieve himself from a duty which he owes to the public independently of the contract").

Using similar principles, a number of jurisdictions have found public policy bars medical providers from attempting pre-injury liability releases. See e.g. Olson v. Molzen, 558 S.W.2d 429, 432 (Tenn. 1977) ("A professional person should not be permitted to hide behind the protective shield of an exculpatory contract and insist that he or she is not answerable for his or her own negligence"); Tunkl v. Regents of Univ. of Cal., 383 P.2d 441 (Cal. 1963) (finding "release from liability for future negligence imposed as a condition for admission" to a hospital violated state public policy). Public policy includes a variety of factors including (1) societal expectations for the relationship; (2) education, sophistication, and financial disparities between the parties; (3) subject matter of the contract; and (4) the nature of the contract's formation including any evidence the contract was one of adhesion—i.e. presented on a take-it-or-leave-it basis. Copeland v. Healthsouth/Methodist Rehab. Hosp., LP, 565 S.W.3d 260, 272 (Tenn. 2018) (quoting 8 Williston on Contracts § 19.22 (4th ed. 1993)).

While there is some variance among the states on the specific subject matters implicating public policy, there is a consensus that the relationship between medical provider and patient is among them. Vinson v. Fitness & Sports Clubs, LLC, 187 A.3d 253 (Pa. Super. 2018) (finding exculpatory contracts violate public policy when they involve a matter of interest to the public or

state including "employer-employee relationship, public service, public utilities, common carriers, and hospitals"); ADT Sec. Servs., Inc. v. Swenson, 276 F.R.D. 278 (D. Minn. 2011) (referencing "common carriers, hospitals and doctors, common carriers, public utilities, innkeepers," etc.); Myers v. Lutsen Mountains Corp., 587 F.3d 891, 895 (8th Cir. 2009); Shields v. Sta-Fit, Inc., 903 P.3d 525, 589 (Wash. App. 1995) (citing "hospitals, housing, public utilities, and public education"). Thus, as the Tennessee Supreme Court recently held, when a patient seeks out a service provider because of a "medical necessity," the resulting relationship implicates the public interest and the provider's attempt to preemptively disclaim liability is unenforceable. Copeland, 565 S.W.3d at 278 (considering contract drafted by medical transport company).

Similarly, Georgia public policy recognizes an exculpatory provision in a contract related to professional medical services is "peculiarly obnoxious." Emory Univ. v. Porubiansky, 282 S.E.2d 903, 905 (Ga. 1981) (quoting 15 Williston, Contracts 1751 (3d ed. 1972)). There is also persuasive authority disavowing exculpatory contracts in relationships similar to the one in this case. Kentucky's Supreme Court has held an exculpatory clause invalid in a contract between a patient and rehabilitation center in a case alleging the center's employee provided negligent care resulting in the patient's broken hip. Meiman v. Rehab. Ctr., 444 S.W.2d 78, 79-80 (Ky. 1969). Georgia courts will not permit exculpatory provisions when the party to be immunized is only a negligent provider's employer rather than the provider herself. Stockbridge Dental Group, P.C. v. Freeman, 728 S.E.2d 871, 873 (Ga. App. 2012). Mississippi law does not permit exculpatory provisions in contracts involving companies providing management services in medical facilities. Natchez Reg'l Med. Ctr. v. Quorum Health Resources, LLC, 879 F. Supp. 2d 556, 568 (S.D. Miss. 2012).

These grossly unfair terms also support the Estate's argument that the Admission Agreement's dispute resolution provisions are unconscionable. Under South Carolina law, unconscionability is "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007) (quoting Carolina Care Plan, Inc. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). The second requirement is easily met because, even if the "Limitations of Liability" provisions were permitted by South Carolina law, they are wholly one-sided. Pepper Hill, as the Admission Agreement's sole drafter, sought to eliminate the most likely legal claims a resident could assert against it while imposing no limitations on any claims it may choose to pursue against the resident.

