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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2021-000586

Mary Tisdale, as Personal Representative of the Estate of Earlene Seabrook …….. Respondent,

v.

Palmetto Lake City Operating, LLC, d/b/a Lake City-Scranton Healthcare Center and Jeffrey Gibbs, …….. Defendants,

Of whom Palmetto Lake City Operating, LLC, d/b/a Lake City-Scranton Healthcare Center is ……. Appellant.

RESPONDENT'S BRIEF

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COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the circuit court correctly determined Ms. Seabrook's "Health Care Power of Attorney" ("HCPOA") did not empower her "health care agent" to enter an arbitration contract since the HCPOA limited the agent's power to "health care" matters and was not properly executed.

2. Whether a nursing home resident or her estate are bound to an arbitration contract to which she did not assent and that is expressly independent of the contract required for her admission to the Facility.

3. Whether a nursing home resident can be equitably estopped from opposing an arbitration contract she did not sign, from which she derives no "direct benefit," and that does not form the basis of any of her legal claims.

4. Whether a nursing home can ask a court to authorize discovery the nursing home has the legal right to conduct without court permission or to preemptively rule that doing so will not waive the nursing home's perceived right to pursue arbitration later.

STATEMENT OF THE CASE

Respondent Mary Tisdale initiated this action by filing a Notice of Intent to File Suit ("NOI") in the Florence County Court of Common Pleas on May 18, 2020. (R. pp. 20-21). Respondent filed the NOI in her appointed role as personal representative for the estate of her aunt Earlene Seabrook. Id. Respondent's action arose from tortious conduct leading to Ms. Seabrook's death following her time as a resident at Appellant Palmetto Lake City Operating, LLC d/b/a Lake City-Scranton Healthcare Center ("the Facility"). (R. pp. 23-24 ¶¶ 1-8). The NOI also named as a defendant the Facility's administrator Jeffrey Gibbs. (R. p. 23 ¶ 3). Following an unsuccessful pre-suit mediation, Respondent filed a Summons and Complaint on October 8, 2020, alleging wrongful death and survival actions based on the Facility and Gibbs' negligence, negligence per se, fraud and misrepresentation, and violations of the South Carolina Unfair Trade Practices Act. (R. pp. 31-38 ¶¶ 40-73). Specifically, the Complaint alleged the Facility's poor care, administrative mismanagement, staffing shortages, and training issues resulted in Ms. Seabrook developing multiple pressure sores. (R. pp. 30-31 ¶¶ 31-38). One of the sores was allowed to develop to a Stage IV wound that directly contributed to Ms. Seabrook's death. (R. p. 31 ¶ 39).

When Ms. Seabrook was admitted on August 7, 2019, the Facility presented two adhesion contracts to Ms. Tisdale. The first was an "Admission Agreement" that governed the type of care Ms. Seabrook would receive at the Facility and Ms. Seabrook's financial obligation to pay for those services. (R. pp. 133-44). On the Admission Agreement's final page, labeled as "Page 12 of 12," there was an "Entire Agreement" provision indicating these 12 pages constituted "the entire agreement and understanding between the parties" concerning Ms. Seabrook's admission to the Facility. (R. p. 144). Ms. Tisdale signed the Admission Agreement on the "Signature of Representative" line. Id. While Ms. Seabrook had previously executed an "Advance Health Care

Directive" including a "Health Care Power of Attorney" ("HCPOA") naming Ms. Tisdale as her "health care agent," the HCPOA was not properly executed and limited its purported authority to "health care" matters. (R. pp. 125-32).

On the same day, Ms. Tisdale signed a contract called "Arbitration Agreement." This contract was not part of the 12 pages comprising the Admission Agreement but was its own separate contract (labeled "Page 1 of 1") with its own signature blocks. (R. p. 98). The Arbitration Agreement, purportedly a contract between the Facility and Ms. Seabrook "or" Ms. Tisdale, provided for alternative dispute resolution for any claim a party may bring against another arising out of Ms. Seabrook's admission in the Facility. Id. Ms. Tisdale signed the Arbitration Agreement on the line labeled "Resident/Representative Signature." Id. The Facility admits Ms. Seabrook agreeing to arbitrate was not a condition or prerequisite to her admission at the Facility. (Appellant's Br. at 13).

The Facility answered the Complaint on November 23, 2020. (R. pp. 47-57). On December 30, 2020, the Facility filed a motion to stay the action and to compel arbitration. (R. pp. 96-97). The Facility and Respondent filed supporting memoranda, and the Honorable William H. Seals, Jr. heard oral arguments on February 9, 2021. Judge Seals denied the Facility's motion in an order entered on March 1, 2021. The order stated in pertinent part that (1) the HCPOA did not authorize Ms. Tisdale to execute the Arbitration Agreement on Ms. Seabrook's behalf (R. pp. 6-8); (2) South Carolina law holds that "health care" matters do not include execution of an arbitration contract (R. pp. 8-9); (3) Ms. Tisdale was not otherwise authorized to sign the Arbitration Agreement (R. pp. 9-10); (4) Respondent was not equitably estopped from opposing arbitration (R. pp. 10-11); (5) the Admission Agreement and Arbitration Agreement did not merge to form a single contract

(R. pp. 12-14); and (6) the Facility's request for limited jurisdictional discovery was improper. (R. p. 14).

The Facility filed a motion to alter or amend judgment on March 11, 2021, which the circuit court denied on May 4, 2021. (R. pp. 155-71; R. pp. 17-19). The Facility filed and served its Notice of Appeal on June 3, 2021. (R. pp. 172-78).

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

1. Ms. Seabrook's facially invalid health care power of attorney ("HCPOA") did not authorize Ms. Tisdale to execute the Arbitration Agreement.

The circuit court correctly denied the Facility's motion to compel arbitration because the Facility cannot show the Arbitration Agreement has the essential requirements to form a valid contract. Under South Carolina law, arbitration is strictly a matter of contract, and arbitration may not be compelled without proof of a valid arbitration contract. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110 (2001). A contract is formed only when one party makes an

offer, the other manifests acceptance, and the contract's promises are supported by valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). Acceptance requires an "objective manifestation of . . . assent at the time the contract was made." Laser Supply & Services, Inc. v. Orchard Park Assoc., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009). The Facility cannot show assent to the Arbitration Agreement by Ms. Seabrook or anyone acting on her behalf.

The Facility asks the Court to find assent for the Arbitration Agreement based on Ms. Tisdale's signature. (Appellant's Br. at 31-32). The Facility argues Ms. Tisdale was empowered by the HCPOA to serve as Ms. Seabrook's agent and that the scope of Ms. Tisdale's HCPOA authority includes the execution of an arbitration contract. Appellant's Br. at 3 (claiming Ms. Tisdale "was indeed Ms. Seabrook's attorney-in-fact pursuant to the HCPOA"); at 31 (arguing HCPOA "explicitly granted" and "duly empowered" Ms. Tisdale to sign the Arbitration Agreement). That argument is flawed for several reasons.

a. The HCPOA is facially invalid.

