

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Richland County
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2019-CP-40-02295
Appellate Case No. 2020-000501

Vermell Daniels
as Personal Representative of the Estate of Annie Porter,

Respondent,

v.

THI of South Carolina at Columbia, LLC
d/b/a Midlands Health & Rehabilitation Center,

Appellant.

RECORD ON APPEAL

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COUNTY OF RICHLAND	)	
Vermell Daniels as Personal Representative of	)	C/A No. 2019-CP-40-02295
the Estate of Annie Porter,	)	
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Plaintiff,	)	ORDER
	)	
Versus	)	
	)	
THI of South Carolina at Columbia, LLC d/b/a	)	
Midlands Health & Rehabilitation Center,	)	
	)	
Defendant.	)	

This matter was before the Court on Monday, August 26, 2019, at 2:00 p.m., in Richland County, South Carolina, upon Defendant THI of South Carolina at Columbia, LLC d/b/a Midlands Health & Rehabilitation Center's Motion to Dismiss and Compel Arbitration. Attorney Bradley H. Banyas of Hughey Law Firm, LLC was present representing the interests of the Plaintiff. Attorney Russell G. Hines of Young Clement Rivers, LLP was present representing the interests of the Defendant.

FACTS

Annie Porter was admitted to the Defendant's skilled nursing facility in December of 2017. The Defendant operates a skilled nursing facility, licensed by the South Carolina Department of Health and Environmental Control, R.61-17, *Standards for Skilled Nursing Facilities*. Plaintiff alleges that while a resident in the Defendant's facility, Ms. Porter was allowed to develop pressure sores, which resulted in her decline and eventual death. Annie Porter died on March 28, 2018. Vermell Daniels, Annie Porter's daughter and Plaintiff in this matter was appointed as Personal Representative of the Estate of Annie Porter on August 18, 2018 by the Kershaw County Probate Court, and filed this action on her behalf, including causes of action for Wrongful Death and Survivorship. Plaintiff filed the Notice of Intent to file suit on October 23, 2018. The parties participated in pre-suit mediation, which resulted in an impasse. Plaintiff filed her Summons and Complaint on April 25, 2019. Defendant THI of South Carolina at Columbia, LLC d/b/a Midlands

Health & Rehabilitation Center filed its Motion to Dismiss and Compel Arbitration on June 5, 2019. Plaintiff contends that the Arbitration Agreement is unenforceable under state contract law.

STANDARD OF REVIEW

A parties' right to a jury trial in South Carolina is governed by state law. Pelfrey v. Bank of Greer, 270 S.C. 691, 693, 244 S.E.2d 315, 316 (1978). The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). It is well established that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement to arbitrate exists in the first place...If no agreement is found to exist, the court must deny any application to arbitrate." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) citing S.C. Code Ann. § 15-48-20(a) (2005). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013).

In determining whether an agreement to arbitrate exists, "the court should apply 'ordinary state-law principles that govern the formation of contracts.'" Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E. 2d 839, 844 (Ct. App., 1999). Arbitration is available only when the parties involved contractually agree to arbitrate. Id. South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. Player v. Chandler, 299 S.C. 101, 105, (1989). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a).

ANALYSIS

1. **The Arbitration Agreement is not enforceable because Vermell Daniels lacked actual or apparent authority to sign the Arbitration Agreement for Annie Porter.**

The legal consequences of an agent's actions can only be attributed to the principle when the agent as actual or apparent authority. Charleston Registry v. Young Clement, 359 S.C. 635, 598 S.E.2d 717 (Ct. App. 2004). It is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority. Frasier v. Palmetto Homes of Florence, 473 S.E.2d 865 (Ct. App. 1996). South Carolina law requires that to prove apparent authority, the Defendant must show "... (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." Cowburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance Company, 306 S.C. 423, 412, S.E.2d 425 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists. Id.

The issue of arbitration agreements in skilled nursing facilities has been addressed at the Court of Appeals and Supreme Court, and the case is very similar to Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292, 304 (Ct. App. 2018); and Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d, 679 (Ct. App. 2016). In all three of these cases, our Courts have found Arbitration Agreements to be unenforceable where a family member signed an Arbitration Agreement near the time of admission to a skilled nursing facility for the Decedent and did not have any actual authority to do the same. In all three cases, the Courts found that no implied

authority nor estoppel applied. Presently, a review of the admissions and arbitration documents by the Defendant would have informed them that Vermell Daniels did not have actual authority by way of a Power of Attorney, nor Court Appointed Guardianship to bind her mother, nor did she ever indicate that she had any apparent authority to enter in to contracts on behalf of her mother. The Adult Health Care Consent Act ("AHCCA") does not confer legal authority to Ms. Daniels to enter into contracts on behalf of her mother, nor does the South Carolina Bill of Rights for Residents of Long-Term care Facilities.

This Court finds that the present case is nearly identical to Hodge and Thompson. In Hodge, the South Carolina Court of Appeals discussed a Maryland case, Dickerson v. Longoria, 414 Md. 419, 995, A.2d 721, 743 (2010). The Court specifically stated, "This limited range of acts performed on the [decedent]'s behalf suggest, at most [he] may have conferred on [the personal representative] the authority to make health care and financial decisions on his behalf, but no more than that." Hodge at 567. Further, in Thompson, the Court determined that " 'The authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial.' " Thompson at 686. Thus, the arbitration agreement and admissions documents do not merge in to one. Based upon the above, Ms. Daniels did not have the actual or apparent authority to sign the Arbitration Agreement on behalf of Ms. Porter.

2. Plaintiff is not equitably estopped from denying the Arbitration Agreement

Defendants also argue that Plaintiff should be equitably estopped from denying enforcement of the Arbitration Agreement. Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements." Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that

such conduct 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 the estoppel must 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 the conduct of the party to be estopped. Id.

Defendant has not met its burden to establish these elements. There is no evidence Ms. Daniels acted in a way amounting to a false representation to Defendant regarding Ms. Porter's status or that Ms. Daniels intended for Defendant to act in reliance on her conduct. Additionally, the evidence shows Defendant cannot meet its burden to show they lacked knowledge or the means of knowledge of the truth of the facts in question. Equitable doctrines such as estoppel favor diligent parties who actively endeavor to protect their rights. A person cannot claim to have been misled and cannot rely on equitable estoppel if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

In this case, Defendant had the capacity to determine whether Ms. Daniels had authority to sign an arbitration agreement on Ms. Porter's behalf. The Defendant is a sophisticated business entity frequently interacting with residents and their families during the nursing home admission process. Defendant are or should be familiar with the legal concepts of guardianship and powers-of-attorney. Defendants had the ability to ask Ms. Daniels whether she was Ms. Porter's guardian or attorney-in-fact and had the ability to request supporting documentation. Since the Defendant has not cited or provided evidence on all required elements of equitable estoppel, Plaintiff is not equitably estopped from denying the arbitration agreement.

3. The FAA does not mandate the enforcement of the Arbitration Agreement

Under the Federal Arbitration Agreement ("FAA"), arbitration is required when there is a

valid arbitration agreement and a dispute exists which is within the scope of the agreement. Under the arbitration clause, neither prong is satisfied. As discussed in the sections above, there is no valid arbitration agreement because Ms. Daniels did not have the legal authority to execute a valid arbitration agreement or health care admission agreement. Accordingly, the FAA does not apply.

CONCLUSION

After consideration of the pleadings, motions and arguments of counsel, I find that there is no valid Arbitration Agreement, and therefore the Defendant's Motion to Dismiss is DENIED.

IT IS SO ORDERED.


Honorable L. Casey Manning


~~September 16, 2019~~
Columbia, South Carolina

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This matter was before the Court on Thursday, February 13, 2020, at 2:00 p.m., in Richland County, South Carolina, upon Defendant THI of South Carolina at Columbia, LLC d/b/a Midlands Health & Rehabilitation Center's Motion to Alter, Amend, and/or Reconsider Order Denying Motion to Compel Arbitration. Attorney Bradley H. Banyas of Hughey Law Firm, LLC was present representing the interests of the Plaintiff. Attorney Russell G. Hines of Young Clement Rivers, LLP was present representing the interests of the Defendant.

PROCEDURAL HISTORY

Annie Porter was admitted to the Defendant's skilled nursing facility in December of 2017. The Defendant operates a skilled nursing facility, licensed by the South Carolina Department of Health and Environmental Control, R.61-17, *Standards for Skilled Nursing Facilities*. Plaintiff alleges that while a resident in the Defendant's facility, Ms. Porter was allowed to develop pressure sores, which resulted in her decline and eventual death. Annie Porter died on March 28, 2018. Vermell Daniels, Annie Porter's daughter and Plaintiff in this matter was appointed as Personal Representative of the Estate of Annie Porter on August 18, 2018 by the Kershaw County Probate Court, and filed this action on her behalf, including causes of action for Wrongful Death and Survivorship. Plaintiff filed the Notice of Intent to file suit on October 23, 2018. The parties participated in pre-suit mediation, which resulted in an impasse. Plaintiff filed her Summons and Complaint on April 25, 2019. Defendant THI of South Carolina at Columbia, LLC d/b/a Midlands

Health & Rehabilitation Center filed its Motion to Dismiss and Compel Arbitration on June 5, 2019. This Court reviewed submissions and heard oral arguments by counsel at a hearing on August 26, 2019. This Court entered an Order Denying the Defendant's Motion to Dismiss and Compel Arbitration on November 6, 2019. Defendant filed a Motion to Alter, Amend, and/or Reconsider Order Denying Motion to Compel Arbitration on November 18, 2019. Oral arguments were held at a hearing February 13, 2020.

FACTUAL BACKGROUND

This matter arises out of a nursing home negligence case where Plaintiff alleges Ms. Porter was injured as a result of the Defendants' negligence allowing her to develop pressure ulcers. Ms. Porter was admitted to the Defendants' facility on or about January 5, 2018. Defendant has represented that agreeing to arbitrate was not a prerequisite to admission to the facility or a condition for admission. It is undisputed that Annie Porter did not sign the Arbitration Agreement. No power of attorney existed at the time of the admission into the nursing home on January 5, 2018. Vermell Daniels is Annie Porter's daughter. Vermell Daniels signed the Arbitration Agreement. At no point in time did Vermell Daniels have Power of Attorney or any other legal authority that would have given Ms. Daniels the legal authority to bind Ms. Porter to arbitration. Plaintiff provided an affidavit from Daniels that stated: " I was never asked by any Midlands Health and Rehabilitation employee if I was Annie Porter's legal guardian, nor if I had legal authority to bind her to arbitration, which I did not." Defendants have never offered any evidence to contradict the affidavit, nor provide any affidavits to the contrary.

STANDARD OF REVIEW

A parties' right to a jury trial in South Carolina is governed by state law. Pelfrey v. Bank of Greer, 270 S.C. 691, 693, 244 S.E.2d 315, 316 (1978). The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007);

MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). It is well established that “where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement to arbitrate exists in the first place...If no agreement is found to exist, the court must deny any application to arbitrate.” Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) citing S.C. Code Ann. § 15-48-20(a) (2005). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013).

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ANALYSIS

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his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." Cowburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance Company, 306 S.C. 423, 412, S.E.2d 425 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists. Id.

Defendants have produced no evidence indicating that Vermell Daniels had authority to enter a contract on Ms. Porter's behalf or waive Ms. Porter's right to a jury trial. The issue of arbitration agreements in skilled nursing facilities has been addressed at the Court of Appeals and Supreme Court, and the case is very similar to Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292, 304 (Ct. App. 2018); and Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d, 679 (Ct. App. 2016). In all three of these cases, our Courts have found Arbitration Agreements to be unenforceable where a family member signed an Arbitration Agreement near the time of admission to a skilled nursing facility for the Decedent and did not have any actual authority to do the same. In all three cases, the Courts found that no implied authority nor estoppel applied. Presently, a review of the admissions and arbitration documents by the Defendant would have informed them that Vermell Daniels did not have actual authority by way of a Power of Attorney, nor Court Appointed Guardianship to bind her mother, nor did she ever indicate that she had any apparent authority to enter in to contracts on behalf of her mother. The Adult Health Care Consent Act ("AHCCA") does not confer legal authority to Ms. Daniels to enter into contracts

on behalf of her mother, nor does the South Carolina Bill of Rights for Residents of Long-Term care Facilities.

This Court finds that the present case is nearly identical to Hodge and Thompson. In Hodge, the South Carolina Court of Appeals discussed a Maryland case, Dickerson v. Longoria, 414 Md. 419, 995, A.2d 721, 743 (2010). The Court specifically stated, “This limited range of acts performed on the [decedent]’s behalf suggest, at most [he] may have conferred on [the personal representative] the authority to make health care and financial decisions on his behalf, but no more than that.” Hodge at 567. Further, in Thompson, the Court determined that “ ‘The authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal’s right of access to the courts and to a jury trial.’ ” Thompson at 686. Thus, the arbitration agreement and admissions documents do not merge in to one. Based upon the above, Ms. Daniels did not have the actual or apparent authority to sign the Arbitration Agreement on behalf of Ms. Porter.

For agency situations, the legal burden is on the party asserting that an agency exists. Frasier v. Palmetto Homes of Florence, Inc., 323 S.C 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996). In this case, Defendant must show all necessary elements of an agency relationship are “clearly established” by the facts. Id. A party dealing with an agent has a duty to use due care to ascertain the scope of the agent’s authority to act. Id. An agency may not, however, be established solely by the declarations and conduct of an alleged agent. Muller v. Myrtle Beach Golf & Yacht Club, 303 S.C. 137, 142-143, 399 S.B.2d at 433 (Ct. App. 1990) overruled on other grounds by Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000)). South Carolina law requires that to prove apparent authority the Defendants must show: 1) that the purported principal consciously or impliedly represented to another to be his agent, 2) that

there was reliance upon the representation, and 3) that there was a change of position to the relying party's detriment. Cownburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance Company, 306 S.C. 423, 412, S.E.2d 425 (Ct. App. 1991). Defendant has failed to provide any evidence beyond Vermell Daniels' signature to suggest she was Ms. Porter's agent. The fact that Daniels signed documents so that Ms. Porter could be admitted to the facility and receive medical care in no way indicates a manifestation of authority by Ms. Porter to waive her right to a jury trial or agree to arbitration. There has been no evidence that Ms. Porter ever manifested any form of assent establishing Daniels as her agent.

Vermell Daniels was one of Ms. Porter's children. She was not Ms. Porter's attorney-in-fact or court appointed guardian. She had no legal authority to enter contracts on Ms. Porter's behalf. The Supreme Court of South Carolina has held that a surrogate without proper legal authority cannot bind a person to arbitration.

The scope of Sister's authority to consent to "decisions concerning Decedent's health care" extended to the admission agreement, which was the basis upon which Facility agreed to provide health care and Sister agreed to pay for it. The separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution between Facility and Decedent or Sister should issues arise in the future. Under the Act, Sister did not have the capacity to bind Decedent to this voluntary arbitration agreement. We therefore affirm the circuit court's holding that the Act did not confer authority on Sister to execute a document which involved neither health care nor financial terms for payment of such care.

Coleman v. Mariner Health Care, Inc., 407 S.C. 346 S.C. 353-54, 755 S.E.2d 450, 454 (2014).

In Coleman, the circuit court refused to compel arbitration because the sister of a nursing

home resident who signed the arbitration and admission agreements lacked authority to bind her sister to the arbitration agreement. In affirming the circuit court's order, the Supreme Court found that, although the South Carolina Adult Healthcare Consent Act gave the sister authority to make 'healthcare decisions' on behalf of her sister, consent for medical treatment is not the same as binding an incompetent person to a legally binding contract such as an arbitration agreement. Coleman, 407 S.C. at 352, 755 S.E.2d at 453-54. The court reasoned that the Act extends authority to surrogates to make traditional healthcare decisions and financial decisions that arise out of those decisions. Id. Daniels had no legal authority to sign the Arbitration Agreement, and Defendant knew or should have known this fact. Since Daniels lacked legal authority to enter into a contract; the arbitration agreement is void and unenforceable.

2. Plaintiff is not equitably estopped from denying the Arbitration Agreement

Defendants also argue that Plaintiff should be equitably estopped from denying enforcement of the Arbitration Agreement. Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements." Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conduct 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 the estoppel must 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 the conduct of the party to be estopped. Id.

Defendant has not met its burden to establish these elements. There is no evidence Ms. Daniels acted in a way amounting to a false representation to Defendant regarding Ms. Porter's status or that Ms. Daniels intended for Defendant to act in reliance on her conduct. Additionally,

the evidence shows Defendant cannot meet its burden to show they lacked knowledge or the means of knowledge of the truth of the facts in question. Equitable doctrines such as estoppel favor diligent parties who actively endeavor to protect their rights. A person cannot claim to have been misled and cannot rely on equitable estoppel if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

In this case, Defendant had the capacity to determine whether Ms. Daniels had authority to sign an arbitration agreement on Ms. Porter's behalf. The Defendant is a sophisticated business entity frequently interacting with residents and their families during the nursing home admission process. Defendant are or should be familiar with the legal concepts of guardianship and powers-of-attorney. Defendants had the ability to ask Ms. Daniels whether she was Ms. Porter's guardian or attorney-in-fact and had the ability to request supporting documentation. Since the Defendant has not cited or provided evidence on all required elements of equitable estoppel, Plaintiff is not equitably estopped from denying the arbitration agreement.

The Admission Agreement and Arbitration Agreement are separate contracts that do not merge. See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) (cert. denied Aug. 21, 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016); Coleman v. Mariner Health Care Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014) (Coleman refused to apply the doctrine of merger because language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." 407 S.C. at 355, 755 S.E.2d at 455. Thompson and Hodge applied Coleman and provided further examples of factors demonstrating "separateness and preventing merger. 416 S.C. at 52, 784 S.E.2d at 684; 422 S.C. at 563, 813 S.E.2d at 302.

As discussed above briefly, there were two separate agreements signed on the day of the

admission, and they were not merged. By their own terms, the Admission Agreement indicated an intent that the common law doctrine of merger not apply. The Admission Agreement's "Entire Agreement" provision shows that one contract constituted "the entire agreement and understanding between the parties" concerning admission to the Facility and prohibits merging the two separate agreements. An admission contract with an "Entirety of Agreement" provision is separate "on its face" from an arbitration contract where the provision identifies the two contracts distinctly—i.e. "this [Admission] Agreement or in the Arbitration Agreement." Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added). Even if the "Entire Agreement" clause creates an ambiguity as to merger, the law is clear that any ambiguity must be construed against the drafter, in this case, Defendants.¹¹ Since there was no merger here, Defendants' equitable estoppel argument must be denied. See Coleman, 407 S.C. at 355–56, 755 S.E.2d at 455 (rejecting estoppel argument by finding no merger).

As in Hodge, the separate contracts here have separate signature pages and separate pagination—i.e. the Admission Agreement ends with "Page 12 of 12" while the Arbitration Agreement is a separate document. As in Thompson, the arbitration agreement announces its independence with its "Arbitration Agreement" title.

The arbitration and admission contracts have different pagination with different signature pages and the arbitration contract has "Arbitration Agreement" at the top of its first page, these factors further indicate the parties' intent for it to stand by itself as an independent contract." Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n.1; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302. Separateness is further demonstrated within the nursing home makes clear that agreeing to arbitrate is not required to gain admission to the home. Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

The Facility cannot meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit. So long as the admission

and arbitration contracts are separate documents, any alleged misrepresentations made by a resident's family member when signing the contracts would not equitably estop the resident's attorney-in-fact from challenging the family member's authority to bind the resident to arbitration. A family member who signs an arbitration contract without legal authority to bind the resident acts in her individual capacity and his misrepresentations, if any, would have no bearing on claims against the home by the resident even if the misrepresenting family member is also the attorney-in-fact for the resident. Thompson, 416 S.C. 43, 62, 784 S.E.2d 679 (Ct. App. 2016) (finding nursing home "may not hold [resident's] estate responsible for any possible misrepresentations Son or Daughter may have made in their individual capacities").