The "absence of meaningful choice" requirement "speaks to the fundamental fairness of the bargaining process." Simpson, 3873 S.C. at 25, 664 S.E.2d at 669. The key factors on this element include (1) the nature of the injuries suffered by the plaintiff; (2) whether the plaintiff is a substantial business concern; (3) the relative disparity in the parties' bargaining power; (4) the parties' relative sophistication; (5) whether there is an element of surprise in the inclusion of the challenged clause; and (6) the conspicuousness of the arbitration clause. Id. (citing Carlson v. Gen. Motors Corp., 883 F.2d 287, 293 (4th Cir. 1989)). Mr. Rudd was not a substantial business concern and had no bargaining power relative to Pepper Hill when asked the Admission Agreement, a form contract of adhesion with an arbitration provision on page 13 of 15. The egregious "Limitation of Liability" provisions were even less conspicuous.

In sum, the Admission Agreement's arbitration and dispute resolution provisions cannot stand under South Carolina law because they seek to avoid accountability for injuries to vulnerable

nursing home residents caused by the nursing facility specifically charged with caring for them. These provisions are so pervasive that they cannot be severed, and the only proper remedy is to invalidate the dispute resolution provisions in full. See Simpson, 373 S.C. at 34-35, 644 S.E.2d at 674 (refusing to sever unconscionable contract terms based on "cumulative effect of a number of oppressive and one-sided provisions contained within the entire [arbitration] clause").

b. Ms. Rudd's Purported Consent to Arbitration Does Not Extend to the Wrongful Death Claim.

As an additional sustaining ground, the Court should hold the Admission Agreement's arbitration provision does not cover Respondent's wrongful death claim. Pepper Hill insist Ms. Rudd had the power to waive the right to a jury trial on a claim that did not exist when the Admission Agreement was presented and that belong to Mr. Rudd's statutory beneficiaries to be determined only after his death. No South Carolina authority supports these propositions as the history and structure of South Carolina's wrongful death and survival statutes show wrongful death is a distinct, independent claim.

i. South Carolina Law does not Allow a Nursing Home Arbitration Contract to be Enforced Against Unconsenting Non-Parties.

The group of Mr. Rudd's wrongful death beneficiaries were not parties to the Admission Agreement's arbitration provision, and Pepper Hill may not rely on this contract to dismiss the wrongful death claim without overcoming the presumption that a contract may be enforced only by its parties. Touchberry v. City of Florence, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988). A South Carolina contract may be enforced against a non-party only with proof of (1) incorporation by reference; (2) assumption; (3) agency; (4) veil piercing/alter ego; or (5) estoppel. Wilson, 426 S.C. at 338, 827 S.E.2d at 174 (citing Malloy v. Thompson, 409 S.C. 57, 561-62, 762 S.E.2d 690,

692 (2014)). Since Appellants do not attempt to apply any of these theories, the Arbitration Agreement does not apply to the wrongful death claim.

ii. South Carolina Courts Define Wrongful Death as a Distinct, Independent Claim that is Not Derivative of Claims Held by a Decedent at his Death.

Pepper Hill may argue the wrongful death claim actually belongs to Mr. Rudd's estate rather than his statutorily designated beneficiaries. However, this argument incorrectly lumps together the wrongful death claim and the survival of tort claims Mr. Rudd had against Pepper Hill at the time of his death. The history and development of South Carolina's wrongful death and survival statutes show wrongful death is something entirely different than tort claims surviving a person's death. South Carolina courts have long recognized these are two very different theories of liability with distinct origins, purposes, and results. Even in more modern cases, their distinct nature is evidenced in how the claims are litigated and how juries resolve them.

The differences begin with the statutes themselves. The wrongful death statute, originally known as Lord Campbell's Act, is now codified beginning at S.C. Code Ann. § 15-51-10 and it creates a cause of action for tortious conduct causing death. A wrongful death claim covers losses and awards damages exclusively to statutorily-defined beneficiaries consisting of the decedent's children, parents, or heirs. S.C. Code Ann. § 15-51-20. Damages are paid to these beneficiaries because a wrongful death claim is directed at their losses suffered as a result of the decedent's absence. Scott v. Porter, 340 S.C. 158, 168, 530 S.E.2d 389, 394 (Ct. App. 2000) (citing F. P. Hubbard & R. L. Felix, The South Carolina Law of Torts 610 (2d ed 1997) (holding wrongful death damages consist of (1) pecuniary loss; (2) mental shock and suffering; (3) wounded feelings; (4) grief and sorrow; (5) loss of companionship; and (6) deprivation of the use and comfort of the decedent's society, experience, knowledge, and judgment).