In Paragraph 6 of its "Selection of Health Care Agent" section, the HCPOA imposes several express execution requirements. (R. p. 127). The HCPOA required the signature of two witnesses. Crucially, the HCPOA imposed limitations on the witnesses' identities. An individual could not serve as a witness if he/she was the principal's "lineal descendant[]" or "lineal ancestor[]." Id. Similarly, a witness could not be the principal's "sibling[]" or any sibling's "lineal descendant." Id. Paragraph 6 also excluded from the group of possible witnesses any "person named in the [HCPOA] as [Ms. Seabrook's] agent or successor agent." Id. In violation of these restrictions, Ms. Tisdale signed the HCPOA as its first witness. (R. p. 132). She was not eligible to serve as a witness because, as the Facility admits (Appellant's Br. at 3), Ms. Tisdale was Ms.

Seabrook's niece, which makes her a "lineal descendent" of one of Ms. Seabrook's siblings. Moreover, Ms. Tisdale was also ineligible to serve as a witness because she is named in the HCPOA as Ms. Seabrook's health care agent. (R. p. 128). As Paragraph 6 plainly states, the HCPOA "will not be valid" if it fails to comply with these witness requirements. (R. p. 127). As this Court has recognized, an improperly executed power of attorney may not be used to compel a nursing home resident to arbitrate her legal claims. Stott v. White Oak Manor, Inc., 426 S.C. 568, 574, 828 S.E.2d 82, 86 (Ct. App. 2019). Accordingly, the HCPOA is invalid, and Ms. Tisdale's signature on the Arbitration Agreement does not provide the assent required to form a valid arbitration contract.

b. The HCPOA does not extend an agent's authority to an arbitration contract not required to obtain Ms. Seabrook's admission.

Even if the HCPOA was not facially invalid, executing a free-standing nursing home arbitration contract does not fall within the scope of authority Ms. Seabrook supposedly conferred on Ms. Tisdale as "health care agent." The HCPOA's language does not extend Ms. Tisdale's purported authority to an arbitration contract that concerns only future dispute resolution procedures, not any medical or nursing services Appellants offered. Moreover, recent South Carolina Supreme Court precedent as well as statutes and precedent hold that the term "health care" cannot be stretched so far as to include the Arbitration Agreement.

i. The HCPOA's Language Limits its Scope to "Health Care" Decisions.

The HCPOA's language expressly states Ms. Tisdale's limited authority and did not grant her power to sign the Arbitration Agreement on Ms. Seabrook's behalf. Under South Carolina law, the interpretation of a power of attorney is similar to contract interpretation. Watson v. Underwood, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014). Accordingly, contract interpretation principles apply to determine the HCPOA's scope. Stott, 426 S.C. at 577, 828 S.E.2d at 87 (citing

In re Thames, 344 S.C. 564, 571, 544 S.E.2d 854, 857 (Ct. App. 2001)). Contracts (and powers of attorney) must be interpreted to carry out their parties' intent as determined primarily by the language they chose in the document itself. A court may not read terms into a contract or power of attorney or infer the parties intended a meaning inconsistent with the language they expressed. Radalytic Labs, Inc. v. Culver, 329 S.C. 380, 383, 495 S.E.2d 782, 784 (1997) (citing Blakeley v. Rabon, 266 S.C. 68, 72, 221 S.E.2d 767, 769 (1976)).

Starting with its title, the HCPOA defines its limited scope. Ms. Seabrook chose to create only a "health care" power of attorney with a specific eye toward her preferences on life-sustaining end-of-life medical treatments ("Advance Health Care Directive"). (R. pp. 125-26). Ms. Tisdale was appointed not as Ms. Seabrook's general financial or legal representative but only as a "health care agent" to "make health care decisions." (R. p. 126). Later, the HCPOA enumerated Ms. Tisdale's specific powers but only after reiterating that all such powers must be interpreted as limited to "decisions . . . regarding . . . health care." (R. p. 128). Ms. Tisdale was empowered to admit and withdraw Ms. Seabrook from locations like the Facility offering medical and nursing services. (R. p. 129 § C). However, that section could not have included authority to execute the Arbitration Agreement because the Facility admits that agreeing to arbitration was not required to secure Ms. Seabrook's admission to the Facility. (Appellants' Br. at 13-14).

The Facility argues provisions in this section should be construed to extend Ms. Tisdale's purported authority to the Arbitration Agreement. (Appellant's Br. at 31) (citing R. p. 129). However, as the Facility admits, that argument is foreclosed by a recent South Carolina Supreme Court ruling. Arredondo v. SNH SE Ashley River Tenant, LLC, 433 S.C. 69, 856 S.E.2d 550 (2021), *cert. denied*, ___ S.Ct. ___, 2021 WL 5763108 (Dec. 6, 2021). In fact, Arredondo considered health care power of attorney language verbatim to the HCPOA provision on which

the Facility relies. Compare Arredondo, 433 S.C. at 80-81, 856 S.E.2d at 556-57 with (HCPOA at 5(D)). While the HCPOA purports to allow Ms. Tisdale to take "action necessary to . . . assuring implementation of" health care decisions, that authority does not extend to an Arbitration Agreement the Facility admits was not required to obtain Ms. Seabrook's admission or any of the nursing services residents receive. Arredondo, 433 S.C. at 81, 856 S.E.2d at 557 (finding this precise language is limited to actions that were "absolutely needed" or "required" to secure a resident's admission).

For similar reasons, the Facility may not rely on the HCPOA language conferring authority on a health care agent for "granting any waiver or release from liability required by" a nursing home provider (R. p. 129 § (D)). Arredondo, 433 S.C. at 84, 856 S.E.2d at 558 ("Since [resident] was not required to sign the arbitration agreement, it logically follows that any waivers contained in the agreement were not required by the facility"). Finally, the HCPOA provision purporting to empower Ms. Tisdale to "pursu[e] any legal action" also does not cover execution of the Arbitration Agreement. This provision, placed in its proper context, is limited to legal actions designed to "force compliance with [Ms. Seabrook's] wishes" or to seek damages for failure to comply with those wishes. Thus, based on this limitation, the Arbitration Agreement does not qualify as a "legal action" covered by the HCPOA. Arredondo, 433 S.C. at 84, 856 S.E.2d at 558-59. Moreover, in its ordinary usage, "legal action" refers to litigation-related decisions for *existing* disputes. The phrase does not extend to a pre-dispute arbitration contract. Id. at 85, 856 S.E.2d at 559 (quoting Kindred Nursing Ctrs. Ltd. P'ship v. Wellner, 533 S.W.3d 189, 193-94 (Ky. 2017) ("the act of executing a pre-dispute arbitration agreement upon admission to a nursing home ha[s] nothing at all to do with . . . institut[ing] legal proceedings.")).

ii. South Carolina Courts Define "Health Care" to Exclude Execution of an Optional Arbitration Contract.

