

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM FLORENCE COUNTY  
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge  
Michael G. Nettles, Circuit Court Judge

**RECEIVED**

JUL 25 2012

**SC Court of Appeals**

Case Nos.: 2010-CP-21-00835, 2010-CP-21-00836

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Ann Coleman, Individually, and as Personal Representative  
Of the Estate of Mary Brinson,

Respondent,

v.

Mariner Health Care, Inc., f/k/a Mariner Post Acute Network, LLC, Mariner Health Care Management Company, Mariner Health Central, Inc., Mariner Health Group, Inc., MHC Holding Company, MHC Florida Holding Company, MHC Gulf Coast Holding Company, MHC MidAmerica Holding Company, MHC Rocky Mountain Holding Company, MHC Northeast Holding Company, MCH West Holding Company, MHC Texas Holding Company, MHC MidAtlantic Holding Company, Living Centers-Southeast, Inc., Grancare South Carolina, Inc., Individually and d/b/a Faith Health Care Center, SavaSeniorCare Management, LLC, SavaSeniorCare Administrative Services, LLC, SavaSeniorCare, LLC, SavaSeniorCare, Inc., National Senior Care, Inc. Palmetto Health Care, LLC, Palmetto Faith Operating, LLC, Individually and d/b/a Faith Health Care Center, Ask Holdings, LLC, Leonard Grunstein, an Individual, Murray Forman, an Individual, Boyd P. Gentry, an Individual, Abraham Shaulson a/k/a Abraham Shavlson a/k/a A. Shawson a/k/a Abraham Shawson, an Individual, Avi Klein, an Individual, SC Property Holdings, LLC, SC Faith, LLC, and John Does I-26,

of Whom,

Mariner Health Care, Inc., f/k/a Mariner Post Acute Network, Mariner Health Care Management Company, Mariner Health Central, Inc., Mariner

Health Group, Inc., MHC Holding Company, MHC Florida Holding Company, MHC Gulf Coast Holding Company, MHC MidAmerica Holding Company, MHC Rocky Mountain Holding Company, MHC Northeast Holding Company, MHC West Holding Company, MHC Texas Holding Company, MHC MidAtlantic Holding Company, Living Centers-Southeast, Inc., SavaSeniorCare Administrative Services, LLC, SavaSeniorCare, LLC, SavaSeniorCare, Inc., National Senior Care, Inc., Leonard Grunzstein, an Individual, Boyd P. Gentry, an Individual, Murray Forman, an Individual, and Palmetto Faith Operating, LLC, Individually and d/b/a Faith Health Care Center, SavaSeniorCare, Inc., National Senior Care, Inc., Leonard Grunstein, an Individual, Boyd P. Gentry, an Individual, and Murray Forman, an Individual are

Appellants.

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**BRIEF, *AMICUS CURIAE* OF AARP**

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## **STATEMENT OF INTEREST OF AARP**

AARP is a nonpartisan, nonprofit organization dedicated to addressing the needs and interests of people age fifty and older. Through education, advocacy and service, AARP seeks to enhance the quality of life for all by promoting independence, dignity, and purpose. As the country's largest membership organization, AARP advocates for access to affordable healthcare and for controlling costs without compromising quality. AARP supports laws and policies designed to protect the rights of healthcare consumers to go to court and obtain redress when they have been victims of neglect or abuse.

### **SUMMARY OF ARGUMENT**

The Florence County Court of Common Pleas correctly refused to compel the arbitration of Ann Coleman's wrongful death suit brought on behalf of her sister, Mary Brinson, and should be affirmed. The trial court correctly distinguished a surrogate's authority to make health care decisions on behalf of an incapacitated patient from the authority to bind that patient to a contract unrelated to health care decisions. The Court also correctly found that an incapacitated person cannot possess the intent necessary to confer implied authority to enter contracts.

Affirming the decision of the trial court is particularly important considering the current state of the facility-based long-term care industry. Despite regulatory and statutory obligations which create minimum standards of care, the non-compliance with these obligations by nursing facilities is rampant. Dept. of Health & Human Servs., Office of Inspector Gen., OEI-02-08-00140, *Trends in Nursing Home Deficiencies and Complaints* 1, 6 (2008), available at <http://oig.hhs.gov/oei/reprots/oei-02-08-00140.pdf> (hereinafter "*OIG Trends*"). This non-compliance often gives rise to disputes between facility and residents' families involving issues such as abuse, assault, malnutrition, and even death. Because of the gravity of consequences stemming from a failure of regulatory enforcement, preventing the improper waiver of a resident's due process rights by a third party is essential:

## ARGUMENT

### **I. A THIRD PARTY DOES NOT HAVE THE AUTHORITY TO ENTER A BINDING CONTRACT ON BEHALF OF THE PRINCIPAL ABSENT AN AGENCY RELATIONSHIP.**

A contractual obligation to arbitrate claims is unenforceable if it is signed by a third party acting without proper legal authority. The threshold

element of a contract is that the parties have capacity to execute the contract. 17 C.J.S. Contracts § 31; *see also Magnusson Agency v. Pub. Entity Nat'l Company-Midwest*, 560 N.W.2d 20, 25 (Iowa 1997). This capacity relates to the status of the person, rather than the related circumstances of the contract. *Id.* Where a principal lacks capacity to make decisions regarding her legal rights, a third party may, in some instances, step into her shoes to make decisions on the principal's behalf. Authority to make legal decisions for another can be statutorily conferred, for example through health care consent statutes, or alternatively it can be created through the establishment of an agency relationship. Two of these instances are particularly relevant to the case before the Court.

