THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
The Honorable 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 which Shiloh Management Company, Inc., Pepper Hill Nursing & Rehab Center, LLC d/b/a Pepper Hill Nursing & Rehab Center are the Appellants.

APPELLANTS' FINAL BRIEF

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STATEMENT OF THE CASE

On November 13, 2019, Respondent filed an action against Appellants alleging Appellants were negligent in providing nursing home care to Mr. Charles S. Rudd, who was a resident at Pepper Hill Rehab and Nursing Center ("Pepper Hill") from approximately July 27, 2016 to November 28, 2016. (R. pp. 52-99, ¶¶ 17, 35). On March 2, 2020, in lieu of an Answer, Appellants filed a Motion to Dismiss and to Compel Arbitration. (R. pp. 100-127). On May 4, 2020, Appellants filed a related Motion to Strike specific paragraphs and allegations in Plaintiff's Memorandum in Opposition to Defendant's Motion to Compel Arbitration. The Circuit Court conducted a hearing on the Motion to Dismiss and Compel Arbitration on May 5, 2020, and the Circuit Court conducted a hearing on the Motion to Strike on May 19, 2020.

After the hearings, on August 14, 2020, the Circuit Court entered an Order Denying Motions to Strike, Dismiss and Compel Arbitration. (R. pp. 182-186).

Appellants filed a Motion to Reconsider on August 24, 2020. (R. pp. 187-194). The Court denied the Motion to Reconsider in a Form 4 Order on October 29, 2020. (R. pp. 195-197).

Appellants filed a Notice of Appeal on October 30, 2020.

STANDARD OF REVIEW

"Determinations of arbitrability are subject to de novo review." *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 609, 571 S.E.2d 711, 713 (Ct. App. 2002). "However, the circuit court's factual findings will not be overruled if there is any evidence reasonably supporting them." *Id.* at 610, 571 S.E.2d at 713.

FACTS

I. Admission to Pepper Hill

Mr. Rudd was admitted to Pepper Hill for care pursuant to a July 27, 2016 Admissions Agreement (R. pp. 244-269). According to Amended Complaint, at all times during Mr. Rudd's residency at Pepper Hill, he was a "vulnerable adult" as defined by S.C. Code Ann. § 43-35-10. (R. p. 54 ¶ 9). Under this code section, a "vulnerable adult" is a person who is substantially impaired "from adequately providing his or her own care or protection," including "a person who is impaired... because of the infirmities of aging including, but not limited to, organic brain damage, advanced age, and physical, mental, or emotional dysfunction." Plaintiff's Memorandum in Opposition to the Motion to Compel further notes that Mr. Rudd had suffered cognitive decline. (R. p. 139).

Given Mr. Rudd's condition, Mr. Rudd's wife, Thelma Rudd, signed the Admissions Agreement as the Representative for Mr. Rudd. In executing this Admissions Agreement, Mrs. Rudd indicated in writing to Pepper Hill that she was the Representative and responsible party for Mr. Rudd. (R. pp. 244, 255, 257). She further represented that she was "authorized by the Resident to act on the Resident's behalf." (R. p. 255). Mrs. Rudd further indicated through the Admissions Agreement that, "by signing this contract," she accepted "the duties and responsibilities" as Mr. Rudd's Representative. (R. p. 255). In addition, Mrs. Rudd expressly acknowledged that "[the Admissions Agreement] shall be binding upon Resident/Representative, Pepper Hill Nursing & Rehab Center, and each of their heirs, successors and assigns." (R. p. 255).

II. Arbitration Agreement

Appellants moved to compel arbitration because the Admissions Agreement executed by Mrs. Rudd includes a conspicuous and enforceable Arbitration Agreement. At the top of every single page of the Admissions Agreement, underlined, in all caps, and in bold, is the following:

> **THIS AGREEMENT IS SUBJECT TO MANDATORY ARBITRATION PURSUANT TO THE FEDERAL ARBITRATION ACT, AND IF THE FEDERAL ARBITRATION ACT IS INAPPLICABLE, THE UNIFORM ARBITRATION ACT, SECTION 15-48-10, ET. SEQ., CODE OF LAWS OF SOUTH CAROLINA (1976), AS AMENDED.**

(R. pp. 244-257). In addition, the Admissions Agreement's full arbitration provision is set forth on its own page under the word "ARBITRATION" in all caps. It states in relevant part as follows:

> ARBITRATION
>
> Any controversy or claim between or among the parties hereto, including but not limited to those arising out of or relating to this agreement or resident's stay in this facility, including any claim based on or arising from an alleged tort, shall be determined by binding arbitration in accordance with the Federal Arbitration Act (or if not applicable, the Uniform Arbitration Act, Section 14-48-10, et. Seq., Code of Laws of South Carolina), the rules of practice and procedure for the arbitration of disputes of J.A.M.S. Arbitration or any successor thereof ("J.A.M.S.") and the "special rules" set forth below. In the event of any inconsistency, the special rules shale control. Judgment upon any arbitration award may be entered in any court having jurisdiction. Any part to the Admissions Agreement may bring an action, including a summary or expedited proceeding, to compel arbitration of any controversy or claim to which the agreement applies in any court having jurisdiction over such action.

(R. p. 256).

Notably, Mrs. Rudd, who signed the Admissions Agreement, is the same individual who filed this lawsuit.

III. Underlying Incident

Mrs. Thelma Rudd, as Mr. Rudd's Personal Representative, alleges that Mr. Rudd was injured after he fell from his wheelchair while he was a resident at Pepper Hill. (R. pp. 53-99). Per the nurse's affidavit filed with Respondent's Complaint, Mr. Rudd reported that he slipped from his chair while eating breakfast and that he hit his head on the wheelchair when he slid out. (R. pp. 49-50 ¶ 3). Mr. Rudd indicated that his head hurt but he had no signs of bruising or hematomas on his head or body. *Id.* Mrs. Thelma Rudd, the Plaintiff in this suit and Mr. Rudd's Representative per the Admissions Agreement, was called about the incident. *Id.* However, Mrs. Rudd did not want to send Mr. Rudd to the hospital that night and wanted to wait until the morning to see how he was doing. (R. pp. 50 ¶ 4). The next morning, Mr. Rudd indicated he was still in pain and wanted to go to the hospital. *Id.* Mrs. Rudd was again contacted and wanted Mr. Rudd sent to the Veterans Hospital. *Id.* Ultimately, because an ambulance was not available, Mr. Rudd went to Aiken Regional and was diagnosed with a slight hemorrhage, for which he was treated. *Id.*

Mr. Rudd then re-entered another long term care facility on December 13, 2016. (R. p. 50 ¶ 7). He did not pass away until nearly a year and a half later on May 10, 2018. (R. p. 99 ¶ 253). Appellants are not aware of any evidence that Mr. Rudd's death was related to his fall.

Appellants sought at the trial court to compel arbitration of the Respondent's lawsuit arising out of this alleged incident. Appellants' Motion was denied and this appeal follows.

ARGUMENTS

I. THE TRIAL COURT ERRED IN FINDING THAT NO BINDING ARBITRATION AGREEMENT EXISTED.

In the present case, it is undisputed that Mr. Rudd's wife, Mrs. Thelma Rudd, executed the Admission Agreement, which included the arbitration provision. As a result, the first question

at issue is whether Mrs. Rudd had the authority to execute the Admission Agreement. Because Mrs. Rudd had actual or apparent authority to execute the admission agreement, which included the arbitration provision, the trial court's Order denying Appellants' Motion to Compel Arbitration is in error and should be reversed.

a. Mrs. Rudd had Authority Under the Adult Health Care Consent Act to Execute the Admission Agreement, which Included the Arbitration Provision.

South Carolina's Adult Health Care Consent Act, S.C. Code Ann. ¶ 44-66-10 *et seq*, provides that "[w]here a patient is unable to consent, decisions concerning his health care may be made by the following persons in the following order of priority: (1) a guardian appointed by the court... (2) an attorney-in-fact... (3) *a spouse of the patient* unless the spouse and the patient are separated...". S.C. Code Ann. § 44-66-30. An individual who has authority to make health care decisions under the Adult Health Care Consent Act is often described as a "surrogate." *See Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 350, 755 S.E.2d 450, 453 (2014)

Several court decisions in South Carolina have examined the scope of a surrogate's decision-making authority under the Adult Health Care Consent Act. For example, in *Coleman*, the South Carolina Supreme Court explored the scope of what qualified as a "health care" decision under the Adult Health Care Consent Act and noted that "[t]he decision to place an incapacitated adult in a nursing facility or a rehabilitative institution is delegated to the surrogate under the Act." 407 S.C. at 352. The Court further noted that "[t]he contract terms offered as part of an admission agreement will often require the surrogate to weigh questions that do not directly involve medical treatment or procedures, but are a necessary part of the decision regarding which institution the patient should be placed in." *Id.*