Even before Arredondo, South Carolina appellate courts had held that "health care" decisions do not encompass arbitration contracts. In Coleman v. Mariner Health Care, Inc., the South Carolina Supreme Court was tasked with determining whether committing a loved one to arbitration was a "health care" decision. 407 S.C. 346, 755 S.E.2d 450 (2014). Coleman considered this key term as it was defined in South Carolina's Adult Health Care Consent Act ('the Act"), holding that the statutory definition of "health care" includes medical procedures, nursing care, placement in a nursing home, and agreeing to pay for nursing home services. Id. at 352, 755 S.E.2d at 453. However, a separate arbitration contract—like the Arbitration Agreement Ms. Tisdale signed—was not a "health care" matter because it was (1) not required for the resident's admission to the nursing home; (2) contained no provisions for medical or nursing services; and (3) did not require any financial commitment for medical or nursing services. Id. at 353, 755 S.E.2d at 454. Coleman is directly on point here because, while it construed the term "health care" in the context of the Act, the statute governing health care powers of attorney instructs courts to apply the Act's terms to documents like the HCPOA. S.C. Code Ann. § 62-5-502(c) (stating that generally the Act's provisions "apply to the making of decisions by a health care agent"). This court followed Coleman's lead in Hodge v. Unihealth Post-Acute Care of Bamberg, LLC where it held:

> Even whe[n] a health care power of attorney was present, courts have concluded that the [signatory relative] lacked authority to sign the arbitration agreement . . . because a health care power of attorney granted for medical decisions does not confer authority to sign an arbitration agreement waiving legal rights.

422 S.C. 544, 569-70, 813 S.E.2d 292, 306 (Ct. App. 2018) (citing Curto v. Illini Manors, Inc., 940 N.E.2d 229, 233 (Ill. App. 2010)).

iii. Persuasive Authority Recognizes Distinction Between "Health Care" Decisions and Arbitration Contracts.

As Arredondo noted, a number of other jurisdictions have also refused to extend the notion of "health care" to arbitration contracts and have held a health care power of attorney does not authorize an agent to enter an arbitration agreement on a nursing home resident's behalf. 433 S.C. at 83, 856 S.E.2d at 558 (collecting cases). Several courts have expressly held that, by its nature, agreeing to arbitrate cannot reasonable be considered a "health care" decision. See e.g. Manor Oaks, Inc. v. Campbell, 276 So.3d 830, 834 (Fla. App. 2019) (citing Blankfeld v. Richmond Health Care, Inc., 902 So.2d 296, 300 (Fla. App. 2005) ("waiving the right to sue for damages in the courts for violations of [state nursing home statute] or common law negligence is not a health care decision"); Cook v. GGNSC Ripley, LLC, 786 F. Supp. 3d 1166, 1170 (N.D. Miss. 2011) (holding that "since the arbitration agreement was not a health care decision," the agent "did not have the authority to bind [the resident] to arbitration"); Texas Cityview Care Ctr., L.P. v. Fryer, 227 S.W.3d 345, 352 (Tex. App. 2007) (finding arbitration contract was a "legal, as opposed to health care decision[]")).

Even when a health care power of attorney contains a broad grant of power to the listed agent, the vast majority of courts have held that authority cannot be stretched so far as to cover an arbitration contract. See e.g. Miller v. Life Care Ctrs. of Am., Inc., 478 P.3d 164, 173 (Wyo. 2020) (collecting cases and applying the "majority position" which holds that "execution of an arbitration agreement is not a health care decision"). For these courts, the key factor was the disconnect between admission and arbitration. Fiala v. Bickford Sr. Living Group, LLC, 32 N.E.3d 80, 92 (Ill. App. 2015) ("where the arbitration provision is optional or otherwise not necessary to gain admission to a long-term care facility, the agent acting pursuant to a health-care power of attorney is not authorized to sign the arbitration provision"); Testa v. Emeritus Corp., 168 F. Supp. 3d 1103

(N.D. Ill. 2016) (applying Fiala rule); Life Care Ctrs. of Am. v. Smith, 681 S.E.2d 182, 185-86 (Ga. App. 2009). In other words, even if admitting a resident to a nursing home is a "health care" decision, agreeing to arbitration cannot be where the arbitration contract expressly states that it is not required for admission. Primmer v. Healthcare Indus. Corp., 43 N.E.3d 788, 795 (Ohio App. 2015) ("The decision to sign a free-standing arbitration agreement is not a health care decision if the patient may receive health care without signing the arbitration agreement"); State ex rel. AMFM, LLC v. King, 740 S.E.2d 66, 75 (W. Va. 2013); see also Morton v. Grace Health & Rehab. of Grenada, LLC, Civil Action No. 4:14-cv-00169-GHD-JMV, 2015 WL 2163827 (N.D. Miss. May 7, 2015). Appellant admits that signing the Arbitration Agreement was not required for Ms. Seabrook's admission. (Appellants' Br. at 13-14). Therefore, the circuit court followed both South Carolina and persuasive authority in finding the Arbitration Agreement's execution was not a "health care" decision covered by the HCPOA.

This rule applies even to a health care power of attorney with language very similar to the HCPOA. In Estate of Irons v. Arcadia Healthcare, L.C., a Florida appellate court held the broad scope of the health care power of attorney before it did not extend to an arbitration contract. 66 So.3d 396 (Fla. App. 2011). The governing document was titled "Health Care Power of Attorney" and identified the empowered family member as "health care surrogate," which led the court to find its provisions were intended to be limited to decisions that "relate to the direct provision of medical care." Id. at 400. An instrument that so affirmatively limits its scope to health care matters does not extend to matters of "property rights or potential litigation with" a nursing home. Id. To rule otherwise, Irons held, would strain the principal's intent when she executed the health care power of attorney. Id. Similarly, the HCPOA was limited to "health care" decisions in its title and purported to appoint Ms. Tisdale only as "health care agent." (R. p. 125). Reading the HCPOA to

extend Ms. Tisdale's purported authority to the optional Arbitration Agreement would strain Ms. Seabrook's intent when she executed the HCPOA, and would be inconsistent with substantial South Carolina and persuasive authority.

2. The independently-invalid Arbitration Agreement does not merge with the Admission Agreement.

The Facility next argues Respondent must arbitrate Ms. Seabrook's claims against the Facility even though there is no valid contract requiring her to do so (Appellant's Br. at 8-19). Ms. Seabrook never signed or otherwise assented to the Arbitration Agreement on which the Facility relies to support its motion. Ms. Tisdale's signature on the Arbitration Agreement is ineffective because she did not have authority to bind Ms. Seabrook to a dispute resolution contract. Moreover, the fact that Ms. Seabrook lived at the Facility as a resident does not estop her or Respondent from contesting arbitration under South Carolina or federal equitable estoppel principles.

Since the Facility points only to the Arbitration Agreement as a basis for dismissing Respondent's claims, it cannot prevail without first establishing the Arbitration Agreement is a properly formed, binding contract. However, while the Facility offered the Arbitration Agreement as an alternative means for settling disputes, neither Ms. Seabrook nor anyone with legal authority accepted that offer. Moreover, as established in South Carolina precedent, even if Ms. Tisdale had possessed authority to admit Ms. Seabrook to the Facility, it would not confer authority to enter the Arbitration Agreement, a document the Facility drafted as a separate and distinct contract offered for a completely different purpose.

a. The Facility cannot show the core requirements to form a contract.