Therefore, Defendants cannot prove merger of the Admission Agreement and Arbitration Agreement. Defendants can also not claim to have been misled and cannot rely on equitable estoppel if they, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in questions. Furthermore, Defendants had the capacity to determine whether Daniels had authority to sign the Arbitration Agreement on Ms. Porter's behalf. Again, Defendants are a sophisticated business entity frequently interacting with residents and their families during the nursing home admission. Defendants are familiar with the legal concepts of guardianship and powers-of-attorney and had the ability to ask Daniels for any power of attorney or court appointed guardianship documentation.

Defendants then argued Ms. Porter's admission to the Facility was the required "direct benefit." In doing so, Defendant tied its estoppel argument to the merger argument. See Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (noting nursing home's "equitable estoppel argument is premised on [the home's] contention that, under state law, the admission agreements and the [arbitration agreements] merged"). Admission can be the "direct benefit" that forces Plaintiff to arbitrate only if admission and arbitration are governed by the same contract. For the reasons outlined above, the two contracts are separate, they do not merge, and Ms. Porter's admission

does not support equitable estoppel.

Precedent is decisive on this point. Citing International Paper, the Court of Appeals held in Thompson that any benefit of admission “is of no moment” for the application of equitable estoppel to a separate arbitration contract. 416 S.C. at 59-60, 784 S.E.2d at 688; see also Coleman. 407 S.C. at 558-59, 813 S.E.2d at 300. Since admission is unavailable as a “direct benefit” to support estoppel, Defendants would be required to point to some benefit Ms. Porter received from the Arbitration Agreement alone. However, Ms. Porter derived no benefit from the Arbitration Agreement. Hodge, 422 S.C. at 563, 813 S.E.2d at 302 (finding family members, resident, and resident’s estate “received no benefit from the Arbitration Agreement”). In sum, Defendants cannot meet their burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit.

Defendants then argued ratification of her continued residency in Defendants’ facility. To establish a ratification of the Arbitration Agreement Defendants must show (1) acceptance by the principal of the benefits of the agent’s acts, (2) the principal’s full knowledge of the facts, and (3) circumstances or an affirmative election demonstrating the principal’s intent to accept the unauthorized arrangement. Lincoln v. Aetna Gas. & Sur. Co., 300 S.C 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989).

This argument fails for several reasons. First, Ms. Porter’s presence alone cannot constitute an affirmative representation. See Hodge where the court rejected the notion that a nursing home resident represents her/her family member has authority to enter an arbitration agreement on the resident’s behalf simply by failing to object to the family member’s signature.

Defendants argued Ms. Porter accepted the benefits of the contracts. It is doubtful that the resident received a benefit from the Arbitration Agreement. Hodge was skeptical of the notion that admission was a benefit to the resident considering Complaint allegations that the nursing home’s acts during the admission caused the resident’s death. 422 S.C. at 563, 813 S.E.2d at

303 (“we find it difficult to find [resident] benefitted even from being admitted”).

However, the only alleged benefit Defendants cited is admission itself, a benefit Defendants have admitted being separate from arbitration. Defendants never attempt to explain what supposed benefit of the independent Arbitration Agreement Ms. Porter derived during her time as a resident in Defendants’ facility. The Court of Appeals’ ruling in Thompson speaks directly on this point, i.e., “any possible benefit emanating from the [arbitration agreement] alone is offset by the [arbitration agreement’s] requirement that [resident] waive her right to access the courts and her right to a jury trial.” 416 S.C. at 60, 784 S.E.2d at 688.

Defendants then made a broader argument that it would be manifestly inequitable for Plaintiff to pursue a tort claim based on the Admission Agreement while denying Daniel’s authority to sign the Arbitration Agreement. The Adult Health Care Consent Act does provide statutory authority for family members to make an incapacitated loved one’s health care decisions but leaves the conferral of authority to arbitrate for powers of attorney or other legal instruments outlined in the probate code. Coleman, 407 S.C. at 353, 755 S.E.2d at 454 (finding statutory power to make “health care” decisions limited to nursing home admission and related financial decisions).

Lastly, Defendants claimed that the agreement is enforceable under a theory of third-party beneficiary. See Thompson, 416 S.C. at 57, 784 S.E.2d at 687 (holding as to the arbitration agreement between the appellants and Son in his individual capacity, a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement.) With no valid underlying contract, there could be no third-party beneficiary. First, Plaintiff’s action sounds solely in tort. There is no breach of contract claim asserted. Plaintiff’s pleading does not specifically refer to any written contract or necessarily rely upon the language of any written contract. Plaintiff’s tort claims presumably are based on common law and statutory or regulatory duties imposed by law. Second,

as discussed above, the Arbitration Agreement is a separate and distinct agreement from the Admission Agreement. Plaintiff does not rely upon the terms of the Arbitration Agreement to establish her tort claims.

CONCLUSION

After consideration of the pleadings, motions and arguments of counsel, I find that there is no valid Arbitration Agreement. In order to prevail in its motion, the Defendant facility must show a valid and enforceable arbitration agreement between Ms. Porter and the facility to prevail on its motion. Defendants have not met this burden. As such, the Court finds no valid arbitration contract existed between Ms. Porter and the facility because: (1) Vermell Daniels did not have legal authority to bind Annie Porter to the arbitration agreement; (2) there is a lack of consideration and mutuality under the circumstances; and (3) the affirmative defenses of equitable estoppel, ratification, and third-party beneficiary do not apply under the circumstances. Accordingly, for the foregoing reasons the Defendant's Motion to Alter, Amend, and/or Reconsider Order Denying Motion to Compel Arbitration is DENIED.

IT IS SO ORDERED.


Honorable L. Casey Manning



February 18, 2020
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
Vermell Daniels as Personal Representative of the	)	C/A No. 2019-CP
Estate of Annie Porter,	)	
	)	
	)	SUMMONS
Plaintiff,	)	(Jury Trial Demanded)
	)	
Versus	)	
	)	
THI of South Carolina at Columbia, LLC d/b/a	)	
Midlands Health & Rehabilitation Center, and	)	
Matt Stanley,	)	
	)	
Defendants.	)	

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is hereby served upon you, and to serve a copy of your Answer to the said Complaint to said Plaintiff's attorneys D. Nathan Hughey, A. Stuart Hudson and Bradley H. Banyas, at their office located at 1311 Chuck Dawley Blvd, Suite 201, Post Office Box 348, Mt. Pleasant, South Carolina 29465-0348, within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to do so, judgment by default will be rendered against you for the relief demanded in the Complaint.

s/ Bradley H. Banyas
D. Nathan Hughey (SC Bar No. 68409)
A. Stuart Hudson (SC Bar No. 71691)
Bradley H. Banyas (SC Bar No. 101668)
HUGHEY LAW FIRM, LLC
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Mount Pleasant, SC 29465-0348
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Attorneys for the Plaintiff

April 25, 2019
Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
Vermell Daniels as Personal Representative of the	)	C/A No. 2019-CP
Estate of Annie Porter,	)	
	)	
Plaintiff,	)	COMPLAINT
	)	(Jury Trial Demanded)
Versus	)	
	)	
THI of South Carolina at Columbia, LLC d/b/a	)	
Midlands Health & Rehabilitation Center, and	)	
Matt Stanley,	)	
	)	
Defendants.	)	

The Plaintiff, Vermell Daniels as Personal Representative of the Estate of Annie Porter, complaining of the Defendants, THI of South Carolina at Columbia, LLC d/b/a Midlands Health & Rehabilitation Center, and Matt Stanley ("Defendants"), alleges as follows:

1. The Plaintiff is a citizen and resident of North Carolina.
2. Upon information and belief, the Defendant, THI of South Carolina at Columbia, LLC d/b/a Midlands Health & Rehabilitation Center, is a business corporation organized and existing pursuant to the laws of the State of Delaware which conducts business in Richland County, South Carolina at 1007 N. Kings Street, Columbia, South Carolina.
3. Upon information and belief, the Defendant, Matt Stanley, is a citizen and resident of Richland County, South Carolina and is the administrator of Midlands Health & Rehabilitation Center.
4. The Defendants had the right and/or power to direct and control its employees and/or agents in the business of delivering care for a fee through skilled nursing facilities and they are personally, jointly and severally liable for the acts and omissions committed.
5. The Defendants delivered care for a fee and had authority, express or implied, to control the means and agents employed to execute care at the Defendants' facilities at all times during the residency of Annie Porter.
6. Attached as Exhibit A is an expert affidavit specifying at least one negligent act.

7. This Court has personal and subject matter jurisdiction over this case and venue is proper in this Court.

GENERAL FACTUAL ALLEGATIONS APPLICABLE TO ALL CLAIMS

8. The Plaintiff is informed and believes that at all times material to this Complaint the Defendants' employees and/or agents were acting on behalf of or, in place of the Defendants in making decisions regarding the care of Annie Porter. Additionally, the Plaintiff is informed and believes that at all times material to this Complaint that all of the employees of the Defendants were acting within the course and scope of their employment in regard to their care and treatment of Annie Porter.

9. On the application for the license in effect at the time of Annie Porter's injury, Midlands Health & Rehabilitation Center, being sworn under oath, acknowledged that it was required to comply with the standards set forth in South Carolina Regulation 61-17 and further that understood in order to maintain a license to operate, it was required to comply with applicable State, Federal, and local laws, codes, and regulations applicable to the facility prior to Annie Porter's injury.

10. The State of South Carolina required that Midlands Health & Rehabilitation Center have policies and procedures that accurately reflected actual practice regarding care, treatment, procedures, and services - including nursing services, the operation of the facility, and how Midlands Health & Rehabilitation Center was going to meet the specialized needs of the residents with Alzheimer's disease and/or related dementia such as Annie Porter - and the State of South Carolina required that Midlands Health & Rehabilitation Center make the policies and procedures available be accessible to staff. Midlands Health & Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

11. The State of South Carolina required that Midlands Health & Rehabilitation Center have a documented regimen of appropriate care, treatment, services or written action plan prepared by the facility for Annie Porter, based on assessment data, e.g., social services, which was to be implemented for the

benefit of Annie Porter as well as other residents. Midlands Health & Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

12. The State of South Carolina required that Midlands Health & Rehabilitation Center keep a record of each incident involving residents or staff members or volunteers, occurring in the facility or on the facility grounds, and directed that it was required to be reviewed, investigated if necessary, evaluated in accordance with facility policies and procedures. Midlands Health & Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

13. Annie Porter's injuries constituted reportable incidents.

14. The State of South Carolina required that Midlands Health & Rehabilitation Center keep a legible and complete medical record, to include and any all incidents involving Annie Porter as well as other residents. Midlands Health & Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

15. The State of South Carolina required Midlands Health & Rehabilitation Center to describe in its care plan for Annie Porter as well as other residents the services that Midlands Health & Rehabilitation Center was going to furnish to her, *i.e.*, what assistance Midlands Health & Rehabilitation Center was going to provide to her, how much assistance Midlands Health & Rehabilitation Center was going to provide to her, who at Midlands Health & Rehabilitation Center was going to provide the assistance, how often, and when. Midlands Health & Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

16. The State of South Carolina required that Midlands Health & Rehabilitation Center to administer treatment and services to Annie Porter as well as other residents in a caring and humane manner,

effectively and *safely*, and staff were required to respond to a signal system call from a resident to provide care or assistance in a prompt manner. Midlands Health & Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

17. The State of South Carolina required Midlands Health & Rehabilitation Center to assure that Annie Porter did not develop pressure-related wounds unless the resident's clinical condition demonstrates that they were unavoidable and to address treatment of existing pressure-related wounds. Midlands Health & Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

18. The State of South Carolina required Midlands Health & Rehabilitation Center to take an interdisciplinary approach to decrease the risk of pressure-related wounds, and institute measures to prevent and treat wounds that are consistent with each resident's clinical condition, risk factors, and goals. Such actions were required to include but not be limited to: body position of bed or chair bound residents changed in accordance with the ICP; proper skin care provided for bony prominences and weight bearing parts to prevent discomfort and the development of pressure areas, unless contraindicated by physician's orders; and soiled or wet bed linen replaced promptly with clean, dry linen and clothing after being soiled. Midlands Health & Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

19. The State of South Carolina required Midlands Health & Rehabilitation Center to provide appropriate staff members in numbers and training to perform those duties that result in compliance with 61-17, to suit the needs and condition of the residents, and to meet the demands of effective emergency on-site action that might arise, and to provide training and qualifications for the tasks performed in compliance with all State, Federal, and local laws, and current professional organizational standards.

Midlands Health & Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

20. The State of South Carolina required Midlands Health & Rehabilitation Center to ensure that staff members Direct care staff members, in addition to meal service staff have at least the following qualifications: ability to render care and services to residents in an understanding and gentle manner; sufficient education to be able to perform their duties and have a working knowledge of regulations applicable to their scope of work. Midlands Health & Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

21. The State of South Carolina required Midlands Health & Rehabilitation Center to have direct care staff adequate in number and skill in the facility at all times to provide nursing and related care and services to attain or maintain the highest practicable physical, mental, and psychosocial health and safety of each resident, as determined by resident assessments and ICPs and that direct care staff be assigned only duties for which they are trained. Further, the State of South Carolina required Midlands Health & Rehabilitation Center to have licensed nurse staff members currently and continuously licensed to practice nursing in South Carolina during the period they are staff members, and that only individuals appropriately licensed may perform duties requiring a registered or licensed practical nurse. Midlands Health & Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

22. The State of South Carolina required Midlands Health & Rehabilitation Center to have an adequate number of licensed nurses be on duty to meet the total nursing needs of residents. Licensed nursing staff were required to be assigned to duties consistent with their scope of practice as determined through their licensure and educational preparation. Midlands Health & Rehabilitation Center

acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

23. The State of South Carolina required Midlands Health & Rehabilitation Center to ensure staff members were provided the necessary training to perform the duties for which they were responsible and that, before performing any duties, all newly-hired staff members were to be oriented to the facility organization and physical plant, specific duties and responsibilities of staff members, and residents' needs. All staff members were to be instructed in the provisions of S.C. Code Ann. Section 43-35-5 *et seq.* (1976, as amended), "Omnibus Adult Protection Act" and S.C. Code Ann. Section 44-81-10 *et seq.* (1976, as amended), "Bill of Rights for Residents of Long-Term Care Facilities" as well as other rights and assurances as required in 61-17. Midlands Health & Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

24. The State of South Carolina required Midlands Health & Rehabilitation Center to ensure all staff were provided inservice training programs that identify training needs related to problems, needs, care of residents and infection control and were sufficient to assure staff's continuing competency. Midlands Health & Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

25. The State of South Carolina required Midlands Health & Rehabilitation Center to acknowledge its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

26. The State of South Carolina required Midlands Health & Rehabilitation Center to ensure all entries in the resident record were legible and complete, and separately authenticated and dated promptly

by the individual, identified by name and discipline, responsible for providing or evaluating the service or care furnished. Midlands Health & Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

27. The State of South Carolina required Midlands Health & Rehabilitation Center to admit only individuals identified as appropriate for the level of care, services, or assistance offered. The facility was required to establish admission criteria that are consistently applied and comply with State, Federal, and local laws and regulations, and permitted to admit and retain only those individuals whose needs could be met by the accommodations and services for which the facility is licensed. Anyone who had a need for medical care for acute illness or injury that was beyond the scope of the facility to provide, and where hospitalization was consistent with the individual's condition was not permitted to be retained as a resident. Midlands Health & Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

28. The State of South Carolina required Midlands Health & Rehabilitation Center to have practices that promote conditions that prevent the spread of infectious, contagious, or communicable diseases and provide for the proper disposal of toxic and hazardous substances. These preventive measures and practices were required to be in compliance with applicable regulations and guidelines of the Occupational Safety and Health Administration, *e.g.*, the Bloodborne Pathogens Standard; the Centers for Disease Control and Prevention, *e.g.*, Immunization of Health-Care Workers: Recommendations of the Advisory Committee on Immunization Practices and the Hospital Infection Control Practices Advisory Committee; the Department's South Carolina Guidelines For Prevention and Control of Antibiotic Resistant Organisms in Health Care Settings, and R.61-105; and other applicable State, Federal and local laws and regulations. The State of South Carolina required Midlands Health & Rehabilitation Center to have an infection control/QI committee that meets at least annually to address infection control issues

consisting of the medical director and representatives from at least administration, nursing, dietary, and housekeeping staff to assure compliance with 61-17 regarding infection control. Midlands Health & Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

29. The State of South Carolina required Midlands Health & Rehabilitation Center to have a written, implemented quality improvement program that provided effective self-assessment and implementation of changes designed to improve the care, treatment and services provided by the facility. Midlands Health & Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

30. Annie Porter was admitted to the Defendants' facility, Midlands Health & Rehabilitation Center, on or about January 5, 2018.

31. While at the facility, the Defendants allowed Ms. Potter to develop preventable injuries which the Defendants had a duty to prevent, caused by a breach of that duty, including but not limited to pressure sores, and suffer horrific, painful, disfiguring, permanent and life threatening injuries which caused great pain and suffering.

32. Upon information and belief, the Defendants were licensed under the laws of the State of South Carolina and were required to provide reasonable and prudent nursing home care to Annie Porter.

33. The Defendants had an obligation to employ nursing assistants, nurses and orderlies who were qualified to render reasonable care to a patient in the condition of Annie Porter and in accordance with federal and state regulations as well as the representations made by the Defendants.

34. Additionally, pursuant to South Carolina law, the Defendants had a duty to ensure that care/services were rendered effectively and safely and precautions taken for residents with special conditions,

e.g., Alzheimer's disease and/or related dementia, etc. and to provide appropriate assistance in activities of daily living were required to be provided to residents, as needed.

35. Furthermore, without limitation, the Defendants had a duty to comply with all current federal, state, and local laws and regulations concerning resident care, resident rights and protections, and privacy and disclosure requirements, e.g., Section 44-81-10, et seq., of the S.C. Code of Laws, 1976, as amended, Resident's Bill of Rights, Alzheimer's Special Care Disclosure Act, and the Omnibus Adult Protection Act notice, Section 43-35-5, et seq. as well as all local, state, and federal laws and current professional organizational standards.

36. Upon information and belief, the Defendants failed to assign sufficient and qualified staff to ensure that all necessary care was delivered to Annie Porter.

37. Upon information and belief, the Defendants failed to ensure that the proper treatment and standard of care was delivered to Annie Porter.

38. Upon information and belief, the Defendants failed to properly train, monitor and supervise the staff necessary to provide a reasonably prudent standard of care to Annie Porter.

39. In particular, while at the Defendants' facility, the Defendant acquired a stage IV wound.

FOR A FIRST CAUSE OF ACTION
(Negligence)

40. The Plaintiff realleges and reiterates all previous paragraphs as fully as if set forth in this paragraph and in their entirety.

41. The Defendants undertook the duty to render nursing home care to Annie Porter in accordance with the prevailing and acceptable professional standards of care for nursing homes and their employees and agents in the national community and as further required by the state and federal laws applicable to the same.