Whether an arbitration agreement falls within the surrogate's decision-making authority depends largely on whether the arbitration agreement was part of the admissions agreement or whether it was a separate, voluntary agreement. For example, where the arbitration agreement was a separate, voluntary document, South Carolina courts have found that the agreement was not within the surrogate's authority. *See, e.g., Coleman,* 407 S.C. at 354 (finding that surrogate's authority extended to the admissions agreement, "which was the basis upon which Facility agreed to provide health care," but not to a "separate" and "voluntary arbitration agreement"); *Thompson v. Pruitt Corp.*, 416 S.C. 43, 52, 784 S.E.2d 679, 684 (Ct. App. 2016) (holding that because the arbitration agreement "was separate from the Admission Agreement," then "any authority Son had to sign the [Arbitration Agreement] on Mother's behalf could not come from the [Adult Health Care Consent Act]"); *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 563, 813 S.E.2d 292, 302 (Ct. App. 2018) (declining to compel arbitration where arbitration and admissions agreement were separate documents);

In contrast, where the admission agreement *contains* the arbitration provision, the arbitration provision falls within the surrogate's authority under the Adult Health Care Consent Act. For example, in *THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185, at *2 (D.S.C. Mar. 19, 2015), the District Court reviewed South Carolina law governing a surrogate's decision-making authority under the Adult Health Care Consent Act. Because the facts before the court involved an admission agreement *containing* an arbitration provision, the court held that the arbitration agreement was binding on the resident and later her estate. *Id.* Similarly, in *THI of S.C. at Columbia, LLC v. Wiggins*, No. CA 3:11-888-CMC, 2011 WL 4089435, at *1 (D.S.C. Sept. 13, 2011), the district court granted a motion to compel arbitration where the arbitration provisions were "included *in* the Admission Contract."

See also Abrams v. Fundamental Long-Term Care Holdings, LLC, No. 2010-CP-42-6861, 2019 WL 10984312, at *9 (S.C.Com.Pl. Aug. 28, 2019) (compelling arbitration where resident's wife executed an Admissions Agreement and Arbitration Agreement and the court found that the agreements merged into one contract).

In the present case, Mrs. Rudd was Mr. Rudd's surrogate with the authority to make health care decisions under the Adult Health Care Consent Act. Specifically, the Act provides that decisions concerning health care may be made by the following persons in the following order of priority: "(1) a guardian appointed by the court... (2) an attorney-in-fact... (3) *a spouse of the patient* unless the spouse and the patient are separated...". S.C. Code Ann. § 44-66-30 (emphasis added). Here, there is no contention that Mr. Rudd had a court-appointed guardian, and Mrs. Rudd did not become attorney-in-fact until January 2019. (R. p. 218 lines 4-12). As a result, Mrs. Rudd, the spouse, had priority under the Act at the time Mr. Rudd was admitted in 2016. *See Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 351, 755 S.E.2d 450, 453 (2014) (holding that sister was authorized to make health care decisions for decedent because "[d]ecedent had no guardian or attorney-in-fact, no other individual had statutory priority, and she had neither a spouse, a parent, nor an adult child").

Because Mrs. Rudd had authority under the Adult Health Care Consent Act, the remaining question is whether Mrs. Rudd's decision-making authority extended to execution of the admissions agreement with its arbitration provisions. Here, it is uncontested that the arbitration provisions were part of the admissions agreement. The arbitration agreement itself is included within the admissions agreement and the top of every page of the admissions agreement indicated, in highly conspicuous font, that the admissions agreement was subject to arbitration. (*See* R. pp. 244-257). The arbitration provisions are not separately paginated. *Id.* As a result,

Mrs. Rudd's authority under the Adult Health Care Consent Act encompassed execution of the Admissions Agreement and its terms, which included the arbitration provisions. *See THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, 2015 WL 1268185; *see also Abrams v. Fundamental Long-Term Care Holdings*, LLC, No. 2010-CP-42-6861, 2019 WL 10984312, at *9 (S.C.Com.Pl. Aug. 28, 2019). Further, because this case does not involve an admissions agreement and a separate, voluntary arbitration agreement of the kind discussed in *Coleman, Thompson,* and *Hodge*, those cases are not controlling in this matter.