A contract is formed only with proof of an offer, acceptance, and consideration. Sauner, 354 S.C. at 406, 581 S.E.2d at 166. Acceptance requires an "objective manifestation of . . . assent at the time the contract was made." Laser Supply & Services, Inc., 382 S.C. at 334, 676 S.E.2d at

143-44. The Arbitration Agreement was not signed by Ms. Seabrook or offered for her signature. The Facility argues Ms. Tisdale's signature assented on Ms. Seabrook's behalf, but the Facility cannot show Ms. Tisdale had authority to contract for Ms. Seabrook. Instead, the Facility now seems to argue Ms. Seabrook had some unspecified authority to sign the Admission Agreement for Ms. Seabrook and that authority either carries over to the Arbitration Agreement or equitably estops Ms. Seabrook/Respondent from opposing arbitration. The circuit court correctly refused both of these arguments because they have been rejected by South Carolina appellate courts multiple times over the last few years.

The Act empowers designated family members of some vulnerable adults to sign a contract admitting the vulnerable adult to a skilled nursing facility and agree to pay the fees imposed by that facility for its services. S.C. Code Ann. § 44-66-60(A); Coleman, 407 S.C. at 352, 755 S.E.2d at 453. But, since the Act is limited to "health care" decisions, it provides no authority for separate contracts like the Arbitration Agreement. Id. at 354, 755 S.E.2d at 454; Thompson v. Pruitt Corp., 416 S.C. 43, 51, 784 S.E.2d 679, 684 (Ct. App. 2016) (citing Coleman and agreeing an "Arbitration Agreement does not deal with healthcare decisions"). Additionally, a family member signing a nursing home admission contract pursuant to authority derived from the Act does not estop a later argument that the same family member lacked authority to sign a separate arbitration contract. Coleman, 407 S.C. at 354-56, 755 S.E.2d at 455; Thompson, 416 S.C. at 60, 784 S.E.2d at 688. The Act was never meant to affect anything other than "health care" decisions, and the Arbitration Agreement was not a health care decision because Ms. Seabrook could get all the health care services covered in the Admission Agreement without agreeing to arbitrate. Appellant's Br. at 13 (admitting Arbitration Agreement was unnecessary to gain admission to the Facility).

Coleman did acknowledge the possibility equitable estoppel could be invoked if the disputed arbitration language was actually or effectively part of the same admission contract. 407 S.C. at 355, 755 S.E.2d at 455. This narrow path to a successful estoppel argument requires several steps. Preliminarily, the Facility must establish the Act empowered Ms. Tisdale to enter the Admission Agreement on Ms. Seabrook's behalf. See Hodge, 422 S.C. at 574, 813 S.E.2d at 308 (finding that there can be no estoppel argument where signatory family member lacked authority under Act to enter admission contract). Then, the Facility must link the admission and arbitration contracts by meeting multiple requirements to apply a common-law contract law interpretation principle by which courts interpret multiple writings as a single contract. Coleman, 407 S.C. at 355, 755 S.E.2d at 455. This "merger" principle cannot apply unless the writings in question were executed "at the same time, by the same parties, for the same purpose, and in the course of the same transaction." Id. (quoting Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)). Even then, merger does not apply if there is "*anything* indicating a contrary intention." Id. (emphasis added). Thus, simultaneously executed writings relating to the same general subject matter will not be viewed as a single or merged agreement if either their language or the circumstances even hint that the parties actually intended the writings to be distinct, separate contracts. Three nursing homes have previously attempted but failed to meet these requirements, and South Carolina's appellate courts have never applied merger to nursing home admission and arbitration contracts. See generally Coleman, Thompson, and Hodge.

b. The Facility cannot show Ms. Tisdale had authority to act for Ms. Seabrook under the Adult Health Care Consent Act.

The Facility cannot meet any of the requirements to support its equitable estoppel argument. First, the Facility cannot show Ms. Tisdale had authority to enter the Admission Agreement. As Coleman and Thompson demonstrate, the Facility's merger and estoppel

arguments could only be relevant to this appeal if Ms. Tisdale had authority under the Act. Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (noting estoppel argument "is premised on [nursing home's] contention that, under state law, the admissions agreements and the [arbitration contract] merge"); Thompson, 416 S.C. at 49-50, 784 S.E.2d at 683 (finding merger argument depended on notion that family member who signed contract "was authorized to execute [admission contract] under the Act"). The Facility offers no evidence to show Ms. Tisdale had authority under the Act to enter the Admission Agreement on Ms. Seabrook's behalf.

Moreover, the record also lacks evidence to make this showing. The Act confers limited authority on a limited group for the limited purpose of making another person's health care decisions. The Act effectively separates critical medical decision making power from the individual receiving medical care and, as a result, the Act must be read narrowly with its requirements construed strictly. Coleman, 407 S.C. at 353, 755 S.E.2d at 454 (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 Act is properly limited, the authority it grants only applies when the individual whose health care is at stake is "unable to consent," a defined term requiring substantial incapacitation and physician verification. S.C. Code Ann. § 44-66-20(8); § 44-66-30(A). "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[1] 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.

Ms. Seabrook did not meet these requirements when he was admitted to the Facility as the Facility does not present the required physician certifications. Since the Act does not apply, the Facility's merger and estoppel arguments fail at their initial hurdle.[2]

c. The Admission Agreement and Arbitration Agreements serve different purposes.

Second, the Facility cannot show the Admission Agreement and Arbitration Agreement were executed for the same purpose. The Admission Agreement was formed to enumerate the nursing services the Facility would provide and to define Ms. Seabrook's obligation to pay for those services. (R. pp. 134-38). That purpose is borne out in the Admission Agreement's twelve pages. The Facility agreed to provide Ms. Seabrook with basic room and board as well as nursing and personal care. (R. p. 134 § (A)(3)). In turn, Ms. Seabrook agreed to pay the fees the Facility charged for its services. (R. p. 135 § (B)(4)). The Admission Agreement's provisions referred to insurance matters, bed hold policies, late fees for unpaid service charges, etc. The Arbitration

[1] 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).

[2] Without the authority granted by the Act, the Facility's only remaining argument to support Ms. Tisdale's alleged authority to execute the Admission Agreement is a double-layer estoppel argument. In short, the Facility claims (1) Ms. Seabrook is equitably estopped from denying the Admission Agreement because he was in fact admitted; (2) the Admission Agreement and Arbitration Agreement merged; and (3) Ms. Seabrook was then estopped from denying the Arbitration Agreement because it was part of the Admission Agreement. Appellant's Br. at 19 n. 25. Here again, however, the Facility's estoppel argument as to the Admission Agreement has been rejected by this Court. Hodge, 422 S.C. at 563, 813 S.E.2d at 302 (finding it difficult to conclude a nursing home resident "benefited" from a nursing home admission marked by negligent care that caused her death). Plus, as discussed below, the Facility has not met its burden to prove the Admission Agreement and Arbitration Agreement merged.

Agreement covered a completely different issue. It was solely devoted to directing an alternative dispute resolution method and purporting to eliminate its parties' right to seek relief through the courts. (R. p. 98). Thus, the Admission Agreement and Arbitration Agreement cannot have the same purpose because, as the Facility admits, the Arbitration Agreement was not a pre-condition for admission. Appellants' Br. at 13.

d. The terms and context show the parties intended the Admission Agreement and Arbitration Agreement to be separate contracts.