In contrast, the legislature positioned the survival statute in a completely different code chapter. Both wrongful death and survival relate to "civil remedies and procedures" (Title 15) but, while wrongful death is a distinct claim warranting its own designation (Chapter 51), the survival statute is classified within an existing chapter (Chapter 5) identifying the proper "parties" for pursuing legal claims. A plaintiff may cite the survival statute to support a suit for any number of legal claims. When that claim is based on the decedent's personal injury, the available damages include "medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased." Scott, 340 S.C. at 170, 530 S.E.2d at 395. Thus, while courts and parties often refer to a "survival claim," this term is a misnomer because the survival statute does not create a claim, it only corrects a misguided common-law rule that assumed a person's existing legal claims died with her. Bemis v. Waters, 170 S.C. 432, 170 S.E. 475, 476 (1933) (holding that survival statute exists as a "correct[ion]" to common-law rule). The statutory scheme alone shows wrongful death and survival are distinct claims accruing at different times and governed by different statutes of limitation. S.C. Code Ann. § 15-3-560(6) (measuring three-year limitations period for wrongful death claims from date of death).

The statutes' history also shows their independence. In Grainger v. Greenville, S. & A. Railway Co., the South Carolina Supreme Court traced the divergent tracks wrongful death and survival claims have taken over their development. 101 S.C. 399, 85 S.E. 968 (1915). In that case, the trial court had dismissed a survival action because the decedent's administrator (equivalent to the modern "personal representative") had previously recovered on a wrongful death claim. Id. at 968. The wrongful death statute in place then was nearly identical to current section 15-51-10 and it provided a claim "in favor of the beneficiaries" but nothing for "the deceased or his estate." Id. at 969. When the legislature recognized this abnormality, it responded by creating the predecessor

to the modern survival statute. Id. (citing 1912 Code section 3693). Grainger held this legislative history conclusively established wrongful death and survival claims are distinct and independent. Id. The claims are distinct because "[t]he beneficiaries, the cause of action, the measure of damages, are all different." Grainger, 85 S.E. at 969.

Building on Grainger and other similar cases, the Supreme Court further highlighted the claims' distinctiveness by holding judgment in a wrongful death claim does not have claim preclusive effect on survival claims. Complete Auto Transit, Inc. v. Bass, 229 S.C. 607, 611-12, 93 S.E.2d 912, 914 (1956); see also Gleaton v. Southern Ry. Co., 212 S.C. 186, 192, 46 S.E.2d 879 (1948) ("verdict and judgment for defendant in an action under the survival statute will not estop the personal representative of the deceased in an action under Lord Campbell's Act"). Bass also addressed a reason why wrongful death claims are often erroneously perceived as derivative of survival claims. In both, the decedent's personal representative is the named plaintiff. 229 S.C. at 612, 93 S.E.2d at 914. But this fact alone is not determinative because, when asserting wrongful death and survival claims, a personal representative "function[s] under two separate and distinct trusteeships." Id. In other words, while it is the personal representative's name in the caption for a wrongful death claim, "it is clear . . . the real parties to the action were the beneficiaries." Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539, 541 (1928).

In light of the history and structure of wrongful death and survival claims, a number of other reported opinions have rejected the notion that the former is derivative of the latter. As early as 1907, the South Carolina Supreme Court recognized a wrongful death action is not the survival of an action which the deceased had in his lifetime, but is a "new cause of action." Osteen v. Sothern Ry., Carolina Division, 76 S.C. 368, 57 S.E. 196, 200 (1907). Claussen held a wrongful death claim is "not a continuation" of any claim the decedent had before her death. 145 S.E. at

540. A wrongful death claim is "independent" of claims the decedent had during her life and "wholly different" than any other claim available at her death. Wellman v. Bethea, 243 F. 222 (E.D.S.C. 1917); In re Mayo's Estate, 60 S.C. 401, 38 S.E. 634, 638 (1901). Wrongful death and survival claims are "separable and distinct." Keel v. Seaboard Air Line Ry., 122 S.C. 17, 114 S.E. 761, 762 (1922). In sum, wrongful death is not derivative of survival claims because "[t]he object, scope, and measure of damages" is different for the two claims. In re Mayo's Estate, 38 S.E. at 638.