As a result, Mrs. Rudd had authority to execute the admissions agreement and its arbitration provisions based on her authority under the Adult Health Care Consent Act. Furthermore, the arbitration provisions are binding on Mr. Rudd and his estate. *See, e.g., THI of S.C. at Magnolia Manor-Inman, LLC*, 2015 WL 1268185, at *2 (finding representative's acts were binding on estate); *THI of S.C. at Columbia, LLC v. Wiggins*, 2011 WL 4089435, at *6 (finding daughter's execution of arbitration agreement contained in admissions agreement binding on resident and his estate).

b. Mrs. Rudd had Actual or Apparent Authority Apart From the Adult Health Care Consent Act to Execute the Admission Agreement, which Included the Arbitration Provision.

In the alternative, to the extent there is any question regarding Mr. Rudd's competence, the evidence shows Mrs. Rudd had actual or apparent authority to execute the Admission Agreement and its arbitration provisions.

"Agency is a fiduciary relationship which results from the manifestation of consent by one person to another to be subject to the control of the other and to act on his behalf." *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145, 425 S.E.2d 764, 773 (Ct. App. 1992). "An agreement may result in the creation of an agency relationship

although the parties did not call it an agency and did not intend the consequences of the relationship to follow." *Id.* The agency relationship "may be proved by circumstantial evidence showing a course of dealing between the two parties." *Id.*

Actual authority may be either express or implied. *Roberson v. S. Fin. of S.C., Inc.*, 365 S.C. 6, 10, 615 S.E.2d 112, 115 (2005). On the other hand, "[a]pparent authority to do an act is created as to a third person by written or spoken words *or any other conduct of the principal* which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him." *Froneberger v. Smith*, 406 S.C. 37, 47, 748 S.E.2d 625, 630 (Ct. App. 2013) (emphasis in original).

"[T]he elements which must be proven to establish apparent agency are: (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." *Id.* "The first element of apparent agency can be established by either: (1) affirmative conduct or (2) conscious and voluntary inaction." *Id.* "Under the first of these two scenarios, the principal makes direct representations to a third party that another has authority to act on his behalf." *Id.* at 48, 748 S.E.2d at 630. This can be accomplished by "written or spoken words or any other conduct of the principal" that shows consent to allow another to act on the principal's behalf. *Id.* (citing *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 244–45, 473 S.E.2d 865, 868 (Ct. App. 1996)). Under the second of these two scenarios, "the principal implies authority by passively permitting another to appear to third parties to have authority to act on his behalf." *Froneberger*, 406 S.C. at 48, 748 S.E.2d at 630. Also, "[a]gency may be *implied or inferred and may be circumstantially proved* by the conduct of the purported agent

exhibiting a pretense of authority with the knowledge of the alleged principal." *Id.* (emphasis added) (citing *Fernander v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982)).

Upon information and belief, it is undisputed that Mr. Rudd was impaired when he was admitted to Pepper Hill. However, to the extent there is any question on this point, Mrs. Rudd's authority to execute the Admission Agreement and its arbitration provisions would alternatively be established through actual or apparent agency. Mrs. Rudd brought Mr. Rudd to the facility and through the Admissions Agreement obtained him a room and care at the facility. She signed the Admissions Agreement representing that she was Mr. Rudd's Representative, and she had the authority to authorize the release of information and payment to Pepper Hill. (*See* R. pp. 244, 250, 257). Mrs. Rudd further initialed the Admissions Agreement following the Agreement's arbitration provision. (R. p. 257). In addition, her status and authority to act as Mr. Rudd's Representative is further confirmed by her appearance now as Mr. Rudd's Personal Representative in this suit. Upon information and belief, no one has challenged Mr. Rudd's admission to Pepper Hill as outside her authority, nor has anyone challenged her authority to make healthcare and related decisions for Mr. Rudd at the time of his admission. This conduct by the purported agent exhibits a "pretense of authority with the knowledge of the alleged principal" from which agency may be implied, inferred, and circumstantially proved. *See Froneberger*, 406 S.C. at 48, 748 S.E.2d at 630.