Third, even if the Facility could show the required authority under the Act and even if the prerequisites to merger were present, the Facility's argument fails because the language and circumstances of the Admission Agreement and Arbitration Agreement show the parties intended they be construed as separate contracts. Coleman, Thompson, and Hodge are the key precedent here because they illustrate the type of contract language or structure showing parties do not intend multiple agreements to be interpreted as one. For example, an arbitration contract does not merge with an admission contract in which a nursing home and its resident chose to insert an "entire agreement" or integration provision (aka "merger clause") limiting its parameters and excluding other writings. Coleman, 407 S.C. at 355, 755 S.E.2d at 455. Coleman held one such provision proved "on its face" that merger does not apply. Id. Also, admission and arbitration contracts cannot merge if they contain inconsistent terms, especially provisions related to how each contract may be terminated. Id.; Thompson, 416 S.C. at 53, 784 S.E.2d at 685. Moreover, courts look at the way the contracts are structured, finding it is unlikely parties intended two contracts to be treated as one if they chose separate titles, required separate signatures, and numbered each contract's pages differently. Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562, 813 S.E.2d at 302. Finally, Hodge held a nursing home cannot argue for merger when it chose to separate arbitration and admission into two agreements while taking the position that

agreeing to the former was not required to obtain the benefits of the latter. 422 S.C. at 562-63, 813 S.E.2d at 302.

The Facility preemptively dismisses all of these factors, arguing none of them suggest the parties intended the Admission Agreement and Arbitration Agreement stand on their own. Appellant's Br. at 11-17. However, by rejecting or discounting these factors, the Facility is arguing against well-established, recent precedent (Coleman, Thompson, and Hodge) without offering the Court any reason why it should so dramatically and quickly reverse course. All four of these factors apply to the Admission Agreement and Arbitration Agreement and provide extensive evidence to support the circuit court's finding that the contracts do not merge.

i. The Admission Agreement's "Entire Agreement" provision

The Admission Agreement concludes with an "Entire Agreement" provision identifying the contract's limited scope. (R. p. 144 § XVIII). Specifically, this provision states "this Agreement represents the entire . . . understanding between the parties." "Agreement" is capitalized because it is a defined term, which the Admission Agreement's opening line limits to "THIS ADMISSION AGREEMENT." (R. p. 133) (emphasis in original). The Facility argues the Admission Agreement's "Entire Agreement" provision is different than its counterparts in Coleman, Thompson, and Hodge because it does not specifically reference the Arbitration Agreement. Appellants' Br. at 12. However, the Admission Agreement's "Entire Agreement" provision is just as probative against merger as those in earlier cases. It specifically limits the contract's interpretation to the "Agreement" and then defines that term narrowly in a way that does not include the Arbitration Agreement or any other writing. To argue the "Entire Agreement" provision must specifically reference a separate writing to exclude that writing from the common law merger rule is to overlook the fundamental purpose an integration provision serves in a

contract. See Palmetto State Sav. Bank of S.C. v. Barr, 293 S.C. 252, 253-54, 359 S.E.2d 531, 532 (Ct. App. 1987) (finding purpose of integration provision is to create "strong implication the whole intentions of the parties has been expressed" in the writing containing the clause); Wilson v. Landstrom, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984) (citing Armour Fertilizer Works v. Hyman, 120 S.C. 375, 113 S.E. 330 (1922) (the terms of a completely integrated contract "cannot be varied or contradicted by parol evidence of prior or contemporaneous agreements not included in the writing")).

Plus, there is contract language here that tracks Coleman and progeny almost word for word. In Coleman, the court focused on the fact that the admission contract's "Entire Agreement" provision referenced "[t]his Agreement . . . and the Arbitration Agreement." Referencing the two writings distinctly was "the admission agreement's recognition of the arbitration agreement as a separate document." Thompson, 416 S.C. at 52, 784 S.E.2d at 684 (citing Coleman, 407 S.C. at 355, 755 S.E.2d at 455). Hodge applied the same principle using language from an arbitration contract that referenced an admission contract in distinct terms. 422 S.C. at 562, 813 S.E.2d at 302. If an arbitration contract explains its scope extends to disputes arising from "this Agreement or the . . . Admission Agreement," then the parties "recognized a separateness" between the two contracts. Id. The Arbitration Agreement in this case does exactly what Coleman, Thompson, and Hodge identify as proof that defeats the Facility's merger argument. In describing its term, the Arbitration Agreement states that its effect will continue even after the termination of "this Agreement ***or the Admission Agreement***." (R. p. 98) (emphasis added).

Finally, the Facility argues the "Entire Agreement" provision supports an Admission Agreement-Arbitration Agreement merger because it incorporates "other Admissions Materials." Appellants' Br. at 12 (quoting R. p. 144 § XVIII). To the extent the Facility implies the Arbitration

Agreement was incorporated by reference into the Admission Agreement, the Facility has offered nothing in either contract to support this conclusion. "Admissions materials" is not a defined term, and there is nothing to suggest the Arbitration Agreement was intended to be included within it.[3] Plus, since the Facility admits agreeing to arbitration was not required for admission, it would be counterintuitive to conclude the Arbitration Agreement was an "admissions material." Thompson rejected a similar argument when a nursing home argued its admission contract's "entire agreement" provision incorporated a separate arbitration contract by referring broadly to "exhibits." 416 S.C. at 53-54, 784 S.E.2d at 685. Since "exhibit" was undefined and not referenced elsewhere in either contract, the term was ambiguous and was interpreted against the nursing home who drafted it. Id. (citing Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455).

ii. Inconsistent termination provisions

Two contracts executed at the same time do not merge if they contain inconsistent terms. The parties likely did not intend for the two be read as one if they chose to, for example, apply different substantive law to the two agreements. Hodge, 422 S.C. at 562, 813 S.E.2d at 302. Coleman, Thompson, and Hodge made special note of inconsistent provisions in admission and arbitration contracts regarding when each contract may be cancelled at the resident's urging. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 551, 813 S.E.2d at 296. In each instance, the arbitration contract allowed the resident to disclaim or revoke its provisions within thirty days but the admission contract did not include a

[3] Appellant argues this Court previously recognized an arbitration contract is an "admission material." (Appellant's Br. at 12) (quoting Stott, 426 S.C. at 571-72, 828 S.E.2d at 84). However, Stott actually affirmed a circuit court's ruling that a nursing home resident's family member *did not* have authority to bind the resident to arbitration. Id. at 578, 828 S.E.2d at 88. Plus, as in this case, Stott found a nursing home resident's family member lacked authority to enter an arbitration contract because a durable power of attorney form was improperly executed. Id. at 576-77, 828 S.E.2d at 86-87.

similar right. Id. Here, the Arbitration Agreement does not have a disclaimer provision, and the Facility positions this fact as its primary argument for distinguishing Coleman, Thompson, and Hodge. Appellants' Br. at 11-12.