These distinctions remain valid even in more modern cases. This Court continues to recognize the wrongful death statute created a new cause of action that did not exist at common law, accrues only at the decedent's death, and which is subject to its own statute of limitation. Weaver v. Lentz, 348 S.C. 672, 678, 561 S.E.2d 360, 363 (Ct. App. 2002). Accordingly, wrongful death actions and survival claims consider the losses related to a person's death from completely different perspectives. Boyle v. U.S., 948 F. Supp. 2d 577, 580 (D.S.C. 2012); 28 S.C. Jur. Wrongful Death § 5 ("***the wrongful death action and the survival action involve different, independent claims***") (emphasis added). Their distinctiveness is even plainer in practice. Since they compensate different groups for different losses, wrongful death and survival claims can result in dramatically different verdicts. For example, in Scott, the jury awarded $ 600,000 in actual damages on a medical malpractice claim alleged under the survival statute and $ 1.5 million in punitive damages for the same claim. 340 S.C. at 162, 530 S.E.2d at 391. On a wrongful death claim in the same action, the jury awarded $ 1.5 million in actual damages and $ 2 million in punitive damages. Id. Since these two claims addressed such different losses by different people, the disparate awards were not inconsistent, and this Court affirmed the verdict in its entirety. Id. at 169-71, 530 S.E.2d at 394-96; see also Welch v. Epstein, 342 S.C. 279, 303-05, 536 S.E.2d 408,

420-21 (Ct. App. 2000) (affirming verdict of less than $29,000 for survival claim and $ 3 million for wrongful death claim).

In sum, extensive South Carolina precedent rejects Pepper Hill's contention that wrongful death claims are derivative of claims a person holds at the time of her death. South Carolina's appellate courts have held wrongful death claims are "distinct," "independent," "separate," "wholly different," and "not a continuation" of claims a decedent could have filed during her lifetime. Thus, Mr. Rudd's wrongful death beneficiaries are the "real parties" to the wrongful death claim, and they did not sign the Arbitration Agreement or otherwise consent to waive their right to a jury trial.

iii. Many Other Jurisdictions Have Refused to Compel Arbitration of Wrongful Death Claims Based on a Decedent's Arbitration Contract.

In light of the historical and structural differences between South Carolina's wrongful death and survival statutes, as well as substantial case law defining and treating the resulting claims distinctly, the Court should reject Pepper Hill's attempt to use the Admission Agreement's arbitration provision to force arbitration on a wrongful death claim. At least a dozen other jurisdictions have rejected this argument.[8] Four different state supreme courts have done so over

[8] FutureCare NorthPoint, LLC v. Peeler, 143 A.3d 191, 209-10, 213 (Md. App. 2016); Taylor v. Extendicare Health Facilities, Inc., 147 A.3d 490, 494 and n. 1 (Pa. 2016) (citing Pisano v. Extendicare Homes, Inc., 77 A.3d 651, 660 (Pa. Super. 2013)); Boler v. Sec. Health Care, LLC, 336 P.3d 468, 477 (Okla. 2014); Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc., 316 P.3d 607, 614 (Ariz. Ct. App. 2014); Daniels v. Sunrise Sr. Living, Inc., 212 Cal. App. 4th 674, 151 Cal. Rptr. 3d 273 (2013); Carter v. SSC Odin Operating Co, LLC, 976 N.E.2d 344, 355-58 (Ill. 2012); Ping v. Beverly Enters., Inc., 376 S.W.3d 581 (Ky. 2012); Woodall v. Avalon Care Center-Federal Way, LLC, 231 P.3d 1252 (Wash. App. 2010); Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009); Bybee v. Abdulla, 189 P.3d 40 (Utah 2008); Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1262 (Ohio 2007); Chapman v. Cardiac Pacemakers, Inc., 673 P.2d 385 (Idaho 1983); see also Strickholm v. Evangelical Lutheran Good Samaritan Soc'y, Case No. 4:11-CV-00059-BLW, 2011 WL 2532395 (D. Idaho June 24, 2011).

just the last ten years. While some jurisdictions have taken a contrary view[9], South Carolina's statutory language and case law discussed above are more in line with the states that refuse to compel arbitration under similar circumstances. In the aggregate, to the extent the Court looks beyond South Carolina law, persuasive authority supports the circuit court's order.