42. Notwithstanding undertaking that duty and while Annie Porter was under the care of the Defendants, the Defendants departed from prevailing and acceptable professional standards of care and treatment of Annie Porter and were thereby negligent, careless, grossly negligent, reckless and in violation

of the duties owed to Annie Porter, and they are liable for one or more of the following acts of omission or commission, any or all of which are departures from the prevailing and acceptable professional standards of care:

- a. In failing to comply with those provisions of 61-17 recited above and to which the Defendants' swore under oath subject to penalty of perjury that they would comply;
- b. In failing to properly monitor the resident's physical well-being while residing at the Defendants' facility;
- c. In failing to properly supervise the personnel and staff and employees at the Defendants' facility with regard to Annie Porter's care;
- d. In failing to properly revise and modify plans of care for Annie Porter in response to Annie Porter's needs;
- e. In failing to properly utilize equipment, including medications and devices to prevent and to minimize or reduce injuries resulting from improper care;
- f. In violating state and/or federal regulations requiring actions to protect the safety and health of Annie Porter, so as to constitute negligence per se;
- g. In failing to ensure that the Defendants' personnel and employees had sufficient, adequate and current training, credentials and skills to properly prevent Annie Porter from suffering from injury and pain;
- h. In failing to have in place proper and adequate policies, procedures, protocols, rules and regulations for the care and treatment of nutritional and infection control issues and fall prevention issues at the Defendants' facility, or if such policies, procedures, protocols, rules and regulations were in place, in failing to enforce them;
- i. In failing to properly and adequately assess, monitor and update policies, procedures, protocols, rules and regulations in response to knowledge garnered from published guidelines and case reviews relating to proper nutritional and infection control procedures and pressure ulcer prevention procedures;
- j. In failing to ensure that manuals, instructions and warnings relating to appropriate nutrition and infection control procedures and pressure ulcer prevention procedures were available to agents, servants and employees of the Defendants;
- k. In failing to properly train and educate its employees or, if properly trained and educated, in failing to allow its employees to exercise independent skill and judgment;
- l. In failing to ensure that Annie Porter had proper care;
- m. In failing to properly document significant clinical findings;
- n. In failing to properly document the medical records of Annie Porter;

- o. In failing to follow and ensure that its employees follow the South Carolina Residence Bill of Rights for Long Term Care Facilities, South Carolina Department of Health and Environmental Control Regulation 61-84;
- p. In failure to provide sufficient number of personnel to meet the needs of residents;
- q. In failure to ensure that a resident maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless the resident's clinical conditions demonstrates that this is not possible;
- r. In failing to ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source are reported immediately to the administrator of the facility and to other officials in accordance with State Law through established procedures (including to the State survey and certification agency);
- s. In failing to conduct assessments promptly after a significant change in the resident's physical or mental condition;
- t. In failing to conduct assessments promptly after a significant change in the resident's physical or mental condition;
- u. In failing to notify family members or authorities after incidents;
- v. In failing to transfer Annie Porter to a higher level of care as needed, and
- w. In such other particulars as may be ascertained through discovery or shown at trial.

43. As a direct and proximate result of the negligence, carelessness, gross negligence, recklessness and departure from the professional standards of care by the Defendants and their agents, servants and/or employees, Annie Porter suffered from severe debilitating injuries which resulted in permanent decline, as a result of which Annie Porter has suffered severe and extreme emotional distress, anxiety, physical injuries, medical bills, the likes of which no person should endure, for which Annie Porter is entitled to recover in an amount to be determined by a jury at the trial of this action.

FOR A SECOND CAUSE OF ACTION
(Negligence per se)

44. The Plaintiff realleges and reiterates all previous paragraphs as fully as if set forth in this paragraph in their entirety.

45. The Defendants are a long term health care providers who have a duty to abide by certain federal and state regulations in the care and treatment of their residents.

46. The federal and state regulations combine to form minimum standards of care which the Defendants must meet and exceed in order to ensure proper treatment of patients, including, specifically, Annie Porter.

47. The Defendants failed to abide by the standards, rule and regulations promulgated by the United States Government and the State of South Carolina in their treatment and care of Annie Porter.

48. The standards, rule and regulations promulgated by the United States Government and the State of South Carolina were specifically enacted for the benefit of the class of persons for which Annie Porter was a member.

49. As a direct and proximate result of the Defendants' negligence, recklessness, willfulness and wantonness in failing to abide by the standards of care, rules and regulations standards, rule and regulations promulgated by the United States Government and the State of South Carolina, Annie Porter suffered severe injuries as described above, constituting negligence per se.

FOR A THIRD CAUSE OF ACTION
(Fraud and Misrepresentation)

50. The Plaintiff realleges and reiterates all previous paragraphs as fully as if set forth in this paragraph in its entirety.

51. The Defendants, through deception, artifice, and circumvention, successfully defrauded Plaintiff, who trustingly submitted to care at the Defendants' facilities on the basis of explicit and implicit representations:

- a. That the Defendants would comply on a continuing basis with those licensure requirements, regulations, laws and professional standards designed to assure the Plaintiff received safe and adequate care;
- b. That the Defendants would adequately staff the skilled nursing facility and he would enjoy confident and adequately trained employees;
- c. That the Defendants would provide high quality professional care and would accurately and truthfully document the condition of the Plaintiff and the care rendered to her;

- d. Such other misrepresentations as may be set forth above in this Complaint or as may later be set forth;

52. At the time of the Plaintiff's admission to care, the Defendants promoted and disseminated the above representations and information which would lead the Plaintiff, her family, and other similarly situated consumers to believe the above representations were true.

53. The Defendants purposefully disseminated such representations and promotions in order to induce the Plaintiff, her family, and others like them into placing themselves or their relatives in the exclusive control and custody of the Defendants, and once there, allowing such persons to remain.

54. The Defendants fraudulently concealed its inability to care for the Plaintiff according to acceptable standards required by law and represented by the Defendants, and the representations made were false.

55. The representations made and concealments done by the Defendants were material to the Plaintiff and her family.

56. At the time the Defendants made such representations, they knew such affirmative claims of service were false.

57. The Plaintiff and her family were unaware of the falsity of the representations made by the Defendants.

58. The Plaintiff and her family had a right to rely on the representations and concealments made by the Defendants.

59. As a result of the Defendants' fraud, misrepresentations and concealments, the Plaintiff subsequently suffered damages and injuries while a patient/resident at the Defendants' facilities.

60. As a proximate cause of the Defendants' fraud and misrepresentation, the Plaintiff suffered physical injuries, pain and suffering as previously alleged.

FOR A FOURTH CAUSE OF ACTION
(Violation of the South Carolina Unfair Trade Practices Act)

61. The Plaintiff realleges and reiterates all previous paragraphs as fully as if set forth in this paragraph in its entirety.

62. The Plaintiff and Defendants are “persons” within the meaning of Section 39-5-10(a), Code of Laws of South Carolina, 1976, as amended.

63. The Defendants, by conducting business in the state of South Carolina, are engaged in commerce within the meaning of Code Section 39-5-10(b).

64. The Defendants' actions described in this Complaint constitute unfair and deceptive practices within the meaning of Code Section 39-5-20(a), including but not limited to:

- a. Representing to the general public and to the Plaintiff and her family: that the Defendants would comply on a continuing basis with those licensure requirements, regulations, laws and professional standards designed to assure the Plaintiff received safe and adequate care; that the Defendants would adequately staff the skilled nursing facility and she would enjoy confident and adequately trained employees; that they would provide high quality professional care and would accurately and truthfully document the condition of the Plaintiff and the care rendered to her; and such other particulars as are set forth above in this Complaint or may be shown through discovery or trial;
- b. Further, at the time of the Plaintiff's admission to care, the Defendants promoted and disseminated the above representations and information which would lead the Plaintiff, her family, and other similarly situated consumers to believe the above representations were true. The Defendants purposefully disseminated such representations and promotions in order to induce the Plaintiff, his family, and others like them into placing himself or his relatives in the exclusive control and custody of the Defendants, and once there, allowing such persons to remain.
- c. The Defendants fraudulently concealed their inability to care for the Plaintiff according to acceptable standards required by law and represented by the Defendants, and the representations made were false.
- d. The representations made and concealments done by the Defendants were material to the Plaintiff and her family.
- e. At the time the Defendants made such representations, they knew such affirmative claims of service were false.
- f. The Plaintiff and her family were unaware of the falsity of the representations made by the Defendants.
- g. The Plaintiff and her family had a right to rely on the representations and concealments made by the Defendants.

- h. As a result of the Defendants' fraud, misrepresentations and concealments and deceptive and unfair representations, the Plaintiff subsequently suffered damages and injuries while a patient/resident at the Defendants' facilities.

65. The Defendants' acts are capable of repetition, and, upon information and belief, have been repeated with other residents.

66. The Defendants' conduct adversely affects the public interest of South Carolina.

67. The Defendants knew or reasonably should have known their conduct violated the Unfair Trade Practices Act.

68. As a direct, foreseeable, and proximate result of Defendants' unfair and deceptive practices, the Plaintiff have suffered an ascertainable loss of money, physical injuries, pain and suffering as previously alleged.

69. The Plaintiff is entitled to recover her actual damages, which amount should be trebled, pursuant to South Carolina law, together with interest and attorneys' fees.

FOR A FIFTH CAUSE OF ACTION
(Negligence - Wrongful Death)

70. The Plaintiff realleges and reiterates all previous paragraphs as fully as if set forth in this paragraph in its entirety.

71. As a direct and proximate result of the negligence, carelessness, gross negligence, recklessness and departure from the professional standards of care by the Defendants and their agents, servants and/or employees, Annie Porter suffered from severe debilitating injuries which resulted in her death, as a result of which Annie Porter's statutory beneficiaries have lost the aid, comfort, support, society and companionship of the decedent, and have suffered severe and extreme emotional distress, anxiety, grief and sorrow, the likes of which no person should endure, for which the Plaintiff is entitled to recover on behalf of statutory beneficiaries, actual and punitive damages pursuant to section 15-51-10, et. seq., Code of Laws of South Carolina (1976, as amended) in an amount to be determined by a jury at the trial of this action.

FOR A SIXTH CAUSE OF ACTION

(Negligence - Survivorship)

72. The Plaintiff realleges and reiterates all previous paragraphs as fully as if set forth in this paragraph in its entirety.

73. Annie Porter's estate, as a direct and proximate result of the negligence, carelessness, gross negligence, and recklessness of the Defendants, has incurred expenses in the form of funeral and burial expenses. The Plaintiff is further informed and does believe that as a direct and proximate result of the negligence, carelessness, gross negligence, and recklessness of the Defendants, as stated, Annie Porter suffered fear, physical pain, and suffering, medical expense and mental and emotional distress and anguish in the time before her death, for which Annie Porter's estate is entitled to an award of actual and punitive damages pursuant to section 15-5-90, Code of Laws of South Carolina (1976) in an amount to be determined by a jury at the trial of this action.

WHEREFORE, the Plaintiff respectfully prays for judgment against the Defendants for actual damages, punitive damages, special damages and consequential damages, in an amount to be determined by the jury at the trial of this action, fees, the costs and disbursements of this action, and for such other and further relief as this Court deems proper.

s/ Bradley H. Banyas
D. Nathan Hughey (SC Bar No. 68409)
A. Stuart Hudson (SC Bar No. 71691)
Bradley H. Banyas (SC Bar No. 101668)
HUGHEY LAW FIRM, LLC
1311 Chuck Dawley Blvd., Suite 201
Post Office Box 348
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Facsimile: (888) 884-8311
nate@hugheyfirm.com
stuart@hugheyfirm.com
brad@hugheyfirm.com

Attorneys for the Plaintiff

April 25, 2019
Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

)

Vermell Daniels as Personal Representative of
the Estate of Annie Porter,

) C/A No. 2018-NI-

)

Plaintiff,

)

AFFIDAVIT OF ALYSSA GOLDSTEIN, RN

)

Versus

)

THI of South Carolina at Columbia, LLC d/b/a
Midlands Health & Rehabilitation Center, and
Matt Stanley,

)

)

)

)

)

)

Defendants.

)

1. My name is Alyssa Goldstein, RN and I am over the age of eighteen, of sound mind and otherwise competent to make this Affidavit, which I make based upon my background, education, training, and experience. This affidavit is also based upon my own personal knowledge.

2. I am a Registered Nurse, licensed in the State of South Carolina. My further qualifications and background are set forth in the attached CV (Exhibit "A"), which is incorporated by reference.

3. I have actual professional knowledge and experience in my area of practice, Registered Nursing. In addition to the above, I have been in the active practice of the area of my specialty, in the profession of Registered Nursing in the State of South Carolina for at least three of the last five years preceding this opinion.

4. I am familiar with the standard of care applicable to the Defendants during the time of Annie Porter's admittance in the Defendants' facility, commonly known as Midlands Health & Rehabilitation, and the standard of care and skill exercised by reasonably prudent skilled nursing facilities, management companies, operating companies, and other healthcare providers under similar conditions as those involving Annie Porter.

5. I have reviewed records and / or documents relating to Annie Porter from the skilled nursing facilities, as well as hospitals where Annie Porter was treated. Based on my review of these records, I find that there is at least one deviation from the standard of care on behalf of the Defendants during her residency at Midlands Health & Rehabilitation.

6. Without limitation, my review of records and/or documents relating to Annie Porter show the following:

- Annie Porter was admitted to Midlands Health & Rehabilitation on or about January 5, 2018.
- During Ms. Porter's residency, she was allowed to develop pressure sores.

7. In my professional opinion, the Defendants deviated from the standard of care and skill exercised by nurses generally and under similar conditions and like surrounding circumstances as those presented by Annie Porter. In particular, in my opinion, without limitation, they deviated from the standard of care in the following particulars:

- Failing to prevent pressure ulcers.

- Failing to monitor for skin breakdown and promote healing.
- Failing to turn and reposition Annie Porter.
- Failing to develop and maintain an appropriate interim care plan.
- Failing to recognize treat and heal pressure ulcers.
- Failing to meet the standard care of reasonably prudent skilled nursing facilities, management companies, nurses, owners and operators.

8. Additionally, it is my opinion that Annie Porter's injuries were proximately caused by the Defendants' deviations.

9. This is not a complete list of all deviations from the standard of care which I have found in reviewing these records. As a result, I reserve the right to modify, change or supplement these opinions in the future.

Alyssa Goldstein, RN
Alyssa Goldstein, RN

Sworn to me this 29th day of September 2018.

Jennifer Wilson
Notary Public for South Carolina
My commission expires: 4/4/2022

Alyssa Goldstein, RN

Alyssa3034@gmail.com

216 Carriage Hill Place
Charleston, SC 29492

Cell 561 271-0815

East Cooper Medical Center, Mount Pleasant, SC

2014- Present

Day Surgery Nurse/Endoscopy Nurse/Preceptor

- Assess and prepare patient in timely manner for scheduled surgery
- Communicate pertinent patient information to OR staff members
- Manage care for post-operative patients through discharge
- Manage / reassess patients for discharge criteria

Windwood Farm, Mount Pleasant, SC

2013- 2014

Residential home for persons who have been placed because of emotional, behavioral, and or psychiatric disorders.

Registered Nurse

- Maintain and monitor medication administration for residents
- Develop and Implement Health and Wellness program for residents and families
- Schedule and maintain medical appointments for residents and coordinate care.

Trident Medical Center, Charleston, SC

2013- April 2014

296- bed hospital providing a range of services, and specialties.

Registered Nurse: Full Time

- Provide direct patient care to patients requiring continuous telemetry monitoring, and medical patients on the heart failure unit.
- Directly supervise and teach student nurses when providing patient care.
- Participate in coordinating discharge planning and home care with doctors, case managers, physical therapists, occupational therapists, nutritionists
- Actively participate in codes and rapid responses on the unit
- Educate all patients on the promotion and maintenance of health and disease prevention.

Franke at Seaside, Mount Pleasant, SC

2012 - 2013

Full-service retirement community branch of Lutheran Homes of SC; provides active lifestyle, assisted living, specialized care and rehabilitation services for 44 residents.

Registered Nurse

- Manage all activities of 22 patients, 1 Licensed Practical Nurse (LPN) and 3 Certified Nurse's Aides (CNA)

- Provide appraisal of patient's condition, distribute medications and update charts
- Schedule, train, motivate, ensure standards and supervise shift medical staff
- Support and educate patients and family in necessary medical procedures
- Utilize McKesson Care Manager Charting System proficiently

Franke at Seaside, Mount Pleasant, SC

2008 - 2010

Lead Certified Nurse's Aide

- Provided assistance to medical professionals in all resident's issues
- Assess patient condition regularly and apprise medical staff

Education

Trident Technical College, North Charleston, SC

2012-2016

Associate in Applied Science - Nursing

Completed 876 hour's training in general / high risk medical and surgical floor, women's health, pediatrics, mental health, cardiac and oncology topics

Palm Beach Community College, Lake Worth, FL

2007

Associate in Arts – general business

Certifications and Licenses

Registered Nurse, License number: 218929, State of South Carolina	2016
Basic Life Support (BLS), American Heart Association- Certification	2015
Advanced Cardiovascular Life Support (ACLS), American Heart Association	2015
Nonviolent crisis Intervention (CPI)	2016
NIH Stroke Scale Certification	2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
VERNELL DANIELS AS PERSONAL	)	CASE NO. 2019-CP-40-2295
REPRESENTATIVE OF THE ESTATE	)	
OF ANNIE PORTER,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	ANSWER ON BEHALF OF THI OF
	)	SOUTH CAROLINA AT COLUMBIA,
THI OF SOUTH CAROLINA AT	)	LLC D/B/A MIDLANDS HEALTH AND
COLUMBIA, LLC, D/B/A MIDLANDS	)	REHABILITATION CENTER
HEALTH & REHABILITATION	)	
CENTER, and MATT STANLEY,	)	
	)	
DEFENDANTS.	)	
	)	

The Defendant THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center (hereinafter the “Facility” or this “Defendant”), by and through its undersigned counsel, *subject to and without waiving any and all rights to compel this matter to arbitration*, responds to the allegations set forth in Plaintiff’s Complaint as follows:

1. Any and all allegations of Plaintiff’s Complaint not hereinafter admitted, denied, qualified, or otherwise explained are hereby expressly denied and strict proof thereof is demanded.
2. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations contained in Paragraph 1 of Plaintiff’s Complaint and therefore denies the same and demands strict proof thereof.
3. In responding to the allegations in Paragraph 2 of the Plaintiff’s Complaint, this Defendant admits only that it is a Delaware limited liability company and was the sole entity licensed to operate the skilled nursing facility doing business as Midlands Health and Rehabilitation Center at the address stated. Any and all allegations inconsistent with this response

or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

4. The allegations in Paragraph 3 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant admits Matt Stanley was the Administrator at the Facility during the time period at issue in Plaintiff's Complaint.

5. This Defendant denies the allegations set forth in Paragraph 4 of Plaintiff's Complaint and demands strict proof thereof.

6. Responding to the allegations set forth in Paragraph 5 of Plaintiff's Complaint, this Defendant admits that it provides skilled nursing care and treatment to its residents in compliance with the standard of care, and a fee is provided for services related thereto. Further responding, this Defendant admits it has the authority to control its employees in the provision of skilled nursing care at the facility. Any and all further allegations, and those inconsistent with the limited admission above, are hereby denied and strict proof is demanded thereof.

7. In responding to the allegations set forth in Paragraph 6 of Plaintiff's Complaint, this Defendant admits only that Plaintiff has attached a photocopied affidavit of Alyssa Goldstein, RN to the Complaint. This Defendant denies the sufficiency of the affidavit and denies any and all allegations and assertions contained therein to the extent they allege liability or damages against this Defendant.

8. This Defendant denies the allegations set forth in Paragraph 7 of Plaintiff's Complaint and affirmatively states that this matter should be submitted to arbitration pursuant to a valid arbitration agreement entered into between the parties to this litigation.

9. The allegations set forth in Paragraph 8 of Plaintiff's Complaint call for legal conclusions to which no response is required. To the extent a response is required, those allegations are denied to the extent they allege liability or damages against this Defendant.

10. In responding to the allegations set forth in Paragraphs 9, 10, 11, and 12 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, it is subject to certain applicable statutes and regulations. This Defendant affirmatively states that such statutes and regulations do not establish the standard of care. This Defendant further affirmatively asserts that the care and treatment provided to Ms. Porter was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages as against this Defendant are denied and strict proof is demanded thereof.

11. The allegations set forth in Paragraph 13 of Plaintiff's Complaint call for legal conclusions to which no response is required. To the extent a response is required, those allegations are denied to the extent they allege liability or damages against this Defendant.

12. In responding to the allegations set forth in Paragraphs 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, and 29 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, it is subject to certain applicable statutes and regulations. This Defendant affirmatively states that such statutes and regulations do not establish the standard of care. This Defendant further affirmatively asserts that the care and treatment provided to Ms. Porter was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this

response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

13. In responding to the allegations in Paragraph 30 of Plaintiff's Complaint, this Defendant admits that Ms. Porter was a resident at the Facility at times relevant to this action, but would crave reference to the skilled nursing chart and records to confirm the dates of her admission. This Defendant denies any and all allegations inconsistent with those records or intended to assert liability or damages against this Defendant.