However, the contracts' termination provisions are just as inconsistent here as in those cases. The Arbitration Agreement states that its effect on disputes between the parties would survive even if both the Admission Agreement and Arbitration Agreement are cancelled. (R. p. 98). As structured by the Facility, there does not seem to be any means by which a resident could unilaterally cancel the Arbitration Agreement. The Admission Agreement is very different in that it allows a resident to unilaterally terminate that contract "at any time." (R. p. 138 § IV, ¶ 1). Thus, while the Facility is correct the Arbitration Agreement is technically different than Coleman and progeny because it lacks a disclaimer provision, that distinction makes no difference because the Arbitration Agreement and Admission Agreement still have inconsistent termination provisions that rebut any argument the parties intended these two separate contracts merge into one.

iii. Contract formatting and structure

Thompson and Hodge prove it is not just specific contract language that shows a nursing home and its resident did not intend for admission and arbitration contracts to merge. Intent can be derived from the way a contract is formatted or structured. Rather than adding an arbitration provision to the admission contract or attaching that language as an exhibit, the nursing home in Thompson chose to place it in an entirely separate document with its own, distinct "Arbitration Agreement" label. 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1. That choice was in itself further proof of "the parties' intent for [the arbitration contract] to stand by itself as an independent contract." Id. The Facility did the same here, and the Arbitration Agreement announces itself as a distinctive contract from its very title. Hodge also noted the importance of formatting choices a

nursing home makes when constructing its admission and arbitration contracts. 422 S.C. at 562, 813 S.E.2d at 302. An arbitration contract looks more and more like its own independent document if entering it requires a separate signature than the admission contract and the documents have separate pagination. Id. Here, the Admission Agreement required separate signatures and signaled its separateness as it ran from page 1 to 12 while the Arbitration Agreement was on its own separate single page.

iv. Admission is not dependent on Arbitration Agreement

The Facility's merger argument is also rebutted by its admissions. The purported interaction between two separate contracts can be judged not only by their language but also by how their parties treat each contract. An arbitration contract is far less likely to merge with an admission contract if the nursing home admits arbitration is not required for admission. The Facility argues the fact that admission does not depend on consent to arbitrate somehow supports merger. Appellants' Br. at 13-14. But, in Hodge, this Court cited as further evidence against merger an arbitration contract provision stating that arbitration was not a precondition to a resident's acceptance into the nursing home. 422 S.C. at 562-63, 813 S.E.2d at 302. Similarly, the Facility does not treat the Admission Agreement and Arbitration Agreement as if they are interdependent or even as related to the same purpose. The Facility admits that executing the Arbitration Agreement was not mandatory and not a precondition to admission. Appellants' Br. at 13.

In sum, the Arbitration Agreement and Admission Agreement have the same four indicators South Carolina courts have cited in the past to find simultaneously-executed contracts were not intended to merge into one. Moreover, contrary to the Facility's arguments, any uncertainty about these four indicators must be resolved in Respondent/Ms. Seabrook's favor, not to their detriment. The Facility argues merger is the default position and must be applied absent an

affirmative showing of contrary intent. Appellants' Br. at 16-17. But, that argument overlooks key holdings from Coleman. First, while the Facility several times refers to a "presumption" of merger, South Carolina courts have never presumed merger of any two contracts. Nowhere in Coleman, Thompson, and Hodge does a court refer to a merger "presumption" for nursing home admission and arbitration contracts. In fact, neither does the case Coleman cites in support of the merger principle. 407 S.C. at 355, 755 S.E.2d at 455 (citing Klutts, 268 S.C. at 88, 232 S.E.2d at 24). There is simply no textual support for the notion that the court should "presume" merger applies.

Second, even if merger was a presumption, it is an easily rebuttable one because "***anything*** indicating a contrary intention" means a court will not apply merger. 407 S.C. at 355, 755 S.E.2d at 455 (quoting Klutts, 268 S.C. at 88, 232 S.E.2d at 24) (emphasis added). Thus, the Facility's task on appeal is not to successfully oppose one of the four indicators discussed above but to prove all four are absent here. Third, since the Facility drafted these form contracts of adhesion, any ambiguities must be construed against it. The Facility argues that applying the ambiguity rule here "makes no sense" (Appellants' Br. at 16), but does not acknowledge the Facility's argument effectively asks the Court to reverse its own ruling on the issue and to overrule South Carolina Supreme Court precedent. Coleman applied the "presumption against drafter" rule to a nursing home's quibbles over the effect of an "entire agreement" clause, and Thompson used it to reject a nursing home's argument that an arbitration contract was incorporated into an admission contract. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53-54; 784 S.E.2d at 685.

Accordingly, the Facility's merger argument is flawed not only in the specific ways described above but also in its very conception of when and how the merger principle operates. The circuit court properly applied extensive South Carolina law in this field and rejected the Facility's contention that the Arbitration Agreement and Admission Agreement merged.

3. Respondent is not equitably estopped from opposing arbitration.

Ms. Seabrook did not sign the Arbitration Agreement or authorize anyone to sign for her. Yet, the Facility argues South Carolina Supreme Court precedent suggests Ms. Seabrook/Respondent are equitably estopped from opposing arbitration. Appellants' Br. at 17-19 (citing Wilson). However, the Facility does not cite or attempt to apply the elements of equitable estoppel imposed by South Carolina law.[4] Plus, Wilson actually refused to compel arbitration against a non-signatory, holding there is a presumption *against* forcing someone to arbitrate based on a contract he did not sign. 426 S.C. at 338, 827 S.E.2d at 173. Wilson even went on record to say equitable estoppel is rarely appropriate to force arbitration. Id. at 345, 827 S.E.2d at 177 (finding equitable estoppel "should be used sparingly"). Finally, as this Court recently reaffirmed in Weaver v. Brookdale Senior Living, Inc., 431 S.C. 223, 847 S.E.2d 268 (Ct. App. 2020), the Facility cannot meet the "direct benefits" test considered in Wilson because Mr. Seabrook's claims in no sense rely on the Arbitration Agreement's terms, and the Facility's argument to the contrary expressly links its estoppel claim to its fatally flawed merger argument.

[4] As Wilson recognized, whether a non-signatory may be bound to an arbitration contract is a state law issue. 426 S.C. at 348, 827 S.E.2d at 174 (citing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630-31 n. 5 (2009)). Under South Carolina law, equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conducted be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on conduct of the party to be estopped. Id. Wilson did not dismiss or eliminate this test for equitable estoppel but only found its application was an issue that had not been preserved for appellate review. 426 S.C. at 341 n. 9, 827 S.E.2d at 175 n. 9. The Facility argues Wilson concluded this test only applies to "non-arbitration cases." Appellant's Br. at 18 (citing Wilson, 426 S.C. at 340 n. 9, 827 S.E.2d at 175 n. 9). However, that could not have been Wilson's meaning because applying different rules to arbitration and non-arbitration contracts would violate the U.S. Supreme Court's equal-treatment principle. See Prima Paint Corp. v. Flood Conklin Mfg. Co., 388 U.S. 395, 404 n. 12 (1967) (finding intent of FAA was "to make arbitration agreements as enforceable as other contracts, but not more so").