In addition, in event Mr. Rudd's incompetence is challenged, his actions would establish that he passively permitted Mrs. Rudd to act on his behalf. In this situation, Mr. Rudd's conduct in allowing Mrs. Rudd to sign the paperwork, particularly when combined with Mr. Rudd's acceptance of the benefits of admission, would reasonably suggest to third parties that Mrs. Rudd had the authority to act. In addition, after admission, Mr. Rudd remained at Pepper Hill for over

four months, accepting and retaining services including room accommodations, food services, professional nursing services, therapy, housekeeping, and others. (*See* R. p. 245). As a result, had Mr. Rudd been competent, these actions would show passive permission and ratification by Mr. Rudd.

Other factors also reasonably demonstrate to a third party that Mrs. Rudd had authority to execute the agreement. In assisting Mr. Rudd to be admitted to Pepper Hill, Mrs. Rudd took a number of steps and provided information of a nature that represents she was authorized by Mr. Rudd to act as her agent: (1) she identified Mr. Rudd's attending physician, (R. p. 245); (2) she signed to certify that information provided in relation to payment under the Social Security Act is correct and authorized release of medical or other information to the Social Security Administration, and requested that payment or authorized benefits be made, (R. pp. 250, 264); and (3) upon information and belief, she has never denied that she was authorized to execute the Admissions Agreement on Mr. Rudd's behalf.

In sum, the circumstantial and direct evidence indicates that Mrs. Rudd had actual or apparent authority to execute the Admission Agreement and admit Mr. Rudd to Pepper Hill.

II. THE TRIAL COURT ERRED IN FAILING TO FIND THAT RESPONDENT IS EQUITABLY ESTOPPED FROM DECLINING TO PARTICIPATE IN ARBITRATION.

While Appellants contend that an enforceable contract existed, equitable estoppel in the form of direct-benefits estoppel would apply even in the absence of an enforceable contract. In the present case, as to equitable estoppel, the trial court erred in applying a general equitable estoppel framework rather than the direct-benefits estoppel framework. (R. pp. 184-185). In addition, the trial court erred failing to consider the direct benefits Mr. Rudd received under the contract. (R. pp. 182-186). The Court's reliance on the *Coleman*, *Hodge*, and *Thompson* cases is

also in error, as those matters involved separate arbitration agreements separate from the admissions agreement and are not controlling. *See* discussion *supra* pp. 7-9.

Applied to arbitration, the doctrine of direct-benefits equitable estoppel "recognizes that a party may be estopped from asserting that the lack of [their] signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that the other provisions of the same contract should be enforced to benefit him." *Thompson,* 416 S.C. at 59, 784 S.E.2d at 688 (citing *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012)). "In other words, '[w]hen a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine estops the non-signatory from claiming that he is not bound to the arbitration agreement when he receives a "direct benefit" from a contract containing an arbitration clause.'" *Id.* This doctrine has also been applied to an estate that later seeks to escape the operations of an arbitration provision in facts similar to those in the present case. *See, e.g., THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, 2015 WL 1268185, at *2 (D.S.C. Mar. 19, 2015); *THI of South Carolina at Columbia, LLC v. Wiggins*, 2011 WL 4089435 (D.S.C. 2011).

In *THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, the District Court, applying South Carolina law, found that the doctrines of third-party beneficiary and equitable estoppel bound a nursing facility's resident, and later her estate, to an arbitration agreement executed by the resident's representative. 2015 WL 1268185, at *2. In so doing, the court found that the third-party beneficiary doctrine and equitable estoppel arguments made the question of whether the representative had authority irrelevant. *Id.* The court further specifically considered the *Coleman* case and found it was inapposite because it involved an arbitration agreement that was "separate from the admissions agreement." *Id.* Because the admission agreement before the court

"*contained* the arbitration agreement," the court found that *Coleman* and its analysis was not implicated and did not govern. *Id.* In sum, because the resident had received benefits contracted for under the admissions agreement, the resident and his estate were bound by the admissions agreement under the doctrines of third-party beneficiary and equitable estoppel. *Id.*

Similarly, the court in *THI of South Carolina at Columbia, LLC v. Wiggins* found a nursing home resident's estate was equitably estopped from disclaiming the enforceability of the arbitration provision contained in the admissions contract. *THI of South Carolina at Columbia, LLC v. Wiggins*, 2011 WL 4089435 (D.S.C. 2011). In *Wiggins*, a daughter executed an admissions contract to a nursing home on behalf of her father. Following the death of the father and a subsequent filing of suit, the nursing home moved to compel arbitration. *Id.* at *2. The father's estate argued that the arbitration provision was unenforceable because no evidence existed that the daughter had the "authority to act as her father's agent, to legally bind her father, or waive her father's right to a jury trial." *Id.* at *5. In holding that it would be inequitable for the estate to avoid the arbitration provision within the admissions contract, the court noted the father received the benefits provided under the admissions contract and the nursing home performed in reliance on the terms of the agreement. *Id.* at *6.