14. This Defendant denies the allegations set forth in Paragraph 31 of Plaintiff's Complaint and demands strict proof thereof.

15. In responding to the allegations set forth in Paragraphs 32, 33, 34, and 35 Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, it is subject to certain applicable statutes and regulations. This Defendant affirmatively states that such statutes and regulations do not establish the standard of care. This Defendant also admits that the facility had a duty to provide skilled nursing care and treatment to Ms. Porter in compliance with the governing the standard of care. This Defendant affirmatively asserts that the care and treatment provided to Ms. Porter was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

16. This Defendant denies the allegations set forth in Paragraphs 36, 37, 38, and 39 of Plaintiff's Complaint and demands strict proof thereof.

17. In responding to the allegations set forth in Paragraph 40 of Plaintiff's Complaint, this Defendant would restate its answers to the Paragraphs above as if set forth herein verbatim.

18. Responding to the allegations set forth in Paragraph 41, this Defendant admits the Facility had a duty to provide skilled nursing care and treatment to Ms. Porter during her residency in compliance with the governing standard of care. This Defendant affirmatively asserts that the care and treatment provided to Ms. Porter was at all times in compliance with the appropriate standard of care. Any and all allegations contained in the above Paragraph inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

19. This Defendant denies the allegations set forth in Paragraphs 42 and 43 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

20. In responding to the allegations set forth in Paragraph 44 of Plaintiff's Complaint, this Defendant would restate its answers contained in the above paragraphs as if stated verbatim herein.

21. In responding to the allegations set forth in Paragraphs 45 and 46 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, it is subject to certain applicable rules and regulations. This Defendant affirmatively states that such statutes and regulations do not establish the standard of care. This Defendant further affirmatively states that at all times, care was provided to Ms. Porter within the appropriate standard of care. To the extent the allegations in Paragraphs 45 and 46 are intended to allege liability or damages as to this Defendant, those allegations are denied and strict proof is demanded thereof.

22. This Defendant denies the allegations set forth in Paragraph 47 of Plaintiff's Complaint and demands strict proof thereof.

23. The allegations set forth in Paragraph 48 of Plaintiff's Complaint call for legal conclusions to which no response is required. To the extent those allegations are intended to allege liability against this Defendant, those allegations are denied and strict proof is demanded thereof.

24. This Defendant denies the allegations set forth in Paragraph 49 of Plaintiff's Complaint and demands strict proof thereof.

25. In responding to the allegations set forth in Paragraph 50 of Plaintiff's Complaint, this Defendant would restate its answers contained in the above paragraphs as if stated verbatim herein.

26. This Defendant denies the allegations set forth in Paragraphs 51, 52, 53, 54, 55, 56, 57, 58, 59, and 60 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

27. In responding to the allegations set forth in Paragraph 61 of Plaintiff's Complaint, this Defendant would restate its answers contained in the above paragraphs as if stated verbatim herein.

28. The allegations set forth in Paragraphs 62 and 63 of Plaintiff's Complaint call for legal conclusions to which no response is required. To the extent the allegations contained in Paragraphs 62 and 63 of Plaintiff's Complaint are intended to allege liability or damages as against this Defendant, those allegations are denied and strict proof is demanded thereof.

29. This Defendant denies the allegations set forth in Paragraphs 64, 65, 66, 67, 68, and 69 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

30. In responding to the allegations set forth in Paragraph 70 of Plaintiff's Complaint, this Defendant would restate its answers contained in the above paragraphs as if stated verbatim herein.

31. This Defendant denies the allegations set forth in Paragraph 71 of Plaintiff's Complaint and demands strict proof thereof.

32. In responding to the allegations set forth in Paragraph 72 of Plaintiff's Complaint, this Defendant would restate its answers contained in the above paragraphs as if stated verbatim herein.

33. This Defendant denies the allegations set forth in Paragraph 73 of Plaintiff's Complaint and demands strict proof thereof.

34. This Defendant denies the allegations set forth in Plaintiff's Prayer for Relief and demands strict proof thereof.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

35. This Court lacks jurisdiction over this matter because Plaintiff's claims as to this Defendant should be submitted to arbitration pursuant to a valid arbitration agreement entered into between the parties to this litigation hereto, and therefore this matter should be dismissed pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure and compelled to arbitration.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

36. The Complaint fails to state facts sufficient to constitute a cause of action in several regards and fails to state a claim upon which relief can be granted against this Defendant and should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

37. This Defendant would assert that it complied with the applicable standard of care at all times during the timeframe alleged in Plaintiff's Complaint and did not proximately cause damage to the Plaintiff.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

38. Plaintiff's recovery in the matter, if any, is limited by and subject to the provisions of the South Carolina Noneconomic Damages Awards Act of 2005 which is codified at S.C. Code Ann. §15-32-200 et seq., which is pled as a limitation or partial bar to the Plaintiff's claims and alleged damages.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

39. This Defendant hereby gives notice that they intend to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserves the right to amend its Answer to assert any such defenses.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

40. This Defendant would affirmatively assert that, to the extent it is liable to Plaintiff, which is vehemently denied, it would be entitled to any and all benefits, joint and several liability protections, emergency situations limitations on liability, any and all monetary limitations or caps of liability and/or damages under the Uniform Contributions Among Tortfeasors Act, Noneconomic Damages Award Act, and Medical Malpractice Reform Bill, including but not limited to §15-38-15; §15-32-200 et. seq.; §15-36-100; and §15-79-125 and any other applicable provisions under the acts.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

41. This Defendant would affirmatively assert the defense of intervening and superseding negligence of third parties not a party to this action. This Defendant reserves the right to withdraw this defense at a later time as discovery progresses.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

42. This Defendant would allege, upon information and belief, that any injuries or damages sustained by the Plaintiff were due to, caused and occasioned by a natural disease process over which the Defendant had no control and, as such, this Defendant plead such a natural disease process as a complete or partial bar to this action.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

43. This Defendant would assert that some, or all, of the state or federal laws cited by the Plaintiff do not create a standard of care applicable to Plaintiff's claims in this matter.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

44. To the extent this Defendant is required to raise the affirmative defense of comparative negligence under applicable South Carolina law in order to avoid an argument of waiver by Plaintiff, this Defendant would assert Plaintiff's damages, if any, should be proportionately barred or reduced under the doctrine of comparative fault if such evidence is found as the case proceeds.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

45. A claim for punitive damages and an award of punitive damages would violate those clauses of the Constitutions of the United States and South Carolina related to privileges and immunities, due process and equal protection and this Defendant would further assert the protections, defenses, and statutory rights set forth in S.C. Code Ann. § 15-32-510, et. seq.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

46. Plaintiff's claims of fraud fail to meet the standards imposed by Rule 9(b) of the South Carolina Rules of Civil Procedure.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

47. Some or all of the Plaintiff's claims are barred by the applicable Statute of Limitations.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

48. This Defendant hereby raises election of remedies as an affirmative defense to Plaintiff's claims.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

49. This Defendant hereby asserts that the Plaintiff lacks legal standing to pursue the instant claims.

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice or in the alternative, staying this matter until the validity of the arbitration agreement is judicially resolved, and that they be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

YOUNG CLEMENT RIVERS, LLP

By: s/D. Jay Davis, Jr.

D. Jay Davis, Jr.

Perry M. Buckner, IV

J. Joseph Owens

P.O. Box 993, Charleston, SC 29402

(843) 720-5406; jdavis@ycrlaw.com

*Attorneys for the Defendant THI of South Carolina
at Columbia, LLC d/b/a Midlands Health and
Rehabilitation Center*

Charleston, South Carolina

Dated: June 5, 2019

In The Court of Common Pleas
Fifth Judicial Circuit
2019-CP-40-02295

Transcript of Record

August 26, 2019
Columbia, South Carolina

The Honorable L. Casey Manning, Judge

Bradley Hunter Banyas, Esquire
Attorney for the Plaintiffs

Russell G. Hines, Esquire
Attorney for the Defendants

Elizabeth B. Harris, CVR-M-CM
Circuit Court Reporter

I N D E X

<u>Witness/Description</u>	<u>Page No.</u>
Certificate Page.	21

E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>Ev.</u>
No exhibits introduced.		

1 THE COURT: Motion to dismiss and compel arbitration.
2 Who's who? Y'all have to help me out. Medical mal?

3 MR. HINES: Your Honor.

4 THE COURT: Yes, sir.

5 MR. HINES: I'm Russ Hines. If it would be helpful
6 for our court reporter, I have a card that I would be happy
7 to hand to her. Would that be helpful? May I do that,
8 Your Honor?

9 THE COURT: Yes, and you represent who?

10 MR. HINES: I represent the moving party, which is THI
11 South Carolina in Columbia, LLC, DBA Midlands Health.

12 THE COURT: Are you the plaintiff or defendant?
13 That's what I mean.

14 MR. HINES: Defendant, Your Honor.

15 THE COURT: Okay.

16 MR. HINES: One of the defendants. I think there's
17 two defendants. One's an individual in this instance I'm
18 here on.

19 THE COURT: You're Banyas?

20 MR. BANYAS: Yes, sir.

21 THE COURT: I've seen you before.

22 MR. BANYAS: You have.

23 THE COURT: All right. Now, motion to dismiss, compel
24 arbitration, and stay state court action. It's pending in
25 federal court or something or what?

1 MR. HINES: Your Honor, the title is perhaps ---

2 THE COURT: I'll let you -- don't let me jump ahead.

3 MR. HINES: Well, Your Honor, may it please the court?
4 I, I have -- opposing counsel has a copy of this, and I
5 also have a copy of his.

6 THE COURT: All right.

7 MR. HINES: This is a written hardcopy of what we
8 filed in support of our motion. If I may approach?

9 THE COURT: Yes, sir.

10 MR. HINES: If you'd like to have it? Your Honor, I
11 think one of the things that might have looked perhaps
12 confusing to you right off the bat is the rather cumbersome
13 title of this motion. It's a motion to compel arbitration;
14 that's what we're trying to do. There's nothing pending in
15 federal court. What we have is we have an arbitration
16 agreement that we believe is valid and enforceable, and
17 we're asking the court to procedurally -- effectively to
18 stay the action as to the moving party, send it to
19 arbitration.

20 The circumstances, Your Honor, this is a wrongful
21 death and survival claim in the nursing home context. The
22 resident of the nursing home, Ms. Porter, the suit is being
23 brought by her daughter, Vermell Daniels. Ms. Daniels,
24 also in terms of the facts that are before you here, she
25 signed on December the 27th, 2017, at that time of Ms.

1 Porter's, her mother's, admission to our facility, she
2 signed agreements with the facility, one of which was an
3 admission agreement, one of which, it was a separate
4 agreement. It was an arbitration agreement. The
5 arbitration agreement is a one-page document. It's a
6 separate document from the admission agreement. It is
7 not ---

8 THE COURT: Is it contained in this?

9 MR. HINES: Yes, Your Honor. I think it's Exhibit 2
10 to that. It is, it is contained. Let me -- I would submit
11 to you that the agreement is, on its face, it is a valid
12 arbitration agreement with a slight caveat that I want to
13 address.

14 The, the first part, though, what was not -- this is
15 not part of the caveat -- is that the agreement -- and
16 it's, again, it's one page. We recently received in the
17 form of the opposition to our motion an affidavit from Ms.
18 Daniels. Ms. Daniels in her affidavit, for instance, says
19 that she was never asked if she had authority to sign on
20 behalf of her mother. She was never told what an
21 arbitration agreement meant, things of that nature. Your
22 Honor, Ms. Daniels also says in this affidavit that she was
23 over eighteen years of age and she's of sound mind. Of
24 course, she has an obligation to read ---

25 THE COURT: How old was she?

1 MR. HINES: Well, her mother was nearly eighty.

2 THE COURT: What now?

3 MR. HINES: Her, her mother ---

4 THE COURT: No, no, no. I know you've said she's over
5 eighty three times. Let me ask you. How old was the lady
6 that signed this arbitration?

7 MR. HINES: Oh, Your Honor, I, I ---

8 THE COURT: You don't know?

9 MR. HINES: I don't know.

10 THE COURT: That's okay.

11 MR. HINES: She's the child of a nearly
12 eighty-year-old lady.

13 THE COURT: Go ahead.

14 MR. HINES: But think not perhaps -- forgive me. I
15 might have prompted a question that, that -- through poor
16 exposition of the facts here. My only point was there,
17 just bringing that up, Your Honor, is to say that she --
18 you know, under South Carolina law, we all have an
19 obligation to read contracts before we sign them, and we do
20 -- we're charged with knowledge of their contents. This
21 contract she signed, and it made express representations
22 that she had the authority to bind her mother and her
23 mother's estate. That is simply what she did, and there is
24 -- this is a contract, this arbitration agreement, which is
25 covered by the FAA, not by the state arbitration statute.

1 There's bold language on the face of the document that
2 indicates that she's waiving the right to a jury trial.

3 Now, one thing that I suspect counsel might mention in
4 opposition to this is the document is not countersigned by
5 the facility. This is, I think, a fact that looks more
6 troublesome than it is for us. The enforceability of this
7 arbitration agreement is to be determined under general
8 principles of South Carolina contract law. We've cited
9 this for Your Honor in our materials, and it's a case
10 called *Hedler vs. Reichert*, and the proposition that we
11 would rely on is it reads as follows: It's not always
12 necessary in order to ---

13 THE COURT: Let me ask you this. If neither party
14 signed this agreement, would it still be valid?

15 MR. HINES: If neither party had? No. No, Your
16 Honor.

17 THE COURT: All right. Go ahead.

18 MR. HINES: But the, the party, let's call it the
19 party to be charged -- and I use that language hesitantly
20 because I don't want invoke the statute of frauds sort of
21 thought here because I don't think it's really part of this
22 analysis, but the party against whom the agreement, the
23 agreement is sought to be enforced did sign it.

24 This case indicates that the enforcement may be
25 sufficient if it's signed by one party -- in this case,

1 that would be the representative of the resident -- and
2 accepted, held, and acted upon by the other. So, we have
3 signature by -- on the resident's side through her
4 daughter, Ms. Daniels, and it's accepted, held, and
5 enforced by us, and so that's what we are doing today.

6 THE COURT: All right.

7 MR. HINES: Now, usually some of these cases where
8 they get down ---

9 THE COURT: Just tell me about this case, not some
10 case; just tell me about this specific case, sir.

11 MR. HINES: Yes, sir. The -- in this case, my motion
12 is really, is a -- is an alternative, alternative relief
13 that I'm asking for, for you today. The number one agenda
14 item for us is we'd ask the court, as I mentioned before,
15 is stay, compel the arbitration. If the court is not
16 inclined to do that, and I, I could understand why the
17 court may not be, candidly. What we are asking for is
18 leave to conduct discovery into issues that bear upon ---

19 THE COURT: Well, if it proceeds along its regular
20 course, you'll have every opportunity in the world to
21 conduct discovery, sir, in the regular course of business,
22 wouldn't you?

23 MR. HINES: Your Honor, and, and that would be, that
24 would be fine by us but for one problem. And what we are
25 asking is for your help in avoiding that problem is that we

1 would find ourselves, at least potentially, in a catch-22
2 situation which would be you proceed to use discovery tools
3 to prove your right to arbitrate and then open yourself up
4 to a waiver argument.

5 And that's, that is really maybe the rub that is --
6 I'll have to admit to Your Honor. In terms of proving that
7 this document was on its face -- indicated that -- until we
8 received an affidavit last week in opposition to the motion
9 -- by the way. I'm not saying that to, to suggest anything
10 untoward about the timing of the affidavit. I'm just
11 saying until we got the opposition to our motion, we had a
12 facially valid agreement. We don't have that now.

13 But I have -- for instance, counsel just previously in
14 the motion for summary judgment context was mentioning how
15 there was an affidavit that he had not had opportunity to
16 examine the affiant about. Well, that's, that's where we
17 are here, Your Honor. We haven't, haven't had that
18 opportunity, and we'll -- if we avail ourselves of those
19 tools of discovery, it's a catch-22. We try to prove our
20 right through appropriate means, and there we are with the
21 -- giving rise to the comeback of yeah, you got them to
22 arbitrate. What are you doing using the tools of civil
23 litigation to -- you waived your -- and so, Your Honor, I
24 would be happy to cut to the chase and say if Your Honor
25 was inclined to allow us in some appropriately limited way

1 -- and I say that meaning that we're not asking for carte
2 blanche. We're certainly not asking for anything dilatory,
3 but some, some way to have an assurance that we can engage
4 in reasonable discovery on this point without opening
5 ourselves up basically, you know, to win -- to lose for
6 winning essentially. You know, to have this untenable
7 situation in terms of the discovery loses your point, and
8 that's what we're trying to avoid.

9 THE COURT: All right.

10 MR. HINES: Thank you, Your Honor.

11 THE COURT: Thank you, sir.

12 Yes, sir.

13 MR. BANYAS: Thank you, Your Honor. Brad Banyas from
14 the Hewett Law Firm. I have also got a printed out copy of
15 my memo if you'd like me to pass it up.

16 THE COURT: Sure. I'll be glad to look at it.

17 MR. BANYAS: We had filed this. Thank you.

18 Procedurally, just so you're kind of aware of where we're
19 at with this case, it's a nursing home case. We filed the
20 notice of intent in October of 2018. We participated in an
21 in-person mediation in March of this year, which resulted
22 in an impasse. So, we filed the summons and complaint
23 April 25th of 2019; they filed their answer shortly after
24 that. We served discovery. I did get a, a request for an
25 extension to answer that discovery by the defendants, which

1 was granted. Then we received about thirty pages of
2 objections. So -- because they said that they wanted to
3 compel their right to arbitration.

4 Your Honor, I've handled a lot of these nursing home
5 cases. That's about all my practice is, and I see this a
6 lot. What we're really having to look at with this
7 arbitration agreement is whether or not the person who
8 signed the arbitration had the capacity to do so, and in
9 this case ---

10 THE COURT: That's why I tried to find out the age of
11 the lady, mental. Go ahead.

12 MR. BANYAS: So, that's exactly right. So, Ms.
13 Porter, when she went into the facility, she had had a
14 brain tumor removed, and that's why she went into
15 rehabilitation. Her daughter signed her in. She signed
16 the admission agreement; she signed the arbitration
17 agreement. However, the problem that we have here is that
18 Vermell Daniels, Ms. Porter's daughter, did not have a
19 durable power of attorney. She did not have
20 court-appointed guardianship. Ms. Porter had never been
21 declared incapacitated. Whether or not she had the
22 capacity to contract at that point, I really can't say.
23 You know, she did have a, a brain operation shortly before
24 she went in, but the fact remains is Ms. Daniels never had
25 a durable power of attorney or any sort of legal authority

1 to bind Ms. Porter or her estate, now that she has passed
2 away, to arbitration.

3 You know, I, I've consented hundreds of times in these
4 sort of cases where we have a valid power of attorney. In
5 this case, we don't. I've provided the court with an
6 affidavit from Ms. Daniels that states in part:

7 I've never been the legal guardian of Annie
8 Porter, nor have I had that power conferred on me
9 by any power of attorney, court-appointed
10 guardianship, or conservatorship.

11 She was never asked by any Midlands Health employee if
12 she was her legal guardian or if she had legal authority to
13 bind to her to arbitration, which she did not. She was not
14 explained to by any Midlands Health and Rehabilitation
15 employee what an arbitration agreement even was.

16 I cited some, some cases that our, our Supreme Court
17 has had in South Carolina that says -- and, and I'm happy
18 to go into nuanced details if you would like. But
19 basically they -- there's been some case law on this here
20 already where admissions agreements and arbitration
21 agreements don't merge. An admission agreement to a
22 healthcare facility is a medical decision and the reason --
23 and the, and the South Carolina state legislature has
24 codified some specific instances where a family member can
25 consent to have medical treatment and there's, there's good

1 reason for that. Obviously if somebody does not have the
2 capacity to consent to any sort of medical treatment, we
3 want to have somebody to be able to do that, but it does
4 not extend to making legal decisions. If you want someone
5 to be able to make legal decisions on your behalf, that's
6 why we have a power of attorney, and in, and in this case,
7 Ms. Porter did not have any sort of power of attorney over
8 -- or did not have any power of attorney over her that
9 would have given Ms. Daniels any authority to bind her to
10 arbitration. And, and because of that, there's not an
11 enforceable arbitration agreement.