The Facility wholly omits the fact that the "direct benefits estoppel" discussed in Wilson could only apply if Respondent had "consistently maintained that other provisions of the same contract should be enforced to benefit" her. 426 S.C. at 340, 827 S.E.2d at 175 (quoting Pearson, 400 S.C. at 290, 733 S.E.2d at 601). In other words, the Facility's burden is to show (1) Ms. Seabrook's claims arise from the purportedly merged Admission Agreement-Arbitration Agreement; (2) Ms. Seabrook/Respondents have "exploited" other parts of the contract by reaping its benefits; and (3) Ms. Seabrook's claims rely solely on the contract terms to impose liability. Weaver, 431 S.C. at 230, 847 S.E.2d at 272 (citing Wilson, 426 S.C. at 340-44, 827 S.E.2d at 175-77). The Facility makes no attempt to meet this burden and cannot do so. Ms. Seabrook's claims do not cite or rely on the Arbitration Agreement. Instead, the Facility argues Ms. Seabrook's alleged direct benefit was admission itself and the nursing home services he received while a Facility resident. Appellants' Br. at 18-19.

But, this argument has two key flaws. For one, the Facility expressly links its estoppel claim to a merger argument it cannot prove. Appellants' Br. at 19 (arguing estoppel applies because Admission Agreement and Arbitration Agreement merged). As discussed in Argument 2 above, there is no merger here because (1) Ms. Tisdale lacked statutory authority to enter the Admission Agreement; (2) the contracts were created for different purposes; and (3) there are many indications from the contracts' language that they were not intended to be construed as one. Second, Ms. Seabrook has not obtained a "direct benefit" from the Admission Agreement as that term is used for estoppel purposes. The complaint does not allege a breach of contract claim based on the Admission Agreement or otherwise rely on that contract to assert liability against the Facility. The mere fact that Ms. Seabrook's relationship with the Facility underlying the claims was memorialized in the Admission Agreement is not sufficient for the Facility to invoke estoppel.

Wilson, 426 S.C. at 343, 827 S.E.2d at 176 ("direct benefits estoppel is not implicated simply because a claim relates to or would not have arisen 'but for' a contract's existence").

Weaver applied this principle to reject the argument that a nursing home resident receives the required "direct benefit" through her admission or "exploits" either the admission or arbitration contracts by suing for poor nursing home care. 431 S.C. at 232-33, 847 S.E.2d at 273-74. In Weaver, a granddaughter brought wrongful death and survival claims based on a nursing home's failure to supervise a resident who wandered away from the home and was killed by a wild animal. Id. at 271. Equitable estoppel did not apply because the granddaughter's claims "rely on general tort duties . . . not any provision of the residency agreement." Id. at 232, 847 S.E.2d at 273. Weaver did not create new law; it followed Hodge's lead in holding that a nursing home resident or her family members do not "exploit" an admission contract by alleging common law negligence claims. Id. (citing Hodge, 422 S.C. at 563, 813 S.E.2d at 302).

Thompson also rejected a nursing home's attempt to use direct benefits estoppel to compel a non-signatory nursing home resident to arbitrate. 416 S.C. at 58-59, 784 S.E.2d at 687-88. After surveying state and Fourth Circuit precedent, Thompson rejected this form of estoppel because it generally requires proof of some benefit to the party opposing estoppel in "*the contract that includes the arbitration provision*." 416 S.C. at 59, 784 S.E.2d at 688 (emphasis added). The Facility, therefore, cannot build an estoppel argument by citing benefits Ms. Seabrook supposedly gained in the Admission Agreement. Thompson also rejected any effort to argue Ms. Seabrook gained a "direct benefit" from the Arbitration Agreement. Id. at 60, 784 S.E.2d at 688 ("any possible benefit emanating from the [Arbitration Agreement] alone is offset by the [Arbitration Agreement's] requirement that [resident] waive her right of access to the courts . . .").

In sum, the circuit court correctly rejected the Facility's equitable estoppel argument because the Facility has not cited or applied the proper elements, cannot show Ms. Seabrook obtained any "direct benefit," and bases its estoppel claim on a flawed merger argument. As it did in Thompson, Hodge, and Weaver, this Court should reject this equitable estoppel argument.

4. The Facility was not denied the opportunity to conduct discovery and may not ask the Court to preemptively rule on waiver.

The Facility argues the circuit court unreasonably tied its hands in discovery and prevented it from accessing essential information to support arbitration. (Appellant's Br. at 33-36).[5] That argument could wield a measure of intuitive heft except that the Facility's right to conduct discovery was never threatened and is not really what it seeks here. Instead, what the Facility seeks is a prophylactic assurance that choosing to engage in discovery would not lead Respondent to argue, or the circuit court to find, the Facility waived its right to pursue arbitration. That request is both unreasonable and unconstitutional.

Neither the procedural rules nor Respondent's conduct prevented the Facility from serving discovery requests. In fact, the Facility had the right to serve written discovery requests and to notice depositions from the moment Respondent filed her Complaint with the Florence County Clerk of Court. Rule 30(a)(1), SCRCP (permitting depositions "[a]fter commencement of an action"); Rule 33(a), SCRCP (same for serving interrogatories); Rule 34(b), SCRCP (same for serving requests for production); see also Rule 3(a), SCRCP (stating that a civil action is "commenced" when the complaint is filed if later served within the statute of limitations). The

[5] Regardless of the justiciability issues and substantive flaws discussed below, the Court should dismiss Issue No. 2 for lack of appellate jurisdiction. Discovery orders are interlocutory and not otherwise immediately appealable because they do not involve the merits of an action or affect a substantive right. Grosshuesch v. Cramer, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008); Rule 201(a), SCACR (limiting appeals to a final judgments and appealable orders).

rules specifically provide that a party need not seek a court's permission before serving discovery requests. Rule 33(a), SCRCP; Rule 34(b), SCRCP. Plus, it is not as if the Facility tried and failed or was somehow thwarted in seeking information from Respondent. The record contains no discovery requests Respondent ignored and no subpoenas to which she objected. When the Facility argues the circuit court ruled "without allowing" discovery and claims discovery was "disallowed" in this case (Appellant's Br. at 35-36), it can offer zero evidence to support those assertions. The Facility lacks the information it claims now to need only because the Facility never asked for it.

The Facility's real concern relates to the possible consequences of pursuing discovery. South Carolina law holds that a party may waive any right it may have to pursue arbitration if it first chooses to litigate in a way that would render a shift to arbitration prejudicial to its opponent. Johnson v. Heritage Healthcare of Estill, LLC, 416 S.C. 508, 513, 788 S.E.2d 216, 218 (2016); Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 388, 759 S.E.2d 727, 736 (2014). The point at which a party delves too deeply into litigation to assert a right to arbitrate varies because the analysis is heavily fact driven. Johnson, 416 S.C. at 513, 788 S.E.2d at 219 (citing Liberty Builders, Inc. v. Horton, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999)). In any given case, a party seeking arbitration faces uncertainty in knowing when it is vulnerable to a waiver argument, and the opposing party is uncertain when it may become necessary to assert one.