**A. Although South Carolina Law Confers Authority On A Third Party To Consent To The Medical Care Of An Incapacitated Family Member, This Authority Does Not Extend To Permit The Surrogate To Enter Legally Binding Contracts On Behalf Of The Incapacitated Principal.**

A third party can make decisions regarding the legal rights of an incapacitated principal in circumstances where a relative or another proper third party consents to medical procedures on the principal's behalf. South Carolina law grants third parties the express right to "make decisions concerning health care" on behalf of their incapacitated relatives. S.C. Code

Ann. § 44-66-30. The definition of “health care” is limited to “a procedure to diagnose or treat a human disease, ailment, defect, abnormality, or complaint . . .” *Id.*; § 44-66-20(1). Notably, the statute is limited to health care decisions, and nothing in the statute could be construed as conferring the authority to execute a separate binding legal contract.

North Carolina courts have recently endorsed this very approach, finding that authority granted to third parties to make decisions concerning health care under the North Carolina Health Care Consent Act does not grant legal authority to enter binding contracts on behalf of the principal. *Munn v. Haymount Rehabilitation & Nursing Center, Inc.*, 704 S.E.2d 290, 296-97 (N.C. Ct. App. 2010). The facts at issue in North Carolina are strikingly similar to the facts before this Court. Plaintiff Munn had admitted her adult daughter to a nursing facility and, acting without power of attorney, signed the admissions documents which included provisions for mandatory arbitration. *Id.* at 292-93. The court in *Munn* looked at the various ways in which contractual authority may be conferred upon a third party, one of which was through the North Carolina Health Care Consent Act, which contains provisions similar to the South Carolina laws at issue here. *Id.* at

294-97. This statute is entitled “[i]nformed consent to *health care treatment or procedure*,” N.C. Gen. Stat. § 90-21.13 (emphasis added), and the statutory language which addresses consent to health care fails to mention authority to enter contractual agreements. *Munn*, 704 S.E.2d at 297. Moreover, the court noted that the fact that an arbitration provision was included in an admissions agreement in no way transformed this provision into consent for health care. *Id.* Accordingly, the North Carolina court held that “consent for medical care for another person who is unable to consent is a completely different issue than being an agent who has the authority to enter into a contract such as an arbitration agreement.” *Id.* at 296.

A number of other states have also endorsed the position that surrogate health care consent statutes do not confer upon the surrogate the authority to waive a patient’s due process rights. A California court considered a case similar to the case now before this court, *Pagarigan*, where two adult children admitted their mother to a nursing facility and, acting without power of attorney, signed admissions documents, including an arbitration agreement. *Pagarigan v. Libby Care Center, Inc.*, 120 Cal. Rptr. 2d 892 (Cal. Ct. App. 2002). The children filed a wrongful death suit in which the defendant nursing facility sought to compel arbitration. *Id.*

The court looked to state statutes, similar those in South Carolina, which confer surrogate authority to make health care decisions for incapacitated principals. *Id.* at 895. The court concluded that the specific authority to consent to health care decisions did not extend to permit a surrogate decision-maker to bind a principal to an arbitration agreement. *Id.*

A Mississippi federal court held similarly in a case where a woman admitted her adult sister to a nursing facility and executed an arbitration agreement without having power of attorney. *Mariner Health Care Inc. v. Ferguson*, No. 4:04CV245-D-B, 2006 U.S. Dist. LEXIS 47021, at \*20 (N.D. Miss. 2006). The court held that absent legislative intent to allow health care surrogates to terminate legal rights related to health care decisions, the patient's sister could not execute a binding arbitration agreement. *Id.* A Florida court also endorsed this view in *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296 (Fla. Dist. Ct. App. 2005). The *Blankfeld* court considered whether the son of a nursing facility patient validly waived his mother's due process rights when he signed an arbitration agreement on her behalf. *Id.* at 297. Florida had enacted a statute that allows a proxy to make "health care decisions," *id.* at 299 (citing Fla. Stat. § 765.401), but, like other similar statutes, lacked any indication of legislative intent to allow such

proxies to enter contract for things not strictly related to health care decisions, *id.* at 301. Accordingly, the court held that the brother's execution of an arbitration agreement did not bind his mother to the terms of that agreement. *Id.*

Here, Ann Coleman admitted her incompetent sister, Mary Brinson, to the defendant nursing facility and acted without power of attorney when she signed the admission documents, which included an arbitration agreement. Although South Carolina statutory law permitted Ms. Coleman to make health care decisions for Ms. Brinson, Ms. Coleman did not have the authority to waive her sister's due process rights by entering into an arbitration agreement on her behalf.