12 I've argued some cases before where -- and, and Mr.
13 Hines brings up the fact that the facility does not have a
14 signature on there. I'm not overly concerned about that
15 because Ms. Daniels did not have legal authority to bind
16 anybody to arbitration.

17 We would object to any additional discovery to go
18 forward. You know, we served our discovery responses and
19 our discovery requests in this case back in June. Again,
20 they asked for a discovery extension, which we gave, and
21 then we got a bunch of objections citing that they didn't
22 want to waive their right to arbitration. I understand
23 that, but again, Your Honor, the *Coleman* case and the
24 *Thompson* case which I cited in my brief really kind of set
25 forth this and I -- again, if Ms. Porter had signed the

1 arbitration agreement, we wouldn't be here because I would
2 consent and say yes, it's valid thing. If Ms. Daniels had
3 power of attorney that was in place prior to her signing
4 this, we wouldn't be there because we would consent to it.

5 THE COURT: I understand.

6 MR. BANYAS: In this instance, Your Honor, I, I do not
7 believe that we should be compelled to arbitration simply
8 because the arbitration agreement that was signed is
9 invalid.

10 THE COURT: I understand.

11 Yes, sir.

12 MR. HINES: Thank you, Your Honor. I think I need to
13 clarify a couple of points, and I do appreciate very much
14 the court's indulgence with the time. These arguments, I
15 realize I've argued a number of them recently, and they can
16 be a bit tedious, they can, because there's a lot of ground
17 to cover factually and legally, and I say that to say I
18 appreciate the court's patience. I'll do my best not to
19 try it.

20 The first thing I think needs to be clarified is that
21 Your Honor had asked -- I think very understandably --
22 about the age of the affiant. And what I want to make
23 clear, and I hope Mr. Banyas might be in a position to, to
24 clear this up if there is any question. I do not believe
25 there's any question at all in dispute that the affiant I'm

1 talking about of the age of -- this is a copy, Your Honor.
2 This is in your materials. The -- this is the arbitration
3 agreement, one page. Vermell Daniels signed this on behalf
4 of her mother. Her mother was being admitted to the
5 facility. Her mother is Ms. Porter. I don't think there's
6 any question about the competency or capacity of Ms.
7 Daniels, the daughter of Ms. Porter, or that she's a minor.
8 Her mother was nearly eighty. I, I do not know the age of
9 Ms. Daniels, but I didn't want to give the impression that
10 there was a question about the competency of Ms. Daniels.
11 The question is whether or not she can bind her mother and
12 her mother's estate.

13 Now, the -- there was a point that was made about,
14 hey, she doesn't have a power of attorney. She does not;
15 there's not one that I'm aware. However, that's just not
16 the end of the inquiry. It would certainly make it easier
17 if she had one. I would agree. However, when I looked,
18 this is a case, very recent case from our Supreme Court
19 just to give the court the flavor of this. South Carolina
20 has recognized several theories that could bind
21 nonsignatories -- in this case, we're talking about Ms.
22 Porter and more particularly her estate, the nonsignatory
23 -- to arbitration agreements under general principles of
24 contract and agency law, including incorporation by
25 reference, assumption, agency, veil piercing/alter ego, and

1 estoppel. I'll have to admit to the court today that if,
2 if -- I, I am not able to prove agency, not today, not
3 without discovery, and the reason I'm not, Your Honor, is
4 because of this.

5 This is the affidavit of Ms. Daniels which was just
6 submitted recently in opposition to our motion. You have
7 this as well; this is in the material provided by the
8 plaintiff. Among the things that this says is:

9 I've never been the legal guardian of Annie
10 Porter, nor have I ever had that power conferred
11 on me by a power of attorney, or court-appointed
12 guardianship, or conservator. I was never asked
13 by Midlands Health and Rehabilitation if I was
14 Annie Porter's legal guardian, nor if I have
15 legal authority to bind her -- arbitration, which
16 I did not.

17 Well, if we're not able to conduct discovery, Your
18 Honor, this becomes a take-my-word-for-it situation. And
19 this is certainly no reflection on counsel, nor is it a
20 reflection, for that matter, on Ms. Daniels, but this -- we
21 will have a situation where we bring to this court a
22 facially valid arbitration clause because on its face, the
23 arbitration clause right here, right before Ms. Daniels
24 signed it:

25 By his/her signature below, the executing party

1 represents that he/she has authority to sign on
2 the resident's behalf so as to bind the resident,
3 as well as the representative.

4 And right above that is in bold letters:

5 I agree that I am giving up and waiving my right
6 to a jury trial.

7 Now, she certainly has the ability to come in and
8 contest it, as she's contested it, but all she needs to do
9 was contest it with an, with an affidavit that I can't
10 check. We lose every time, and I submit to Your Honor
11 that's not the rule. And so I'm not able to prove agency
12 today, not under, not under a theory of actual agency or
13 even agency, apparent agency. And of course we know the
14 law is that apparent agency really looks at the
15 communications, if any, between the principal and third
16 parties -- and so -- but here, number one, the deposition
17 of Ms. Davis is of significant interest. And perhaps that
18 leads us to some other areas of legitimate inquiry to
19 determine what the relationship was.

20 But, Your Honor, the biggest push that I'm efforting
21 to make today -- and we'll stand by the arguments in our
22 brief on what's there in terms of asking the court to go
23 ahead and grant or compel arbitration. But the only
24 grounds I could see in fairness that we could ask the court
25 to, to grant arbitration on the current record would be one

1 on the basis of estoppel.

2 And I could -- and basically the way that works, Your
3 Honor, is to say this. You're not hearing any, any
4 questioning, any argument from opposing counsel that Ms.
5 Davis didn't have the ability to sign the admission
6 agreement because she did sign that. If she hadn't signed
7 the admission agreement, she -- her mother wouldn't have
8 been admitted to our facility.

9 Now, I heard Mr. Banyas say, Your Honor, I've had some
10 of these and really what happens is these two agreements
11 don't merge. Well, Your Honor, sometimes they don't merge,
12 but sometimes they do. It depends on the facts, and what
13 we've presented to you there, I think it's the, it's the
14 first -- I think it's the third, fourth exhibit to that
15 packet. It's a case called -- make -- it's called *Price*
16 where merger was, was found by a judge, Judge, oh goodness,
17 Henderson perhaps. In any event, what merger says, and
18 this is in these cases, *Coleman*, *Thompson*, and *Hodge*,
19 recent cases about this, this situation from our Court of
20 Appeals and Supreme Court, that when the parties, when the
21 same parties at the same time signed agreements for the
22 same purposes, they are presumed to merge and to be
23 construed together unless there's evidence showing to the
24 contrary.

25 Now in some of these cases, Your Honor -- in fact, all

1 those three cases, the -- our appellate courts upheld
2 findings by the trial court that there was not a merger,
3 but they did that with specific facts. They didn't just
4 say blanket carte blanche there's no such thing as a merger
5 because they, they looked at certain facts, and I never --
6 for instance, in every one of those cases where they found
7 there was not a merger, they noted that the arbitration
8 clause in every one of those cases -- excuse me,
9 arbitration agreement, you had the same situation generally
10 speaking. I should say the specifics are different, but
11 generally speaking you had an arbitration agreement in
12 those cases and an admissions agreement. The arbitration
13 agreements in those cases had a provision where within
14 thirty days, you could just revoke it.

15 We don't have that here, and I, I could see the
16 court's point is that they say why the heck? You have the
17 ability to just revoke and drop this contract all out of
18 existence, and so that, that seems -- I could see where
19 the, the court finds a separatedness between the two if one
20 of them could just fall away with the other one still
21 intact. We don't have that here, Your Honor.

22 There are other distinctions I could get into, and I
23 know I indicated I didn't want to try the court's patience,
24 and I know I'm pushing it. I -- but there's so much nuance
25 here, Your Honor, in factual detail and legal cases, legal

1 matters, and it, and it occurs to me it really puts --
2 well, it requires, candidly, a whole heck of a lot out of a
3 trial judge who's got a docket full of motions today to try
4 to get into this in any kind of meaningful way. And I
5 think the best way we could present this to Your Honor or
6 any judge for decision, you know, would be on record.

7 THE COURT: Well, thank you for your presentation,
8 sir.

9 Anything further?

10 MR. BANYAS: Again, Your Honor, I just renew my
11 arguments. I, I'll even go as far as saying that there was
12 a ---

13 THE COURT: Motion to dismiss, to compel arbitration
14 I'll respectfully deny. Prepare me an order along those
15 lines. Reflect your arguments. You can incorporate those
16 also. Thank you, gentlemen very much. Good luck to you.

17 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON
THE 26TH DAY OF AUGUST, 2019.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/S/ELIZABETH B. HARRIS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

MAY 18TH, 2020

In The Court of Common Pleas
Fifth Judicial Circuit
2019-CP-40-02295

Transcript of Record

February 13, 2020
Columbia, South Carolina

The Honorable L. Casey Manning, Judge

Bradley Hunter Banyas, Esquire
Attorney for the Plaintiffs

Russell G. Hines, Esquire
Attorney for the Defendants

Elizabeth B. Harris, CVR-M-CM
Circuit Court Reporter

I N D E X

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E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>Ev.</u>
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No exhibits introduced.

1 THE COURT: *Daniels vs. South Carolina at Columbia,*
2 *LLC*, and if I read this correctly, a motion to compel, a
3 motion to alter or amend, and/or reconsider?

4 MR. BANYAS: That's correct, Your Honor. That is
5 correct, Your Honor.

6 THE COURT: Is this is a motion that I ruled on or
7 what?

8 MR. HINES: This is a motion that you ruled on.

9 THE COURT: Okay. All right.

10 MR. BANYAS: This was back in August -- oh, it was
11 August 26th of 2019 is when we had this hearing.

12 THE COURT: August 26, 2019. It fell between the
13 cracks? What happened?

14 MR. HINES: No, Your Honor. You ruled on the motion.
15 I don't mean to speak out of turn. If I could clarify, if
16 I may? This is Russ Hines.

17 THE COURT: Yes, sir.

18 MR. HINES: For the, for the moving party here with
19 respect to the motion to reconsider.

20 THE COURT: Okay. All right.

21 MR. HINES: And, Your Honor, Mr. Banyas is right. The
22 exact dates slipped my mind, but we made a motion to compel
23 arbitration and it was heard. Your Honor heard it and
24 denied it, and in response to that order, we made then our
25 motion to reconsider, and it's just taken -- you know, with

1 the volume of ---

2 THE COURT: Okay. That's fine. So, this is the
3 original motion to reconsider?

4 MR. HINES: Correct.

5 THE COURT: All right. Okay. That's fine.

6 MR. HINES: This is the motion to reconsider.

7 THE COURT: You ready? Is everybody ready?

8 MR. HINES: I'm ready.

9 MR. BANYAS: Yes, Your Honor.

10 THE COURT: I vaguely remember it. Yes, sir, you may
11 proceed.

12 MR. BANYAS: Thank you, Your Honor. May it please the
13 court? Again, Russ Hines for the defendant, THI South
14 Carolina at Columbia, LLC, DBA Midlands Health and Rehab
15 Center. Your Honor, I understand that time is of the
16 essence this afternoon, and I would speak ---

17 THE COURT: I'll put it this way. Say what you need
18 to say. We're not in a big rush. Judge Benjamin needs the
19 services of ---

20 You don't mind, do you?

21 COURT REPORTER: No, sir.

22 THE COURT: Okay. But, I mean, don't leave anything
23 out. I'll let you supplement the record later with
24 anything. If you feel rushed, I'll give you the chance to
25 do so, okay?

1 MR. HINES: Thank you, Your Honor.

2 THE COURT: Yes, sir.

3 MR. HINES: And if I might approach?

4 THE COURT: Yes, sir.

5 MR. HINES: I can hand up a copy of -- written copy of
6 what was filed. This is the same thing that's been on
7 file.

8 THE COURT: Okay. All right.

9 MR. HINES: But just in case it helps.

10 THE COURT: So, this is a 59(e) basically?

11 MR. HINES: Yes, Your Honor, that's exactly what it
12 is.

13 (A PAUSE.)

14 THE COURT: Yes, sir.

15 MR. HINES: Thank you, Your Honor. Again, may it
16 please the court? Your Honor, it occurs to me, as it
17 always does with a motion like this, that they can be
18 perhaps somewhat irksome to the court, having already
19 obviously given thought to the, to the matter and ruled on
20 it. And so I, I -- my point in prefacing that is to say
21 also with -- is that as I understand the rules with respect
22 to preserving a record in the, in the possibility there's
23 a ---

24 THE COURT: If I left anything out of the order, it
25 needs to be included.

1 MR. HINES: That's right.

2 THE COURT: I understand.

3 MR. HINES: And that's the main purpose of this, of
4 this order, and I can -- or this motion, rather. There's
5 some items, I mean, they're set forth here in the order I
6 at least need to make a record taking issue with. The
7 first one is a, is a legal proposition that's -- that the
8 order includes. It says:

9 The legal consequences of an agent's actions can
10 only be attributed to the principal when the
11 agent has actual or apparent authority.

12 And so -- and also my suggestion is that more
13 generally, I guess, that the order would rely on a more
14 limited view of the theories of enforceability of the
15 arbitration agreement like this than -- respectfully, I
16 think the law is more limited than the law, in fact, is.

17 And just by way of recapping, Your Honor -- I realize
18 it's been quite a time and many motions for you ago since
19 this was argued. This is a medical malpractice case in the
20 nursing home setting, in the -- in skilled care nursing,
21 skilled nursing facility. The resident and the decedent,
22 her name is Ms. Porter, Annie Porter. When she was
23 admitted to this facility, our facility, her daughter, Ms.
24 Daniels, Vermell Daniels, signed an arbitration agreement
25 and that is the arbitration agreement that we are seeking

1 to enforce. She did that in conjunction with the admission
2 of Ms. Daniels -- excuse me, her mother, Ms. Porter, into
3 the facility. The arbitration agreement obviously was not
4 signed by Ms. Porter herself. That's where we have sort of
5 the rub here as to, as to why there's a controversy.

6 Now our position, and I think it's a well-founded one
7 with South Carolina law, and I would point to a case that
8 we cite called *Wilson vs. Willis*, and if the, if the court
9 will indulge me, this is just one of the main points I want
10 to get to up front.

11 South Carolina has recognized several theories that
12 can bind nonsignatories to arbitration agreements under
13 general principles of contract and agency law, including
14 incorporation by reference, assumption, agency, veil pierce
15 -- excuse me, veil piercing/alter ego, and estoppel. The
16 point of that is I want, I, I -- well, wanted to make sure
17 that, that we at least make the point that we do disagree
18 with the idea that the only way to skin this cat, so to
19 speak, is through an agency that's actual or apparent, that
20 we do have at our disposal -- and this is another point
21 that's made in this motion, the ability to argue other
22 things, not least what's called merger and equitable
23 estoppel.

24 And if Your Honor -- I will -- it's set forth in the
25 brief in which-- you know, in our prior filings. The order

1 for one reason or another, it does not actually address
2 merger, the merger estoppel point we made. And I say
3 merger estoppel, and it's sort of a one-two punch, and the
4 reason is is we have to start with the merger of two
5 things: the admission agreement and the arbitration
6 agreement.

7 And the way the argument flows is that Ms. Daniels
8 signed, in the course of admitting her mother, both an
9 admission agreement and an arbitration agreement. In the
10 arbitration agreement itself, it contains representations
11 that the signer of this agreement, Ms. Daniels, has all due
12 authority to sign it and bind the resident. That's what it
13 represents on the face of the agreement.

14 THE COURT: All right, sir.

15 MR. HINES: Now, she has submitted -- and this was in
16 opposition to our motion originally, this affidavit. It's
17 already part of the court's record, and it's Ms. Daniels
18 and she's saying well, you know, I didn't have authority,
19 and no one ever asked me if I did, and I, I didn't know
20 what an arbitration agreement was.

21 The, the point I would note there is that's -- you
22 know, she certainly is free to say that now, but she did
23 represent at the time that she had that authority, and I'm
24 not suggesting to the court ---

25 THE COURT: What representation was made at that time

1 upon the signing that she had the authority to sign in
2 place of her mother?

3 MR. HINES: Your Honor.

4 THE COURT: I mean, is it general admission agreement
5 or appearance is what you're relying on, I think.

6 MR. HINES: Well, I'm, Your Honor, specifically I'm
7 relying on the arbitration agreement. This is a part of
8 the record. If you'd like, I could hand you up a copy of
9 the agreement. It's a one page ---

10 THE COURT: I think I saw it the first time. I'd be
11 happy to look at it again, sir.

12 MR. HINES: Your Honor, the very last sentence is
13 where I will be looking.

14 THE COURT: All right.

15 (A PAUSE.)

16 MR. HINES: And, Your Honor, Your Honor, I know that
17 you have already read it before. I, I -- well, before I
18 get to it, but to -- obviously that's, that's where we're
19 coming from, and also which is -- you know, the sentence
20 says by her:

21 His or her signature below, the executed party
22 represents that he/she has the authority to sign
23 on resident's behalf so as to bind resident, as
24 well as the representative.

25 And there's also language -- actually, the first

1 paragraph which, you know, also identifies the signatory
2 that has the resident's durable power of attorney and so
3 forth.

4 Now -- which, Your Honor, my point there is not to say
5 that gets us to the finish line because that obviously is
6 only the representation of, of, of Ms. Daniels and not her
7 mother, Ms. Porter. And Ms. Daniels has now disavowed
8 that, but we haven't had an opportunity to check into that
9 by any sort of deposition of Ms. Daniels. I mean,
10 otherwise, if we didn't have this affidavit from Ms.
11 Daniels, we'd have a facially valid arbitration agreement.
12 It would say all the things that it needs to say, and then,
13 you know, we would be in the catbird's seat. However, she
14 has said this.

15 Now, the point is, and my fallback position, Your
16 Honor, is to ask for discovery into issues that would have
17 -- in particular, Ms. Daniels's deposition. And the reason
18 I ask the court for that rather than simply doing it is
19 because we're in a precarious position where we're moving
20 to compel arbitration, of not wanting to, in the process of
21 proving our right to arbitrate, waive our right to
22 arbitrate by availing ourselves of the tools of litigation
23 and then being accused of saying hold on. You can't have
24 it both ways. You can't discover the case through
25 litigation discovery rules and then say no, no. we have to

1 do arbitration. That's why we're asking the court that as
2 a fallback position.

3 Getting back, this is -- and I appreciate Your Honor's
4 indulgence on this. It's a bit complicated, the argument.
5 On the merger point, the way it works one-two is she signs,
6 Ms. Daniels for her mother, admission agreement and
7 arbitration agreement. Our position is that those two
8 documents ---

9 THE COURT: Which is more important, the admission or
10 the arbitration?

11 MR. HINES: Well, Your Honor, in this, under this ---

12 THE COURT: No, no. Which is more important, the
13 admission or the arbitration?

14 MR. HINES: At the, at the time of the admission,
15 well, Your Honor ---

16 THE COURT: No, no, no. Which is more important, the
17 admission or the arbitration?

18 MR. HINES: More important to what end, Your Honor?

19 THE COURT: What?

20 MR. HINES: More important to what end, Your Honor?

21 THE COURT: Never mind. Continue on.

22 MR. HINES: Okay. Well, Your Honor, I'll say it like
23 this. Obviously we couldn't have any argument or there'd
24 be no admission here. We, we, we wouldn't have a chance.
25 So in that respect ---

1 THE COURT: If she had refused to sign the arbitration
2 agreement, would she have been admitted, yes or no?

3 MR. HINES: Yes, she would have.

4 THE COURT: Okay. Go ahead.

5 MR. HINES: It's not mandatory.

6 Now, Your Honor, there's a case, case called *Coleman*
7 *vs. Mariner Health*. It's probably the biggest one that's
8 set this -- in the context of arbitration agreements and
9 admission agreements. It dealt with ---

10 THE COURT: You said Marion Health?

11 MR. HINES: *Mariner Health* and it's, it's essentially
12 -- there are factual inferences in that case that are
13 important, but what is the same here is we're dealing with
14 an elder -- a skilled nursing care facility, admission
15 agreement, arbitration question, and the question of
16 merger. And merger means are the documents, even though
17 they're two instruments, do they create one contract? Now,
18 we say that they do.