The en banc Missouri Supreme Court addressed a similar case in Lawrence v. Beverly Manor., 273 S.W.3d 525 (Mo. 2009). Similar to the Admission Agreement (R. p. 113), the contract in Lawrence purported to bind both a nursing home resident and "all persons whose claim is derived through or on behalf" of the resident including family members, legal representatives, and heirs. Id. at 526-27. Shortly after admission, the nursing home's staff members allegedly dropped the mother and caused fatal injuries. Id. Just like this case, the family filed wrongful death and other legal claims, the nursing home cited the contract in an effort to compel arbitration, and the trial court denied the motion. Id.

The Missouri Supreme Court affirmed, finding wrongful death is not derived from any claim the resident may have had at or before her death. Id. at 529. All of the key components cited in Lawrence to show a wrongful death is not derivative are also present under South Carolina law. Lawrence started by reviewing the wrongful death statute's language. Id. at 527 (quoting Mo. Rev. Stat. § 537.080). Missouri's statute is substantially similar to its South Carolina counterpart, and Lawrence interpreted that language to create a new cause of action that is distinct from survival claims and not a transmitted right from a decedent to her family members. Lawrence, 273 S.W.3d at 527. South Carolina precedent makes these same points. Weaver, 348 S.C. at 678, 561 S.E.2d at 363 ("[t]he wrongful death statute . . . created a new cause of action"); Keel, 114 S.E. at 762

[9] E.g. Laizure v. Avante at Leesburg, Inc., 109 So.3d 752 (Fla. 2013); In re Labatt Food Serv., L.P., 279 S.W.3d 640 (Tex. 2009); Briarcliff Nursing Home, Inc. v. Turcotte, 894 So.2d 661 (Ala. 2004); Ballard v. Southwest Detroit Hosp., 327 N.W.2d 370 (Mich. App. 1982).

(wrongful death and survival claims are "separable and distinct"). Considering both the statutory language and precedent, Lawrence concluded a wrongful death claim is "separate and distinct." 273 S.W.3d at 528. Its holding was buttressed by the fact that Missouri wrongful death claims compensate different people for different losses. Id. at 528-29. South Carolina cites the same factors to highlight a wrongful death claim's independence. Scott, 340 S.C. at 168-70, 530 S.E.2d at 394-95 (listing available damages in wrongful death and survival claims); In re Mayo's Estate, 38 S.E. at 638 (finding "object, scope, and measure of damages" in wrongful death claims is "wholly different").

Lawrence followed and was soon joined by a number of other states in rejecting the notion that a nursing home resident could contract away a jury trial on a wrongful death claim compensating her family members or heirs for their unique damages. These cases often point to a common set of factors to show a wrongful death claim is not derivative of the decedent's claims. First, a wrongful death claim is likely not derivative when wrongful death and survival are expressly distinguished in the statutes. Pisano, 77 A.3d at 656 (reading statutes to mean "two separate and distinct causes of action arise from a single injury" resulting in death); see also Woodall v. Avalon Care Center-Federal Way, LLC, 231 P.3d 1252 (Wash. App. 2010) (describing wrongful death and survival as "conceptually different"). Second, the two claims should be viewed as separate when they are brought by different people to compensate different individuals for different losses. In Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc., an Arizona appellate cited the different claimants, different beneficiaries, and different damages as definitive proof a wrongful death statute "confers an original and distinct claim" and is neither "derived from nor is it a continuation of claims which formerly existed in a decedent." 316 P.3d 607, 613 (Ariz. Ct. App. 2014); see also FutureCare NorthPoint, LLC v. Peeler, 143 A.3d 191, 203

(Md. App. 2016) (holding that survival and wrongful death claims are distinct because they are "by different persons, the damages go into different channels, and are recovered upon different grounds"); Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 599 (Ky. 2012) (concluding wrongful death is independent claim in part because it belongs to the beneficiaries and is "meant to compensate them for their own pecuniary loss").