Mr. Rudd's estate is also bound by the arbitration agreement under the doctrine of equitable estoppel. Mr. Rudd received multiple direct benefits under the Admission Agreement executed by Mrs. Rudd on Mr. Rudd's behalf. For example, it served as the foundation for Mr. Rudd's admission to Pepper Hill. It contained the duties and obligations which the parties had to one another. (R. pp. 244-257). Pursuant to the Admission Agreement, Appellants provided Mr. Rudd with residency, care, and other benefits for over four months. In short, after the execution of the Agreement, Mr. Rudd became a resident of Pepper Hill, receiving the benefits provided for

in the Agreement. Respondent's claims as alleged in this matter all arise out of his residency and care at Pepper Hill. It is inequitable to permit Respondent to disclaim the arbitration clause, which is part of the Admission Agreement, after Pepper Hill provided benefits to Mr. Rudd in reliance on the Admission Agreement for over four months.

Under the doctrine of direct-benefits estoppel, Respondent is therefore estopped from seeking to avoid the arbitration agreement that was also part of the Admission Agreement under which Mr. Rudd received benefits contracted for in the Agreement. As a result, the trial court's order erred in refusing to enforce the arbitration agreement under direct-benefits equitable estoppel, and the trial court's order should be reversed and arbitration compelled.

III. THE TRIAL COURT ERRED IN FAILING TO COMPEL ARBITRATION WHERE MR. RUDD WAS A THIRD-PARTY BENEFICIARY OF THE ADMISSION AGREEMENT.

The trial court also erred in failing to find that Respondent is bound to the arbitration agreement as an intended third-party beneficiary of the Admission Contract. "Under South Carolina law, '[a] third-party beneficiary is a party that the contracting parties intend to directly benefit.'" *THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. 7:13-CV-2929-BHH, 2014 WL 6863550, at *3 (D.S.C. Oct. 31, 2014), *report and recommendation adopted*, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. Mar. 19, 2015) (citing *Helms Realty, Inc. v. Gibson–Wall Co.*, 363 S.C. 334, 611 S.E.2d 485, 488 (2005)). Where a resident of a skilled nursing facility was an intended third-party beneficiary of the admissions agreement signed by family member, the resident and his or her estate is bound by the arbitration provision. *Wiggins*, 2011 WL 4089435, at *6. "Well-established common law principles dictate that in an appropriate case a non-signatory can … be bound by… an arbitration provision within a contract executed by

other parties." *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000).

In the present case, while Mr. Rudd did not sign the Admission Agreement, he is named as the resident to be admitted to the facility. (R. p. 244). *See Wiggins,* 2011 WL 4089435 at *6. The terms of the Admission Agreement refer to benefits and responsibilities of the resident, the facility, and the fiduciary party. (R. pp. 244-269). *See Wiggins,* 2011 WL 4089435 at *6. Mr. Rudd's care was the essential purpose of the Admission Agreement. (R. pp. 244-269). *See Wiggins,* 2011 WL 4089435 at *6. Thus, he was an intended third-party beneficiary of the Contract and the arbitration agreement is enforceable against his estate. *See THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185, at *2 (D.S.C. Mar. 19, 2015); *Wiggins,* 2011 WL 4089435 at *6; *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575, at *3 (D.S.C. Dec. 15, 2011) (finding that non-signatory resident was bound to arbitration agreement as third-party beneficiary of care provided for in admissions agreement).

Because Mr. Rudd was the third-party beneficiary of the Admissions Agreement, and because he received and enforced benefits under the contract, including his admission to the facility, the trial court's order erred in refusing to enforce the arbitration agreement. As a result, the trial court's order should be reversed and arbitration compelled.

IV. Conclusion

For the reasons set forth above, Appellants request that the Court reverse the trial court's Order and compel arbitration.

Respectfully submitted,

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Columbia, South Carolina
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CERTIFICATE OF COUNSEL

Pursuant to Rule 211(a), SCACR, Appellants' counsel hereby certifies that Appellants' Final Brief and Final Reply Brief comply with Rule 211(b), SCACR.

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