19 And the *Coleman* court, our Supreme Court, said at
20 least our legal point is one that is cognizable, which is
21 that when you have multiple instruments that are executed
22 by the same parties at the same time for the same purpose
23 in the course of the same transaction -- which the *Coleman*
24 court said in that case admission agreement and arbitration
25 met all those criteria -- the documents are presumed to be

1 intended to merge under ---

2 THE COURT: Well if that's the case, then you're on
3 solid ground even despite my ruling then, aren't you?

4 MR. HINES: Well, Your Honor, in candor to you, I have
5 to, I have to acknowledge that.

6 THE COURT: Look. Let me tell you something. I make
7 decisions. They're appealed routinely, and I don't worry
8 about it. Anything else you want to add? I'm going to
9 give you a chance to supplement your arguments today with
10 written memoranda.

11 I'd like to hear from you, sir.

12 MR. BANYAS: Thank you, Your Honor. I, I won't get
13 into it very much. This is a case where Ms., Ms. Daniels
14 did not sign the arbitration -- I mean, I'm sorry, Ms.
15 Porter did not sign the arbitration agreement. There's no
16 evidence to say that ---

17 THE COURT: That she was unable to do so.

18 MR. BANYAS: --- she was unable to do so.

19 THE COURT: She wasn't consulted later on. They had
20 plenty of time to do it. Am I right so far?

21 MR. BANYAS: You're exactly right, Your Honor. One
22 thing I do want to point out. Nothing against Mr. Hines.

23 THE COURT: No, no. He's just doing his job.

24 MR. BANYAS: He's doing his job, but I've got a lot of
25 cases against this facility.

1 THE COURT: Yes.

2 MR. BANYAS: All across the state, and I'm running
3 into the same thing every single time we do this, okay? We
4 filed this case back in April of last year. Almost ten
5 months later, I don't have any discovery at all, and at
6 this point I don't know what else I can do.

7 We, we filed this case. The defendants asked for an
8 extension to answer discovery, which I granted, and then
9 they filed this motion to compel arbitration. And so for
10 them to sit there and say, oh, we don't have the
11 opportunity to do discovery -- they've never asked. They
12 have never once said will you agree to allow us to conduct
13 discovery without waiving our right to arbitration? They
14 have never once asked that in any of these cases that I've
15 got with them. So I'm, I'm just kind of at wit's end
16 because I don't know what else I can do, and it's
17 prejudicial to my client.

18 THE COURT: Well, I've heard your arguments about
19 reconsideration. I'll give y'all a chance, if you want to,
20 to submit proposed orders on this issue of 59(e), and I'll
21 make a decision, and we all can go home, or y'all can go
22 appeal it, whatever you want to do.

23 MR. BANYAS: I don't want to appeal it.

24 THE COURT: I know.

25 MR. BANYAS: I think your ruling is correct.

1 THE COURT: How many days do y'all, five days? Five
2 days, proposed orders. Thank you, gentlemen.

3 **--- END OF TRANSCRIPT OF RECORD ---**

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON
THE 13TH DAY OF FEBRUARY, 2020.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/S/Elizabeth B. Harris, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

MAY 18TH, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
VERMELL DANIELS AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ANNIE PORTER,	)	CASE NO. 2019-CP-40-2295
	)	
	)	
PLAINTIFFS,	)	DEFENDANT THI OF SOUTH CAROLINA AT COLUMBIA, LLC D/B/A
	)	MIDLANDS HEALTH &
vs.	)	REHABILITATION CENTER'S MOTION
	)	TO DISMISS PLAINTIFF'S COMPLAINT,
THI OF SOUTH CAROLINA AT COLUMBIA, LLC D/B/A MIDLANDS HEALTH & REHABILITATION CENTER AND MATT STANLEY ,	)	COMPEL ARBITRATION AND STAY
	)	STATE COURT PROCEEDINGS
	)	
DEFENDANTS.	)	
	)	

TO: D. NATHAN HUGHEY ESQUIRE, ATTORNEY FOR PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, THI of South Carolina at Columbia, LLC (hereinafter referred to as "this Defendant" or the "Facility"), by and through its undersigned attorneys, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order dismissing this action pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure and compelling this matter to arbitration, or, alternatively, staying the action pending arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq.

Plaintiff has sued this Defendant for Negligence, Negligence per se, Fraud, Violation of the South Carolina Unfair Trade Practices Act, Wrongful Death, and Survival pursuant to the Plaintiff decedent's residency at the Facility. However, prior to being admitted to the Facility, Plaintiff's decedent entered into an Arbitration Agreement with the Facility. (See Arbitration Agreement attached as **Exhibit A**).

The parties to the Arbitration Agreement agreed that the South Carolina Uniform Arbitration Act would not apply; rather, the arbitration would be governed by the Federal Arbitration Act, because the services and reimbursement thereof to be provided to the Plaintiff upon his admission to the facility involved interstate commerce. In accordance with the terms of this agreement, the Defendant respectfully requests that this matter be compelled to arbitration.

Alternatively, this Defendant requests that these proceedings be stayed pending the outcome of arbitration pursuant to Section 3 of the FAA. Defendant respectfully requests that this Honorable Court specifically stay any further requirement to file any responsive pleading as well as any requirement to respond to any other motions or discovery filed or served by Plaintiff while the current motion is pending.

This Motion and Petition are supported by the attached Arbitration Agreement, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

YOUNG CLEMENT RIVERS, LLP

By: s/D. Jay Davis, Jr.

D. Jay Davis, Jr.

Perry M. Buckner, IV

J. Joseph Owens

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(843) 720-5425; jowens@ycrlaw.com

*Attorneys for the THI of South Carolina at
Columbia, LLC d/b/a Midlands Health &
Rehabilitation Center*

Charleston, South Carolina

Dated: June 5, 2019

FACILITY - RESIDENT/REPRESENTATIVE ARBITRATION AGREEMENT

This Agreement is made between Midlands Health and Rehabilitation Center ("Facility"), its agents, employees and servants, and Annie Porter ("Resident") or (Resident's Durable Power of Attorney for Health Care)"/"Resident's Legal Guardian""/"Resident's Responsible Party" hereinafter collectively ("Representative"). It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.

It is understood by Resident/Representative that he/she is not required to use the aforesaid Facility for Resident's healthcare needs and that there are numerous other health care providers in the State where Facility is located that are qualified to provide such care to Resident.

It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules.

The parties shall select an arbitrator from a panel having experience and knowledge of the health care industry. If the parties cannot reach a mutual decision on the selection of an arbitrator, the parties agree that an arbitrator shall be selected by the Court. The arbitrator shall hear and decide the controversy, and the decision shall be binding on all parties, and may be enforced by a court of competent jurisdiction.

The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law.

I understand and agree that I am giving up and waiving my right to a jury trial.

This Agreement shall remain in effect for all care rendered at Facility and shall survive any termination or breach of this Agreement or the Admission Agreement. By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative.

Resident/Representative Signature

Date _____

Printed Name of Resident/Representative

Authorized Agent of Facility

Date _____

Printed Name & Title

Original: Business File • Photocopy: Resident/Representative

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
VERMELL DANIELS AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ANNIE PORTER,	)	CASE NO. 2019-CP-40-2295
	)	
	)	
PLAINTIFFS,	)	DEFENDANT THI OF SOUTH CAROLINA AT COLUMBIA, LLC D/B/A
	)	MIDLANDS HEALTH &
vs.	)	REHABILITATION CENTER'S
	)	MEMORANDUM IN SUPPORT OF
THI OF SOUTH CAROLINA AT COLUMBIA, LLC D/B/A MIDLANDS HEALTH & REHABILITATION CENTER,	)	MOTION TO DISMISS, COMPEL
	)	ARBITRATION, AND STAY COURT
	)	PROCEEDINGS
	)	
DEFENDANT.	)	
	)	

TO: D. NATHAN HUGHEY AND BRADLEY H. BANYAS, ATTORNEYS FOR PLAINTIFF:

COMES NOW the Defendant, THI of South Carolina at Columbia, LLC (hereinafter “this Defendant”, “the Facility” or “Midlands”) and submits the following Memorandum in Support of its Motion to Dismiss, Compel Arbitration, and Stay Court Proceedings pursuant to the Federal Arbitration Act (“FAA”) 9 U.S.C. § 1, et seq., and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. Upon admission to the Facility, this Defendant and Plaintiff entered into an Arbitration Agreement. The Arbitration Agreement, by its terms, covers all allegations raised in the Complaint. Accordingly, and for the reasons set forth herein, this Defendant respectfully requests that Plaintiff’s Complaint be dismissed and that this matter be compelled to arbitration, or in the alternative, stayed pursuant to 9 U.S.C. §1, et seq.

FACTUAL BACKGROUND

Annie Porter was admitted to Defendant’s Facility on December 22, 2017 for skilled nursing care after undergoing surgery to remove a brain tumor at Palmetto Health Hospital. Ms. Porter was

admitted with the assistance and aid of her daughter, the named Plaintiff, Vermell Daniels. Upon admission, Ms. Porter was 77 years old and was suffering from a host of medical problems, including acute hypoxia, kidney failure, congestive heart failure, pneumonia, and Type 2 diabetes. Upon her admission, Ms. Porter entered into a number of contracts with Midlands. The contracts were each signed by the Plaintiff, as representative of Ms. Porter, on December 22, 2017. These executed contracts included an Admission Agreement and Arbitration Agreement (Attached hereto as **Exhibits 1 and 2** respectively). Based on the Admission Agreement and pursuant to the agreements set forth therein, Ms. Porter was admitted to the Facility and received skilled nursing care and treatment. During her fifteen month stay at the Facility, Ms. Porter accepted the benefits of the contracts entered into on her behalf by her representative, Ms. Daniels. Such benefits included, but are not limited to, Ms. Porter's admission to the Facility and her receipt of the skilled nursing care provided therein. Ms. Porter has never challenged any agreement's validity until now.

Upon admission, Ms. Daniels explicitly represented that she was authorized to admit Ms. Porter to the Facility and execute necessary documents on her behalf, including an Arbitration Agreement. Indeed, the very first provision of the Admission Agreement states that all information provided, including Ms. Daniels' authority to bind her mother to certain agreements, is truthful and correct.

The Arbitration Agreement at issue defines Midlands as the "Facility," and Ms. Porter as the "Resident". Further, Ms. Daniels signed the Arbitration Agreement as Ms. Porter's "Representative." The relevant provisions of the Arbitration Agreement state the following:

It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights

granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules.

The Arbitration Agreement further provides:

The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law.

Regarding Ms. Daniels' authority to sign on behalf of her mother, the Arbitration Agreement states:

By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative.

The Arbitration Agreement was executed by Ms. Daniels as "Representative" and Blake McClure, the Admissions Director for the Facility, was listed as an authorized representative for the Facility. On April 25, 2019, Plaintiff instituted the instant lawsuit asserting claims which fall directly within the scope of the Arbitration Agreement because they are related to Ms. Porter's stay at the Facility and to the provision of care to her. On June 5, 2019, this Defendant filed the instant Motion to enforce the terms of the Arbitration Agreement. For the reasons set forth below, the Court must grant this Defendant's Motion and submit Plaintiff's claims to arbitration pursuant to the valid and binding Arbitration Agreement that Plaintiff executed on her mother's behalf upon admission to the Facility.

ARGUMENT AND CITATION TO AUTHORITY

I. POLICY IN FAVOR OF ARBITRATION

There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir.1997). Indeed, both federal and state policy favor arbitrating disputes. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995) (“The policy of the United States and this State is to favor arbitration of disputes.”). “This preference for arbitration has manifested itself in legislation and judicial decisions supporting the expeditious appeal of decisions denying an application to compel arbitration.” *Towles v. United HealthCare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999). Therefore, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Id.*, 338 S.C. at 41, 524 S.E. 2d at 846 (internal quotations and citations omitted).

II. THE FEDERAL ARBITRATION ACT GOVERNS THE ARBITRATION AGREEMENT AND THE CLAIMS ASSERTED BY THE PLAINTIFF IN THE COMPLAINT

As an initial matter, the Arbitration Agreement, by its terms and by law, is governed by the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16. *See* Ex. A; *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014)(holding that skilled nursing facility admission agreements and residencies implicate interstate commerce, and thus are governed by the FAA). Under the FAA, any written provision in “a contract evidencing a transaction involving commerce” providing that disputes be settled by arbitration is “valid, irrevocable, and enforceable.” 9 U.S.C. § 2. The language of the Act is mandatory and requires the enforcement of all arbitration agreements. Section 4 of the FAA provides, in pertinent part, as follows:

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.*

9 U.S.C. § 4 (emphasis added). “By its terms, the act leaves no place for the exercise of discretion by a... court, but instead mandates that... courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). While a court a court may invalidate an arbitration agreement based on “generally applicable contract defenses,” it may not invalidate an arbitration agreement on legal rules that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423, 197 L. Ed. 2d 806 (2017)(citing *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742).

Under the FAA, a party seeking arbitration must only show two things in order to compel arbitration: (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving interstate commerce. 9 U.S.C. § 2. As discussed and further described herein, such a binding and enforceable written agreement to arbitrate disputes exists in this case and Plaintiff’s claims should be dismissed and compelled to arbitration.

III. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE

A. The Plain Language of the Agreement Binds Plaintiff

Contrary to her assertion, the Plaintiff, Ms. Daniels, represented herself to staff and admissions personnel at Midlands as her mother’s representative, with the authority to sign documents on her behalf and bind Ms. Porter and the Facility pursuant to those documents. It was

clearly Ms. Daniels' intention to bind her mother according to the terms of the Admission Agreement and Arbitration Agreement and her mother evinced no intentions or directions to the contrary. Notably, the court in *Macie Price v. THI of South Carolina at Magnolia Manor Inman, LLC et. Al* faced facts similar to the ones at the bar. *LLC et. Al*, 2018-CP-42-01054 (S.C. Com. Pls. August 7, 2018) (*See Price* decision, attached hereto as **Exhibit 3**). There, the plaintiff was the wife of a skilled nursing home resident at a skilled nursing facility in Inman, South Carolina. Like in this case, the wife executed a number of documents on her husband's behalf upon the latter's admission to the facility, including an admissions agreement and arbitration agreement substantially similar to the ones in the case at bar. Ex. 3, p. 2-3 (emphasis added). Ultimately, this Court determined that "the terms of the Arbitration Agreement clearly apply to the instant dispute[,]" in that it was clearly the intent of the wife to bind her husband (and herself, as personal representative) according to the terms of the Admission and Arbitration Agreement. Ex. 3, p. 5. Here like in *Price*, the terms of the Arbitration Agreement clearly apply to the instant dispute.

Plaintiff's argument that the Arbitration Agreement is unenforceable because it lacks the signature of an authorized representative is of no moment. "The necessary elements of a contract are an offer, acceptance, and valuable consideration." *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct. App. 2012). By presenting the Arbitration Agreement to the Ms. Daniels for her signature, the Facility made a valid offer. Ms. Daniels manifested assent to that valid offer by signing the Arbitration Agreement. Moreover, there is valid consideration as both parties exchanged mutual promises to arbitrate their claims. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997) ("A mutual promise to arbitrate constitutes sufficient consideration...") (applying South Carolina law). The Supreme Court of South Carolina has held that "it is not always necessary, in order to give validity to a contract, that it should be signed by

both parties; **it may be sufficient if it be signed by one party an accepted, held, and acted upon by the other.**" (emphasis added). *Peddler, Inc. v. Rikard*, 266 S.C. 28, 32, 221 S.E.2d 115, 117 (1975)(citing *Bulwinkle v. Cramer*, 27 S.C. 376, 3 S.E. 776, 13 Am.St.Rep. 645)(emphasis added).

In a recent case involving this precise issue, the Court of Appeals of Georgia held that an arbitration agreement which was executed by a nursing home resident's son but not by a representative of the nursing home was nonetheless valid and binding. *Aaron v. United Health Servs. of Georgia, Inc.*, 349 Ga. App. 563, 566, 826 S.E.2d 442, 445 (2019). In upholding the validity of the agreement, the court found that the nursing facility manifested assent to the terms of the arbitration agreement when it drafted the agreement and included language specific to the parties, presented the agreement to the son, then retained it for its records after the son had signed. *Id.*, 349 Ga. App. at 565, 826 S.E.2d at 444.

The case at the bar is no different. Indeed, the Facility drafted the agreement and filled in the names of the parties where appropriate, presented the Arbitration Agreement to Ms. Daniels, and retained it for its records after she had signed. By acting on the Arbitration Agreement and seeking to have it enforced, this Defendant is unequivocally manifesting its assent to its terms. That no representative signed on the Facility's behalf is of no moment.

B. Ms. Daniels Possessed the Apparent and Inherent Authority to Bind Ms. Porter Under the Arbitration Agreement, and Should be Estopped from Denying the Validity of the Arbitration Agreement.

a. Agency Relationship

"Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App.

2013) (quoting Restatement (Third) of Agency § 1.01 (2006)). “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. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties.” *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145-146, 425 S.E.2d 764, 773 (Ct. App. 1992.) The doctrine of apparent authority provides that a principal may be bound by the acts of its agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

Thus, the concept of apparent authority depends upon manifestations by the principal to a third party and the reasonable belief by the third party that the agent is authorized to bind the principal. *Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004). While actual authority is that which is expressly conferred upon the agent by the principal, apparent authority is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which the principal holds the agent out as possessing.” *Id.* If a principal holds another out as having the authority to act on his behalf or knowingly permits another to act as his agent, “either **generally** or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances.” *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000)(emphasis added). Courts in South Carolina have found that even when an agent does not possess the actual authority to bind a principal, the agent can still possess the apparent authority to bind a principal based on a third party’s reasonable interpretation of the

agent's authority and its scope. *Horton v. Pyramid Masonry Contractors, Inc.*, No. 2008-UP-208, 2008 WL 9841237, at *6 (S.C. Ct. App. Mar. 27, 2008).

In *Carraway v. Beverly Enters. Ala., Inc.*, 978 So. 2d 27 (Ala. 2007), the facts are similar to the case at bar. There, the plaintiff was the brother of a resident of a nursing home facility who executed a number of documents on his sister's behalf upon her admission to the facility, including an arbitration agreement. The brother signed the documents as his sister's authorized representative but did not have a power of attorney for his sister at the time. Nevertheless, as in this case, the admissions agreement in *Carraway* provided that plaintiff was his sister's legal representative for the purposes of admission as he was her next-of-kin and represented himself to be authorized to make health care decisions on her behalf. The arbitration agreement in *Carraway* was a separate document and was not a condition of admission to the facility. *Id.*

When signing the arbitration agreement, the brother in *Carraway* left the resident signature line blank and signed it as the "authorized representative" of his sister. Suit was later filed and the facility moved to compel arbitration, which the trial court granted. On appeal, the Alabama Supreme Court affirmed the trial court's decision holding, relevant here, that the resident's brother possessed the apparent authority to enter into the arbitration agreement on his sister's behalf, as evidenced by the fact that she never objected to him signing on her behalf and the arbitration agreement specifically provided that any person authorized by the resident may execute it on her behalf. *Id.* See also, *Tenn. Health Mgmt. v. Johnson*, 49 So. 3d 175 (Ala. 2010)(holding that a daughter possessed the apparent authority to enter into an arbitration agreement on her mother's behalf). Notably, the Supreme Court of Alabama's holding in *Carraway* was applied as "persuasive authority" by this Court in *Price, supra*. Ex. 3, p. 8.

Clearly, Plaintiff held herself out as an agent for her mother without any indication to the contrary when she executed various admission documents on behalf of her mother, including the Arbitration Agreement. She executed these documents in her capacity as “representative.” It was the Facility’s reasonable and justified belief that Plaintiff was her mother’s authorized representative and that she had the authority to execute the documents on her behalf.