Third, many of these opinions find wrongful death to be a non-derivative claim because it accrues at a different time than a survival claim. In Carter v. SSC Odin Operating Co, LLC, the Illinois Supreme Court concluded wrongful death is independent because it "does not accrue until death" while the state's survival statute "simply allows a representative . . . to maintain those . . . actions that had already accrued." 976 N.E.2d 344, 354 (Ill. 2012); see also Boler, 336 P.3d at 477; Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1262 (Ohio 2007) (finding decedent's wrongful death claim "accrued independently to his beneficiaries for the injuries they personally suffered"). In other words, a wrongful death claim does not accrue or, as one court put it, "vest" in the statutory beneficiaries until the decedent's death. Strickholm v. Evangelical Lutheran Good Samaritan Soc'y, Case No. 4:11-CV-00059-BLW, 2011 WL 2532395 (D. Idaho June 24, 2011).

Finally, these cases show the error in Pepper Hill's interpretation of a "derivative" claim. The Admission Agreement purports to extend to people deriving their claim through Ms. Royston. Appellants seem to argue wrongful death is sufficiently derivative because S.C. Code Ann. § 15-51-10 permits a wrongful death claim only if the decedent could have brought a claim for the same harm before she died. Many cases from other states cited above found wrongful death was not a derivative claim despite statutes like section 15-51-10. Boler, 336 P.3d at 472-77; Carter, 976 N.E.2d at 358-59; Woodall, 231 P.3d at 1259 ("characterizing the wrongful death claims as 'derivative' does not support the proposition that the heirs must arbitrate their claims for wrongful

death"). By arguing that a statute like section 15-51-10 was enough to force a wrongful death claim to arbitration, Carter found parties like Appellants "overstate[] the significance of the derivative nature of a wrongful-death action" especially where, here as in Carter, there is extensive case law and structural differences demonstrating wrongful death is an independent claim. Similarly, Boler held that while a statute like 15-51-10 might make wrongful death "partially derivative" in a limited sense, it would still be improper to compel arbitration since wrongful death accrues separately and compensates statutory beneficiaries directly for their personal losses. 336 P. 3d at 472, 477 (finding a resident's signature could not compel arbitration on wrongful death claim unless that claim was "wholly derivative"); see also Pisano, 77 A.3d at 659-60 (providing detailed discussion of definition for "derivative" and rejecting arbitration because while wrongful death claims are inherently "derivative of the decedent's injuries," they "are not derivative of decedent's rights").

In sum, persuasive authority does not support Pepper Hill's argument that South Carolina's wrongful death claim is "derivative" such that a nursing home resident's agreement to arbitrate applies to a wrongful death claim. A dozen states have considered statutes similar to section 15-51-10 and found wrongful death is a distinct, independent claim.[10] Thus, as an additional sustaining ground, the Court should reject arbitration on Respondent's wrongful death claim even if the Court

[10] Pepper Hill dismisses the persuasive authority in a single paragraph, arguing U.S. Supreme Court precedent compels a finding that wrongful death is a derivative claim covered by a nursing home resident's arbitration contract. (R. p. 162 (citing Marmet Health Care Ctr., Inc. v. Brown, 132 S.Ct. 1201 (2012)). However, Marmet Health Care considered a different issue and reversed a state court ruling that invalidated all pre-dispute nursing home arbitration contracts for personal injury and wrongful death claims. 132 S.Ct. at 1202. The Court reiterated the FAA's equal-treatment rule that barred state law rules that singled out arbitration contracts for harsh treatment. However, Marmet Health Care did not rule on uniquely state law issue of whether wrongful death is a derivative legal claim. Nor have state courts read Marmet Health Care as Pepper Hill suggests. Several state supreme courts have found wrongful death to be a non-derivative claim after Marmet Health Care was decided. See Supra at 32 n. 8.

finds the Admission Agreement was properly formed and valid as to arbitration of the survival claim.

CONCLUSION

Based on the arguments stated above, Respondent respectfully requests the court affirm the circuit court's order. Pepper Hill did not meet its burden to show a valid arbitration contract with Mr. Rudd, who did not sign the Admission Agreement or initial its arbitration provision. Moreover, Pepper Hill offered no evidence to show Mr. Rudd's condition empowered Ms. Rudd to act under the AHCCA or that any such authority would cover decisions related to arbitration. Additionally, South Carolina precedent rejects Pepper Hill's agency, estoppel, and third-party beneficiary arguments. Finally, the Admission Agreement's unconscionable dispute resolution provisions are invalid because they violate South Carolina public policy and, alternatively, do not apply to Respondent's wrongful death claim.

Respectfully submitted,

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October 8, 2021