**B. Apparent Agency Authority Is Only Established When A Principal Intends To Cause A Third Person To Believe The Agency Is Authorized To Act, Thus An Incapacitated Person Is Unable To Possess The Requisite Intent To Establish Such Authority.**

An alternate way that a third party may make legally binding decision for a principal is via the authority conferred by an agency relationship. Because the record indicates that the executrix of the arbitration agreement lacked express authority to enter a contract on behalf of the principal, in order for the agreement to be valid, the executrix would have to be acting

with implied authority conferred by virtue of being the apparent agent of the principal. Apparent authority requires either that the principal intend the agent to have such authority, or alternatively, that the principal holds out his agent as possessing such authority. *Heil-Quaker v. Swindler*, 266 F.Supp. 445 (D.S.C. 1966). More specifically, to establish apparent authority the principal must “intend to cause the third person to believe the agent is authorized to act for him, or he should realize that his conduct is likely to create such a belief.” *WDI Meredith & Co. v. American Telesis, Inc.*, 359 S.C. 474, 597 (Ct. App. 2004).

An incompetent individual or incapacitated patient would be unable to possess the requisite intent or to realize that any conduct would create a belief of agency. Mary Brinson was incapacitated at the time of her admission to the defendants’ facility. She could not form the intent necessary to give express authority nor does the record reflect she intended Ms. Coleman to act on her behalf. Finally, Ms Brinson did nothing to cause defendants to believe Ms. Coleman was her agent or to create such a belief in the defendants.

**C. Because The Regulatory Enforcement Process Is Inadequate To Protect Nursing Facility Residents From Abuse And Neglect, Patients Must Be Able To Hold Nursing Facilities Accountable If They Provide Abusive Or Neglectful Care.**

Residents of nursing facilities are all too often subjected to abuse and neglect while in the care of their nursing facility. Kim A. Collins, MD, *Elder Maltreatment: A Review*, 130 Arch Pahtol Lab Med. 1290-96 (2006) (reporting that a random sample survey of nursing home staff members in one state found that 10% of nurses aides reported that they had committed at least one act of physical abuse in the preceding year and 40% reported committing at least one act of psychological abuse). Because of the prevalence of the problems plaguing residents of nursing facilities, it is imperative that residents be afforded all avenues to deter this bad conduct, particularly when this conduct results in the suffering and/or death of a vulnerable person.

Nursing homes must comply with the 1987 Omnibus Budget Reconciliation Act (OBRA) and its implementing regulations, which set forth minimum standards of care for long-term care facilities that receive federal funding. 42 U.S.C. §§ 1395i-3, 42 C.F.R. § 483, *et seq.*

Nonetheless, in 2007, more than 91% of nursing facilities nationwide were

cited for violations of federal health and safety standards, according to a report from the Department of Health and Human Services (HHS) Office of Inspector General. Dept. *OIG Trends* at 6. For-profit nursing facilities exhibited particularly severe problems. *Id.* at 6-7. Overall, approximately 17% of nursing facilities committed one or more violations that caused “actual harm or immediate jeopardy” to residents. *Id.* at 9.

The scope of the problem is greater than these federal reports show, as state surveys of compliance with federal quality standards repeatedly understate serious care problems. U.S. Gov’t Accountability Office, GAO-08-517, *Nursing Home: Federal Monitoring Surveys Demonstrate Continued Understatement of Serious Care Problems and CMS Oversight Weakness*, at 11 (2008), available at <http://www.gao.gov/new.items/d08517.pdf> (noting that “[f]rom fiscal year 2002 through 2007, about 15 percent of federal comparative surveys nationwide identified state surveys that failed to cite at least one deficiency at the most serious levels of noncompliance – the actual harm and immediate jeopardy . . .”).

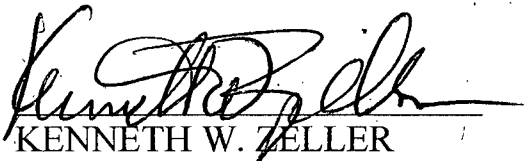
Because of inadequate regulatory protection of nursing facility residents’ rights, the ability to vindicate those rights in court becomes even more vital. Accordingly, third parties should not be allowed to execute

arbitration agreements that waive a residents' right to due process without an express power of attorney to do so.

### CONCLUSION

The Court below acted reasonably and within the dictates of South Carolina law. The cases in neighboring and other jurisdictions are consistent and support the holding that a health care power of attorney does not vest the agent with the authority to bind the principal to an arbitration agreement. For these reasons this Court should affirm the decision of the trial court.

Respectfully submitted,



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