Moreover, by allowing Ms. Daniels to procure her mother’s admission to the Facility and thereafter by accepting the benefits of the contracts entered into in connection with that admission, Ms. Porter represented that Ms. Daniels was her authorized representative to act on her behalf in connection with admission. *See R & G Const., Inc. v. Lowcountry Reg’l Transp. Auth.*, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000)(If a principal holds another out as having the authority to act on his behalf or knowingly permits another to act as his agent, “either **generally** or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances”)(emphasis added).

A holding to the contrary would go against the fundamental concept of apparent agency, that an agency relationship is based on a third party’s understanding of a principal’s manifestations and a reasonable belief that the agent has been authorized to act. The Facility had reason to believe that by allowing Ms. Daniels to sign the admissions paperwork, including the documents providing for Ms. Porter’s stay and the skilled nursing care provided at the Facility, Ms. Porter cloaked her daughter with the authority to execute those documents. Further, Ms. Porter did not repudiate or invalidate her daughter’s actions, and instead, she accepted the benefits of the contracts with the Facility by remaining at the Facility for over a year and receiving skilled nursing care and services thereby ratifying Ms. Daniels’ actions. Because no one attempted to repudiate the Arbitration

Agreement or even question it, the Facility was further justified in believing Ms. Porter had authorized her daughter to execute it.

It is clear that an apparent agency relationship existed such that the Arbitration Agreement should be deemed enforceable.

Even if Plaintiff lacked apparent authority to enter into the terms of the Arbitration Agreement, she still possessed sufficient inherent agency powers to render the agreement enforceable. Such powers are recognized by South Carolina courts and are used to enforce agreements where supposed unauthorized actions “accompany or are incidental to transactions which the agent is authorized to conduct....” See, §§ 8A, 161 *Restatement (Second) of Agency* (1958); *Smith v. Fitton & Pittman, Inc.*, 264 S.C. 129, 212 S.E.2d 925 (1975)(*abrogated on unrelated grounds*)(examining whether party had properly demonstrated the existence of inherent agency powers); *Chicago Title Ins. Co. v. Washington State Office of Ins. Com'r*, 309 P.3d 372 (Wash. 2013); *Daly v. Aspen Ctr. for Women's Health, Inc.*, 134 P.3d 450, 452 (Colo. App. 2005); *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1210-11 (Ind. 2000); *Cange v. Stotler & Co.*, 826 F.2d 581, 591 (7th Cir. 1987)(“[t]he powers of an agent are, prima facie, coextensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals.”)(citing *Lumbermen's Mut. Ins. Co. v. Slide Rule & Scale Eng'g Co.*, 177 F.2d 305, 309 (7th Cir. 1949)).

The basis for this doctrine is that, as between an equally innocent principal and third party, the third party should prevail. This well-established law follows from one of the cardinal principles of agency law: that third parties, such as the Facility, should not be disadvantaged because they dealt with an agent rather than a principal. As set forth above, there is no dispute as to whether the Plaintiff was authorized to admit her mother to Midlands. To the extent Plaintiff takes issue with

her own authority to bind her mother to the Arbitration Agreement and the specific terms therein, such actions merely accompanied and were incidental to her authority to admit her mother as a resident at the Facility. Midlands should not be disadvantaged for acting in accordance with the express representations of Plaintiff regarding her authority.

b. Agency by Estoppel

“When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances.” *R & G*, supra, 343 S.C. at 433, 540 S.E.2d at 118. To properly show estoppel in South Carolina, this Defendant must show: “(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.” *Boyd v. Bellsouth Tel.Co.*, 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006).

In *Price*, supra, this Court ruled that the Plaintiff was equitably estopped from denying that she was her husband’s authorized agent during the latter’s admission to the skilled nursing facility:

In the case at the bar, [the facility] had not knowledge or reason to believe that Plaintiff was not [her husband’s] authorized agent for purposes of executing the Arbitration Agreement or and other admissions paperwork. [The facility] relied on the affirmative representations of Plaintiff in admitting her husband to the Facility for the provision of the skilled nursing care. Additionally, the Arbitration Agreement was signed and executed with the expectation that all disputes between the parties would be governed by its contents and such representations were relied upon by [the facility] for years only for the instant lawsuit to seemingly ignore the binding agreement. Accordingly, agency by estoppel is present based upon the record before this Court such that the arbitration agreement is similarly enforceable.

Ex. 3, p. 9. In *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011), the facts are also substantially similar to the case at bar. (See *McCutcheon*, attached hereto as **Exhibit 4**). There, the plaintiff was the husband of a resident of a nursing home facility in South Carolina who executed a number of documents on his wife's behalf upon her admission to the facility, including an arbitration agreement. The husband signed the documents as his wife's authorized representative. Nevertheless, as in this case, the admissions agreement in *McCutcheon* provided that plaintiff was his wife's legal representative for the purposes of admission as he was her next-of-kin and represented himself to be authorized to make health care decisions on her behalf. Also like here, the arbitration agreement in *McCutcheon* was a separate document and was not a condition of admission to the facility.

Because the Court in *McCutcheon* determined that the arbitration and admission agreements should be merged under general principles of contract law (See, merger argument in following section), the Court determined that the plaintiff was bound to arbitrate his claims under the federal doctrine of equitable estoppel. *Id.* at *4. However, the Court also ruled that,

Even if the Arbitration Agreement and Admissions Agreement constitute two separate contract, plaintiff takes inconsistent positions regarding these contracts, which were executed by the same parties under the same purported authority. [Accordingly,] [i]t would be inequitable [] to allow plaintiff to assert that Elijah McCutcheon had authority to sign the Admissions Agreement on behalf of [his wife], but lacked such authority to sign the Arbitration Agreement. For these reasons, the court finds that plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

Id. at *5.

Like in *Price* and *McCutcheon*, it would be disingenuous and inequitable to allow Ms. Porter to effectively admit that her daughter was her authorized agent as to the Admission Agreement, but not the Arbitration Agreement. In the case at bar, Midlands had no knowledge or

reason to believe that Plaintiff was not Ms. Porter's authorized agent for purposes of executing the Arbitration Agreement and other admissions paperwork. Midlands relied on the affirmative representations of Plaintiff in admitting her mother to the Facility for the provision of the skilled nursing care. Additionally, the Arbitration Agreement was signed and executed with the expectation that all disputes between the parties would be governed by its contents and such representations were relied upon by Midlands only for the instant lawsuit to seemingly ignore the binding agreement. Accordingly, Plaintiff should be estopped denying the validity of the Arbitration Agreement.

C. The Arbitration Agreement and Admission Agreement Must be Construed Together, and Plaintiff Should Be Estopped from Denying the Parties' Mutual Right to Arbitration

a. Merger

As additional grounds to compel arbitration and in the alternative, the Admissions Agreement and Arbitration Agreement should be construed together and Plaintiff should be required to arbitrate her claims against the Facility. The Arbitration Agreement and Admission Agreement were executed by Ms. Daniels on behalf of Ms. Porter. The validity of these agreements, including the Arbitration Agreement, must be determined in accordance with the general principles of contract law and agency law that would apply to any other contract. *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010).

The Arbitration Agreement provides that "any controversy or dispute between the parties *arising out of or relating to Facility's Admission Agreement . . . or relating in any way to Resident's stay at Facility*" shall be resolved by arbitration pursuant to the terms of the Arbitration Agreement. *See Ex. 2* (emphasis added). As described, the Arbitration Agreement and the Admissions

Agreement were both signed by Ms. Daniels on behalf of her mother on the same day, at the same time, upon Ms. Daniels' admission to Midlands.

Courts in South Carolina construe contemporaneous instruments together; if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated. *Klutts Resort Realty, Inc. v. Down'Round Development Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977). Absent some evidence indicating a contrary intention, when instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will generally consider and construe them together on the theory that the instruments are effectively one instrument or contract. *Id.* See also *Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994) (holding that promissory notes and a mortgage agreement executed contemporaneously on the same date, must be construed together). Furthermore, even when instruments are entered into by the same parties at different times but relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties. See *Plaza Development Services v. Joe Hardin Builder, Inc.*, 294 S.C. 430, 365 S.E.2d 231 (Ct. App. 1988); *accord Cafe Associates, Ltd v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991).

As indicated previously, the court in *McCutcheon* analyzed facts almost identical to the case at bar and determined that the arbitration agreement and admissions agreement had merged for purposes of equitable estoppel. *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011WL6318575 Ex. 4. Indeed, this Court has cited to *McCutcheon* on numerous occasions in holding that a nursing home arbitration agreement merged with the admission agreement for purposes of equitable estoppel under precisely the same circumstances. See *Abrams*

v. Fundamental Long-term Care Holdings, LLC, et al, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); *Campsen v. Fundamental Long-Term Care Holdings, LLC et al*, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012). (See *Abrams*, *Campsen* attached hereto as **Exhibits 5 and 6**).

Accordingly, Ms. Porter, by and through the acts of her representative, Ms. Daniels, and the Facility, both contemplated that the terms of the agreement to admit Ms. Porter were contained in the Admissions Agreement and Arbitration Agreement. Plaintiff executed the Arbitration Agreement at the same time as the Admissions Agreement; the Arbitration Agreement and the Admissions Agreement both covered the same subject matter and transaction (Ms. Porter's residency at the Facility); the Arbitration Agreement and Admissions Agreement were between the same parties; the Arbitration Agreement specifically makes citation to and incorporates the Admission Agreement; and thus the Arbitration Agreement and Admission Agreement should be construed as part and parcel of the same agreement between the parties.

b. Coleman, Thompson, and Hodge are Distinguishable

The Plaintiff argues the Admission Agreement and Arbitration Agreement are not merged pursuant to *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 350, 755 S.E.2d 450, 452 (2014), and *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 769 (Ct. App. 2016). However, such reliance is misplaced.

In *Coleman*, Ann Coleman signed a number of documents, including arbitration agreements, when admitting her sister to a health care facility. 407 S.C. at 350, 755 S.E.2d at 452. Coleman brought suit after her sister's death, and the facility sought to compel arbitration. In determining that the arbitration and admission agreements in the case had not merged, the Supreme

Court found, “On its face, this clause recognizes the ‘separatedness’ of the [arbitration agreement] and the admission agreement, not a merger of the two contracts. Moreover, the [arbitration agreement] could be disclaimed within thirty days of signing while the admission agreement could not, evidencing an intention that each contract remain separate.” *Id.* at 452. “By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply.” *Id.*

Similarly, in *Hodge*, the admission agreement indicated it was governed by South Carolina law, whereas the arbitration agreement stated it was governed by federal law. 422 S.C. 544, 813 S.E.2d at 302. Furthermore, like in *Coleman*, the arbitration agreement in *Hodge* recognized a separateness, as it referenced the two documents separately, stating “[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement.” *Id.* Finally, the arbitration agreement in *Hodge* stated it could be revoked within thirty days, whereas the admission agreement contained no such indication. *Id.* In, *Thompson*, the arbitration agreement also contained a disclaimer provision but the admission agreement did not.

Unlike the arbitration agreements in *Coleman*, *Thompson*, and *Hodge*, the Arbitration Agreement and Admission Agreement in the case at bar merged. While the Admission Agreement in this case does contain an “Entire Agreement” clause, unlike the admission agreements in *Hodge* and *Coleman*, the provision in this case does not separately reference the Arbitration Agreement. Moreover, the Arbitration Agreement contained no disclaimer provision as in *Coleman*, *Thompson*, or *Hodge*. Accordingly, there is no language in either the Admission or Arbitration Agreement akin to the language in those cases to indicate the parties desired the documents be

considered as separate contracts, and, as such, those cases should be distinguished from the instant case.

c. Equitable Estoppel of Merged Agreement

“Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity.” *Int'l Paper Co. v. Schwabedissen Maschinen & Anlae GmbH*, 206 F.3d 411, 417-18 (4th Cir. 2000) (citation and internal quotation marks omitted). “A nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause.’” *Id.* (quoting *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999)).

Because of the doctrine of merger referenced above, this legal principle is properly applied in this case. The doctrine of equitable estoppel “exists to prevent a litigant from unfairly receiving the benefit of a contract while at the same time repudiating what it believes to be a disadvantage in the contract, namely the contractual arbitration provision.” *S. Ill. Bev., Inc. v. Hansen Bev. Co.*, 2007 U.S. Dist. LEXIS 76229 (S.D. Ill. 2007). Moreover, the Fourth Circuit has held that “no party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein.” *United States v. Bankers Ins. Co.*, 245 F.3d 315, 323 (4th Cir. 2001).

“Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract.” *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates. S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001)(citing *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) (finding non-signatory

derived benefit from contract and could not avoid the arbitration clause contained therein)). As noted by the Federal District Court in *Jackson v. Iris.com*:

It is an axiomatic rule of contract law that a party may not rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage.

. . . .

[W]here . . . 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.

524 F. Supp. 2d 742, 749-50 (E.D. Va. 2007)(quoting in part *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bide. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981)(citing in part *Int'l Paper Co.*, 206 F.3d at 416)(internal quotations omitted).¹

In the present case, Ms. Porter embraced all aspects of the Admission Agreement with the Facility. It would be manifestly inequitable to permit a party to claim the other is liable in tort based upon a contractual relationship, while at the same time allowing that party to avoid the arbitration provisions of the contract upon which the party bases its claims, when such claims are in the scope of the arbitration provisions. In other words, Plaintiff cannot “have it both ways by

¹ See also *THI of S.C. at Columbia, LLC v. Wiggins*, C/A No. 3:11–888–CMC, 2011 WL 4089435, at *6 (D.S.C. Sept.13, 2011) (“Hall's care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate.”); accord *THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. 7:13-CV-2929-BHH, 2014 WL 6863550, at *4 (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).

relying upon certain terms of the Admission Agreement when it works to her advantage and repudiating the Arbitration Agreement when it works to her disadvantage.

As described, the Plaintiff's allegations fall within the scope of the Arbitration Agreement. In accordance with the foregoing law, Plaintiff cannot assert claims against this Defendant based upon certain terms of the Admission Agreement while repudiating the Arbitration Agreement, and should be prevented from doing so pursuant to the doctrine of equitable estoppel. Moreover, as is cited above, numerous courts hold that where a plaintiff receives the benefits of the contract, which Ms. Porter certainly did, the non-signatory is estopped from denying an arbitration agreement merely because he did not sign the contract under which he received all of the benefits.

IV. SHOULD THE COURT DECIDE TO DENY THIS DEFENDANT'S MOTION, THE PARITES SHOULD BE PERMITTED TO CONDUCT ADDITIONAL DISCOVERY

If the Court is not inclined to grant the instant motion on the grounds contained in this memorandum or asserted at the hearing, this Defendant requests that the parties be permitted to conduct additional discovery on the issues raised herein or at the hearing, and in particular, the nature of Plaintiff's agency relationship with Ms. Porter and the circumstances surrounding the admissions process. In a case involving whether a similar arbitration agreement was a valid contract, the Honorable Perry Gravely allowed the parties to conduct additional discovery on the issue of a signatory's authority to execute an Arbitration Agreement on behalf of the resident in connection with his admission to a skilled nursing facility. *See James Boyd v. THI of South Carolina, LLC d/b/a at Magnolia Place-Greenville, et. Al*, 2018-CP-23-01934 (S.C. Com. Pls. July 9, 2018)(attached hereto as **Exhibit 7**). Critical to the court's decision in that case was whether the son's conduct and admissions director's understanding of that conduct created apparent agency so

as to bind the son to an arbitration agreement. The court permitted limited discovery on issues related to whether the arbitration agreement was a valid contract. After considering the testimony of several individuals who were deposed, the court found there was evidence to support a finding of apparent agency and it was found that the parties entered a valid contract. The case at the bar involves Ms. Daniels' capacity to execute the Arbitration Agreement and bind her mother to its terms. As in *Boyd*, if the Court determines the record is insufficient to grant this Defendant's Motions before it, additional discovery should be permitted as necessary.

CONCLUSION

For the reasons set forth herein, this Defendant respectfully requests that this Court enter an Order staying the pending action and compelling arbitration. Alternatively, and if the Court is not inclined to grant the instant motion on any of the grounds asserted above or at the hearing, this Defendant requests that the parties be permitted to conduct additional discovery on the issues raised above. Defendant also requests permission to be heard after such discovery is conducted and requests that it be permitted to submit supplemental memorandum along with any additional evidence procured.

[signature block on following page]

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

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at Columbia, LLC d/b/a Midlands Health and
Rehabilitation

Charleston, South Carolina

Dated: August 23, 2019

ADMISSION AGREEMENT – SOUTH CAROLINA

RESIDENT NAME:

Annie Porter

RESIDENT NUMBER:

300915

DATE OF ADMISSION:

12/22/17

THIS ADMISSION AGREEMENT ("Agreement") as above dated is by and among
Midlands Health and Rehabilitation Center ("Facility"), Annie Porter
 ("Resident") and/or _____ ("Resident's Durable Power of Attorney for
 Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively
 "Representative").

WHEREAS, the parties wish to admit Resident to Facility and hereto agree as follows:

I. GENERAL CONDITIONS

1. **Inducement:** Resident and/or Representative verifies that all information submitted to Facility, including without limitation, financial information, medical history and medical diagnosis, is true and correct and acknowledges that providing false information constitutes a breach of this Agreement.
2. **Personal Property:** It is understood that Facility is not responsible for either damage to or theft/loss of Resident's valuables, monies or clothing unless the item(s) are held in trust by Facility and the damage, theft, loss was caused by the negligent or willful conduct of Facility personnel. Personal property will not be considered to be held in trust unless the policies and procedures outlined in the *Admission Handbook*, which is made a part of this Agreement by reference herein, and any future amendments thereto, have been followed. Facility reserves the right to prohibit certain personal effects, funds or other property in accordance with state and federal law. Facility is not liable for either damages to or theft/loss of any personal belongings or personal care items, such as dentures, hearing aides and eyeglasses, except with respect to damage, theft or loss caused by the negligent or willful conduct of Facility personnel.
3. **Emergency Care:** In case of an emergency and Resident's personal physician is not available, Resident and/or Representative allows Facility to retain a physician on Resident's behalf. The physician will bill Resident directly and Facility will not be responsible for payment of the bill for such service.
4. **Representative:** When Resident has a Representative, Representative will act on Resident's behalf for all purposes permitted under applicable law. Representative will pay all fees and charges incurred hereunder by or on behalf of Resident using proceeds from Resident's assets or estate. Representative may act in more than one capacity and will be bound by the applicable terms and conditions of this Agreement. Except when Representative has access to Resident's assets, or as otherwise expressly provided to the contrary herein, or as permitted by state or federal law, Representative will not become personally liable for the payment of Resident's fees and charges by signing this Agreement. To the extent possible, Resident acknowledges and consents to the execution of this Agreement by Representative.
5. **Terms and Conditions:** By signing this Agreement, Resident and/or Representative agree(s) to comply with all terms and conditions set forth in this Agreement and Facility's policies, as same apply and as may change from time to time.