What the Facility now calls its request for discovery was actually its improper effort to eliminate its uncertainty at Respondent's expense. The Facility explicitly seeks assurances that choosing to conduct discovery will not expose it to a waiver argument. Appellant's Br. at 35 (noting concern that the Facility could be "vulnerable to [Respondent's] waiver argument . . ."). The Facility's request presents a fundamental problem because what it calls a request for discovery does not present an issue any court could resolve in its favor. No South Carolina court can address

the merits of a party's argument unless it presents a justiciable claim. Lennon v. S.C. Coastal Council, 330 S.C. 414, 417-18, 498 S.E.2d 906, 908 (Ct. App. 1998). South Carolina courts cite the "case or controversy" requirement in the U.S. Constitution's Article III and apply federal standards for identifying a justiciable controversy under South Carolina law. Id.; Waters v. S.C. Land Resources Conservation Comm'n, 321 S.C. 219, 227-28, 467 S.E.2d 913, 917-18 (1996). A claim is justiciable only if it presents a "real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." Sloan v. Greenville Cnty., 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003) (quoting Pee Dee Elec. Coop., Inc. v. Carolina Power Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983)). Justiciability specifically considers a party's standing as well as the suitability of the dispute for judicial resolution. Courts may not address claims that are unripe, moot, or seek only an advisory opinion. Jowers v. S.C. Dep't of Health & Envtl. Control, 423 S.C. 343, 815 S.E.2d 446 (2018).

Here, the Facility lacked standing to assert a discovery argument that was both unripe and sought an advisory opinion. The Facility argues it was denied its "request for limited discovery." Appellants' Br. at 33. The Facility lacks standing to assert this claim. Under South Carolina law, standing may be acquired by statute, using the "public importance" exception, or by satisfying the requirements of "constitutional standing" derived from federal constitutional principles. ATC South, Inc. v. Charleston Cnty., 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). Only constitutional standing could apply here, and the Facility cannot meet those requirements for its discovery-based argument. Constitutional standing demands a concrete and particularized "injury-in-fact," a causal connection between the injury and the conduct complained of, and a finding that the injury will likely be redressed by a ruling in the injured party's favor. Id. (quoting Lujan v. Defenders of

Wildlife, 504 U.S. 555, 560-61 (1992)). The Facility has not suffered any concrete and particularized injury. As discussed above, the South Carolina Rules of Civil Procedure authorized the precise action—serving discovery requests—the Facility claims it was denied. Rules 30(a)(1), 33(a), and 34(b), SCRCP. The Facility cannot claim to be injured by its own decision to forego a right the law unconditionally provided.

The Facility also cannot meet the remaining constitutional standing requirements. There is no causal connection between the Facility's proposed injury (i.e. a lack of discovery) and either Respondent's conduct or the circuit court's order. Neither denied the Facility the right to conduct discovery before filing its motion to compel arbitration. Nor can the Facility meet constitutional standing's redressability requirement. Given the procedural rules' repeated statements that discovery requests may be made "without leave of court,"[6] it is not at all clear it would ever be appropriate for a party in the Facility's position to ask a circuit court to grant a "request" to conduct discovery.

When the true nature of the Facility's request is considered, other justiciability issues arise. Nothing in the Facility's request was about getting discovery it was allegedly denied; it was all about making the Facility more comfortable in opposing any argument of waiver. Thus, it appears the Facility was asking the circuit court to find any discovery it chose to perform would, as a matter of law, not subject it to a waiver argument. This was a proposed ruling the circuit court could not issue. While waiver could become an issue later in this litigation, it was not ripe for adjudication before the Facility sent its first discovery request.

A claim is not ripe if it is "contingent, hypothetical, or abstract." Jowers, 423 S.C. at 353-54, 815 S.E.2d at 451 (quoting Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty.,

[6] Rule 33(a), SCRCP; Rule 34(b), SCRCP.

371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006)). Before a potential waiver dispute could ripen, the Facility would have to conduct whatever discovery it planned, file a later motion to compel arbitration, and then Respondent could raise a waiver argument citing prejudice the Facility's discovery course caused her. Without those progressions in the litigation, the circuit court could have no basis to rule on the future viability of Respondent's potential waiver argument. Alternatively, the Facility's discovery argument may have been an attempt to get some guidance from the circuit court on just how far it could go in discovery before seriously risking waiver. That is also a non-justiciable issue. A party seeking an advisory opinion asks a court to go beyond its jurisdiction. Booth v. Grissom, 265 S.C. 190, 217 S.E.2d 223 (1975); see also Sangamo v. Weston, Inc. v. Nat'l Surety Corp., 307 S.C. 143, 414 S.E.2d 127, 130 (1992) ("This court will not issue advisory opinions and cannot alter precedent based on questions presented in the abstract"); Dodge v. Dodge, 332 S.C. 401, 420, 505 S.E.2d 344, 354 (Ct. App. 1998) ("State appellate courts will not issue advisory opinions on questions for which no meaningful relief can be granted"). In other words, the waiver issue was not only unripe, the Facility erred in asking the circuit court to rule on it because parties may not "fish in judicial ponds for legal advice." City of Columbia v. Sanders, 231 S.C. 61, 68, 97 S.E.2d 210, 213 (1957).

Beyond the justiciability flaws, the Facility's discovery argument is incorrect on the merits. Part of the discovery the Facility seeks relates to a possible agency relationship between Ms. Seabrook and Ms. Tisdale. Hodge rejected a similar argument, affirming a circuit court's refusal to compel a deposition that would add nothing probative to the agency analysis. 422 S.C. at 578, 813 S.E.2d at 310. Moreover, the Facility must show a clear abuse of discretion to reverse the circuit court's discovery ruling. Id. at 576, 813 S.E.2d at 309 (quoting Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 536 787 S.E.2d 485, 495 (2016)). The circuit court's findings

were all supported by the facts and the law, and the circuit court acted within its discretion in denying the Facility's nonjusticiable request.

CONCLUSION

Based on the arguments stated above, Respondent respectfully requests the Court affirm the circuit court's order denying the Facility's motion to compel arbitration. The Facility fails to show it had a valid agreement to arbitrate claims related to Ms. Seabrook's residency. While Ms. Tisdale signed the Arbitration Agreement, she had no authority to do so. The HCPOA cited by the Facility is facially invalid, and Arredondo holds that the HCPOA does not include an agent's authority to execute the Arbitration Agreement anyway. Plus, the Facility's merger/estoppel argument is flawed because the contracts in question lack the prerequisites for merger and show through their contents the parties' intent that they not merge. At least three other appellate court opinions have rejected similar arguments. Finally, the Facility's discovery argument is a nonjusticiable claim that is not properly before the Court.

Respectfully submitted,

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March 25, 2022
Rock Hill, SC

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2021-000586

Mary Tisdale, as Personal Representative of the Estate of Earlene Seabrook	……..	Respondent,
v.		
Palmetto Lake City Operating, LLC, d/b/a Lake City-Scranton Healthcare Center and Jeffrey Gibbs,	……..	Defendants,
Of whom Palmetto Lake City Operating, LLC, d/b/a Lake City-Scranton Healthcare Center is	…….	Appellant.

CERTIFICATE OF COUNSEL

Pursuant to Rule 211(a), SCACR, Respondent's counsel hereby certifies that Respondent's Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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