Original: Business File • Photocopy: Resident/Representative

II. AGREEMENT FOR CARE

A. FACILITY AGREES TO:

1. Admit Resident upon receipt of a physician's order; assist in obtaining physician services if a personal physician becomes unavailable; obtain emergency physician services when required. *Resident is not deemed admitted until such time as all agreements required by law and Facility have been appropriately executed.* This provision may be waived in writing by Facility, at its sole discretion.
2. Maintain written records of financial transactions with Resident and/or Representative responsible for payment. Resident has the right to have personal funds held in trust in accordance with applicable state and federal law, as may be amended from time-to-time.
3. Furnish room, routine meals, nursing care, personal care, or custodial care to Resident in accordance with applicable State and Federal law. This provision expressly excludes extraordinary services, including but not limited to, physician care, private duty nursing, private sitters, specialty foods and therapies not required by law. Resident will be placed in a semi-private room, absent medical need for a private room as determined by Facility staff. Residents residing in private rooms will be billed accordingly.
4. Assist in applying for private insurance benefits, but not to accept assignment thereof unless otherwise noted as an exception herein.
5. Assist Resident and/or Representative in applying for Medicare or Medicaid benefits where applicable.
6. Provide assistance in daily living and restorative nursing care in accordance with Resident's care plan, where appropriate. Resident and/or Representative reserves the right to refuse said treatment. If said treatment is refused, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.
7. Arrange for transfer of Resident to a hospital upon physician's order or in an emergency situation. Expenses of transfer and care of Resident at the hospital are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment of those services.
8. Obtain and administer medication as prescribed. Expenses for the cost of obtaining the medications are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment for the medications. Resident and/or Representative has the right to refuse medication. If Resident refuses medication, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.
9. Provide an activities program for Resident, components of which will be at the discretion of Facility.
10. Furnish Resident bed linens and hospital gowns. All personal clothing will be supplied by Resident or Representative and will be properly labeled as outlined in the *Admission Handbook* for identification purposes.

Original: Business File • Photocopy: Resident/Representative

B. RESIDENT AND/OR REPRESENTATIVE AGREE(S) TO:

1. Provide complete and accurate information regarding Resident to Facility as requested. This information must be updated on a regular basis and when any substantial change occurs.
2. Provide Facility, prior to or at the time of admission, orders from Resident's attending physician for the immediate care of Resident, medical history, physical examination, current physician's orders and physician's statement that Resident is free from communicable disease at the time of Resident's admission or within the required time limitation. If Resident is suffering from communicable disease, Resident and/or Representative will provide a physician's certificate that the disease is not in a transferable stage, or that adequate or appropriate isolation measures are being carried out to control transmission of the disease. Facility retains the right to refuse admission to any Resident suffering from a communicable disease, whether that disease is in a transferable stage or not, so long as said refusal is in compliance with state and federal law. Resident's attending physician will provide, at Resident's expense, a physical examination performed either within five (5) days prior to admission or within forty-eight (48) hours following admission.
3. Allow Facility staff to perform such functions as may be necessary to maintain Resident's well-being, including but not limited to, assistance with bathing and hygiene, dressing, toileting, daily activities, performance of restorative nursing care as appropriate (including bowel and bladder training), and the performance of therapies determined necessary by a physician, but limited to those therapies for which Resident has funding. Resident and/or Representative has the right to refuse medication and treatment as prescribed by Resident's physician. In accordance with the policies of Facility, in the event that Resident and/or Representative refuses to abide by the physician's orders, Facility retains the right to discharge Resident from Facility if, in the judgment of appropriate Facility staff, it is determined that discharge or transfer is appropriate under applicable federal and state law. In addition, if Resident and/or Representative refuses to abide by the physician's order, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.
4. Pay all fees and charges described in this Agreement upon the terms agreed to herein.
5. Adhere to Facility's *Bed Reservation Policy* as outlined in the *Admission Handbook* and the *Facility's Policy and State Requirements for a Temporary Leave Bed-Hold*.
6. Provide and be responsible for personal items of clothing and property.
7. (a) Vacate/remove Resident from Facility within thirty (30) days, upon receipt of a Notice of Discharge and Transfer for any of the reasons required or allowable under state or federal law; (b) cooperate with Facility's efforts to locate alternative placement; (c) Vacate/remove Resident from Facility in less than thirty (30) days if the situation warrants immediate removal. All transfers and discharges will be carried out in accordance with state and federal law.
8. In the event Resident no longer requires Medicare or Medicaid services, Resident and/or Representative agree that Resident will be relocated to a bed certified for the appropriate level of care needed. Please note, room-to-room changes within the same certified unit of Facility are not considered a transfer for purposes of this section.
9. Notify Facility at least three (3) days in advance of Resident's voluntary discharge from Facility, excepting discharge as the result of an emergency. If advance notice is not provided, Resident and/or Representative will be liable for payment of three (3) days.

Original: Business File • Photocopy: Resident/Representative

10. Accept full responsibility for, absolve and release Facility, its agents, Medical Director and/or attending physicians from any ~~liability for~~ any event, including but not limited to, injury, illness, accident, or deterioration of medical condition suffered by Resident when Resident is not on Facility premises and is not under the care, custody and/or supervision of Facility and its staff.

11. Abide by Facility's policies and procedures as amended from time to time and outlined in the *Admission Handbook* and other Admissions materials, which are made a part of this Agreement by reference herein, as well as the Resident Rights under applicable state law and any future amendments. Facility's rules, regulations, policies and procedures shall not be construed as imposing contractual obligations on Facility and are subject to change.

12. Cooperate with Facility in securing third-party payments, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments.

13. In the event Resident is transferred or discharged, Resident and/or Representative will be responsible for collecting and moving Resident's personal property within forty-eight (48) hours of the transfer/discharge. If the property is not moved, Facility will remove all property from the Resident's room and store same at Resident's and/or Representative's cost and risk. Facility is not responsible for any damage, theft or loss to Resident's property during this period of time. Unclaimed property will be disposed of in accordance with applicable state law.

14. Resident and/or Representative will be responsible for any damage caused to Facility property by Resident or his/her guests beyond normal wear and tear and will pay for such damage, based on the actual charge to Facility for repair or replacement.

15. Resident and/or Representative will be responsible for obtaining adequate information from Resident's attending physician before any extraordinary treatment. Absent knowledge that the consent was not informed, Facility staff may rely upon the physician's written order as evidence that the physician secured informed consent.

16. Resident and/or Representative will be responsible for any damages or injuries caused by Resident to other persons, and will indemnify and hold Facility harmless from any claims, actions or proceedings against Facility resulting from Resident's actions or omissions.

17. In the event of Resident's death, Representative agrees to authorize Facility to notify the person(s) designated by Resident and/or Representative. Additionally, Facility is authorized to transfer Resident's body to the designated funeral home. If Resident has not designated a funeral home, Resident's family will be consulted and Resident's body will be transferred in accordance with their wishes. All costs associated with the transfer and funeral expenses will be the responsibility of Resident's estate.

18. In the event Resident becomes incapable of making medical decisions and no guardian, proxy, surrogate or agent under a valid durable power of attorney for health care or no person qualified under the South Carolina Adult Health Code Consent Act is available, Facility is authorized to seek court appointment of a legal guardian. All associated costs and attorneys' fees will be borne by Resident or Resident's estate.

19. Resident and/or Representative agree that they will present grievances in an orderly manner. Information on Facility's Grievance Procedure can be found in the *Admission Handbook* and the *Resident Rights* under applicable state law. Nothing herein will preclude Resident or any other party from filing a complaint with any governmental agency, but will be ancillary thereto. Facility will review and investigate all complaints in a timely manner.

Original: Business File • Photocopy: Resident/Representative

20. Resident and/or ~~Representative~~ will be responsible for paying all costs, expenses and reasonable attorneys' fees, whether or not suit is brought, in the event costs, expenses, and/or attorneys' fees are incurred by Facility in the collection of sums due from and owed by Resident or any other party on Resident's behalf to Facility.

III. FINANCIAL AGREEMENT

Resident and/or Representative will be responsible for immediate payment of all charges incurred as follows:

1. Room and board, including meals, laundering of linens and bedding, nursing care, personal care or custodial care for the health, grooming and well-being of Resident in (☐-private) (☐-semi-private) accommodations, for a basic fee of \$_____ per day, payable one month in advance. In the event Resident is unable or unwilling to receive any of the services included in the room and board charge, such as meals, laundry, etc., no adjustment will be made to the daily rate. Payment for all invoices is due upon receipt. In the event public aid funds are denied for services for which coverage has been expected, Resident and/or Representative will be responsible for payment and will pay such charges upon receipt of invoice. Resident and/or Representative agree(s) to pay any rate change charged to Resident so long as each party to this Agreement is given at least thirty (30) days written notice of the new rate, including any increases or adjustments in Resident's liability by any financial third party or regulatory agency. Additional notice may be provided under applicable state regulations.

- a. Additional services and items may be provided at a separate charge. The current rates charged for additional services and items are set out in Exhibit B. These charges may change from time to time. Resident and/or Representative agree(s) to pay the charges in effect at the time that the service is performed or the item supplied. Facility agrees to give thirty (30) days advance notice to Resident and/or Representative of any price changes.
- b. Services or items not provided by Facility may be supplied by third-party vendors. Facility will assist Resident and/or Representative in securing such items or services, but will assume no liability for providing the services and makes no representations or warranties regarding the quality of such items or services. Facility assumes no liability for payment of any services provided by third-party vendors.
- c. The daily rate will be charged for the day of admission. Private pay residents will not be charged the daily charge for the day of discharge if discharge occurs before 12:00 p.m., unless the discharge is for emergency medical treatment. Medicare and Medicaid Residents will not be charged a daily charge for the day of discharge. The daily rate will be charged, if applicable, on the day of death.

2. Facility may charge a private pay resident a late payment fee of interest at a rate equal to the lesser of (a) eighteen percent (18%) per annum or, if lesser, the highest percentage allowed by law, on all charges (exclusive of interest) for which resident is liable that are outstanding for more than thirty (30) days from the date on which the resident was billed for said charges or (b) the amount set forth in any Agreement Addendum.

3. Refunds will be made for any prepaid room and board services for which payment has been received. The refund of the unused portion of prepaid fees and charges will be made within thirty (30) days following Resident's discharge. In the event of Resident's death, refunds will be made in accordance with

Original: Business File • Photocopy: Resident/Representative

state and federal law. Any personal property belonging to Resident in Facility at the time of Resident's discharge or death will be released in accordance Section II-B-13 herein.

4. In the event Resident leaves Facility and has personal funds on account, Facility may deduct any outstanding monies due to Facility from said personal funds. The remainder will be distributed in accordance with applicable state and federal law.

5. If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative shall pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

IV. TERMINATION

1. Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.

2. Except as otherwise provided herein, Facility may terminate this Agreement by providing at least fifteen (15) days advance notice to Resident and/or his/her legal representative.

3. This Agreement may be terminate immediately upon the occurrence of any of the following:

- a. Resident's condition has improved sufficiently so that he/she no longer requires the services provided by Facility.
- b. Resident's physical or mental condition changes and he/she requires a higher level of care which cannot be provided by Facility.
- c. Resident's death
- d. The safety or health of individuals in the Facility is endangered.
- e. Resident and/or his/her legal representative has failed to pay for his/her stay.
- f. Facility ceases to operate or is no longer able to provide services to Resident.
- g. Sanctions or remedies imposed by the Department.

4. In the event Facility terminates this Agreement through an involuntary transfer or Discharge, Facility shall provide appropriate notice and discharge planning as required by State and Federal law.

V. MEDICAID BENEFICIARIES

1. **Eligibility.** Eligibility for Medicaid-sponsored long-term care services is based on income and medical necessity. To qualify for assistance through the Medicaid program, a nursing home patient must need intermediate or skilled nursing care as determined through an assessment conducted by Medicaid program staff. The fact that a patient has already been admitted to a nursing home is not considered in this determination. It is possible that a patient could exhaust all other means of paying for nursing home care and meet Medicaid income criteria but still be denied assistance due to the lack of medical necessity.

It is recommended that all persons seeking admission to a nursing home be assessed by the Medicaid program prior to admission. This assessment will provide information about the level of care needed and the viability of community services as an alternative to admission. The Department may charge a fee, not to exceed the cost of the assessment, to persons not eligible for Medicaid-sponsored long-term care services.

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2. **Covered Services.** If Resident is a Medicaid recipient, the Medicaid Program will reimburse Facility for certain skilled services ordered by a physician. Reimbursable routine services include: dietary services; activities programs; room and bed maintenance services; and customary personal hygiene items and services as required to meet the needs of residents, including, but not limited to: hair hygiene supplies, comb, brush, bath soap, disinfecting soaps or specialized cleansing agents (when indicated to treat special skin problems or to fight infection), razor, shaving cream, toothbrush, toothpaste, denture adhesive, denture cleaner, dental floss, moisturizing lotion, tissues, cotton balls, cotton swabs, deodorant, incontinence care and supplies, sanitary napkins and related supplies, towels, washcloths, hospital gowns, over the counter drugs, hair and nail hygiene services (other than Beauty Shop fees), bathing, and basic personal laundry.

3. **Non-Covered Services.**

- a. Medicaid is a cost-sharing program. Resident's monthly income must be contributed to the cost of his or her care. Medicaid determines how much of the Resident's monthly income must be paid to the Facility (also called "patient liability"). To the extent permitted by law, Resident's monthly Social Security and pension funds, minus the personal allowance retained by Resident (or other allowance as set by law), will be paid to Facility.
- b. Resident and/or Representative may purchase from Facility certain miscellaneous products and services that are not covered by Medicaid. An itemized list of fees for these additional products and services is available in the Admissions Office and may be reviewed by Resident and/or Representative upon request during normal business hours of the Admissions Office.

4. **Assignment of Benefits.** In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from Medicaid for services rendered by Facility and authorizes Facility to receive payments from Medicaid pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent Medicaid refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative will remain liable for payment of those services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from Medicaid.

5. **Benefit Disallowance.** If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

6. **Application/ Appeals.** Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VI. MEDICARE BENEFICIARIES

1. **Covered Services.** If Resident is a Medicare recipient, the Medicare Program will reimburse Facility for certain skilled services such as nursing services and certain therapies ordered by a physician. Reimbursable routine services include: dietary services; activities programs; room and bed maintenance services; and customary personal hygiene items and services as required to meet the needs of residents, including, but not limited to, hair hygiene supplies, comb, brush, bath soap, disinfecting soaps or specialized cleansing agents (when indicated to treat special skin problems or to fight infection), razor, shaving cream,

Original: Business File • Photocopy: Resident/Representative

toothbrush, toothpaste, denture adhesive, denture cleaner, dental floss, moisturizing lotion, tissues, cotton balls, cotton swabs, deodorant, **in**continence care and supplies, sanitary napkins and related supplies, towels, washcloths, hospital gowns, over the counter drugs, hair and nail hygiene services (other than Beauty Shop fees), bathing, basic personal laundry and medically related social services.

2. **Non-Covered Services.** Resident and/or Representative will be required to pay certain other "Allowable Charges" which include, but are not limited to:

- a. Fees for certain products and services not covered under the Medicare program. Fees for such **services** will be identical those charged to private pay residents of Facility for the same products and services.
- b. Fees for certain products and services that are more expensive than the products and services covered under the Medicare program (e.g., a private room), as requested by a Resident and/or Representative. Fees charged for the more expensive products and services will be based on the difference between the fees charged to private pay residents of Facility and the customary charge for the same products and services under Medicare. Facility staff will inform Resident and/or Representative requesting additional or more expensive products or services that there will be a specified charge.
- c. Certain deductibles and co-insurance amounts under the Medicare Program.

3. **Assignment of Benefits.** In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from Medicare for services rendered by Facility and authorizes Facility to receive direct payments from Medicare pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent Medicare refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative shall remain liable for payment of those services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from Medicare.

4. **Benefit Disallowance.** If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

5. **Application/ Appeals.** Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VII. PRIVATE PAY/INSURANCE

1. **Routine Services.** If Resident is paying for his/her stay privately OR if he/she is having his/her stay paid for through a third-party insurance carrier, Resident and/or Representative will reimburse Facility for routine services ("Routine Services") which include: routine nursing services; routine dietary services; routine activities programs; and routine room and bed maintenance services. Beauty shop fees are not included in the daily rate. Resident and/or Representative shall pay a deposit of two months' basic room and board prior to admission. Each subsequent monthly payment is due on or before the 10th day of the month.

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2. **Ancillary Services.** Resident and/or Representative may purchase services and products that are not included in Routine Services from Facility. An itemized list of fees for these additional services and products is available in the Admissions Office and may be reviewed by Resident and/or Representative upon request during normal business hours of the Admissions Office. Resident and/or Representative shall pay for ancillary services at the end of the month in which such services are rendered.

3. **Assignment of Benefits.** In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from any insurance company paying benefits to Resident for services rendered by Facility and authorizes Facility to receive payments from such insurance company pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent such insurance company refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative shall remain liable for payment for these services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from such insurance company.

4. **Benefit Disallowance.** If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

5. **Application/ Appeals.** Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VIII. NOTICES

All notices, consents, approvals and the like required to be given hereunder shall be given in writing to Facility to the address below or such other address as Facility may designate:

All notices, consents, approvals and the like required to be given to Resident and/or Representative shall be given in writing to Resident and/or Representative to the address below or at such other address as he/she may designate:

Notice may be given via facsimile, e-mail or U.S. Mail, certified mail return receipt requested.

Original: Business File • Photocopy: Resident/Representative

IX. GOVERNING LAW

This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located. This Agreement will be binding and inure to the benefit of each of the undersigned parties and their respective heirs, personal representatives, successors and assigns.

X. SEVERABILITY

If any provision(s) of this Agreement will be deemed to be illegal or otherwise unenforceable, all other provisions will remain in full force and effect as if the invalid provision had not been part of this Agreement.

XI. CAPTIONS

Captions are for the purpose of reference only and do not govern, limit, modify, enlarge or in any manner affect the scope, meaning and intent of the provisions of this Agreement, nor will such captions be given any legal effect.

XII. MODIFICATIONS

Facility reserves the right to unilaterally modify this Agreement to conform to law and regulations as may be passed from time to time. Reasonable notice, considering all of the circumstances, will be given to Resident and/or Representative when any change is made in accordance with this paragraph. Any other modification, except as otherwise specifically reserved herein, will be made in writing and signed by all relevant parties.

XIII. WAIVER

Facility reserves the right to waive any obligation of Resident under the provisions of this Agreement in its sole and absolute discretion. No term, provision or obligation of this Agreement will be deemed to have been waived by Facility unless in writing, signed by Facility. Any waiver of any provision of this Agreement will not be deemed a waiver of any other term, provision or obligation of this Agreement, and the other obligations of Resident and/or Representative and this Agreement will remain in full force and effect.

XIV. RESIDENT

Use of the term "Resident" herein includes the Resident and any person with legal authority to handle Resident's funds or property and/or make medical decisions depending on the context in which the term is used.

XV. ASSIGNABILITY

This Agreement is fully assignable by Facility in the event that Facility is sold and/or the license is transferred such that a new licensee operates Facility. This Agreement, at Facility's option and without notice to Resident and/or Representative, may be automatically assigned to the new licensee and will be fully binding upon Resident and the new licensee.

Original: Business File • Photocopy: Resident/Representative

XVI. INFORMATION RELEASE/BILLING AUTHORIZATION

1. Resident information included in Facility's records is confidential. Unauthorized persons will not be allowed to review these records without Resident's and/or Representative's consent, except as required or permitted by law. Resident's records are the sole property of Facility, but may be reviewed by authorized person(s) by appointment, in the presence of a Facility representative, as permitted by applicable state or federal law. Authorized persons may request and purchase photocopies of the medical record or any portion thereof with two (2) business days notice, unless a longer time period is permitted under state law. The fees for reproduction will be billed at the current rate permitted by applicable state or federal law.

2. Resident and/or Representative authorize(s) Facility to release all or part of Resident's protected health information ("PHI") as defined by the Health Information Protection and Portability Act of 1996 to any person or entity which has or may have a legal contractual obligation to pay all or a portion of the costs of care provided to Resident, including but not limited to Medicare, Medicaid, hospital or medical service companies, insurance companies, workers' compensation carriers, welfare funds and/or Resident's employer.

3. Resident and/or Representative authorize(s) Facility to release all or any part of Resident's PHI to any medical professional or institution responsible for Resident's medical or nursing care when Resident is receiving treatment, is transferring, or is discharged from Facility.

4. Resident and/or Representative authorize(s) Facility to send and release PHI to Medicare, Medicaid or other third-party payers for the purpose of receiving payment of covered services. Resident and/or Representative further authorize(s) and request(s) that Medicare, Medicaid, their representatives, their intermediaries and other third-party payers send payment for covered services directly to Facility. This authorization does not release Resident and/or Representative from financial responsibility for charges that may be non-covered or denied by Medicare or Medicaid, or other third party payer.

XVII. MISCELLANEOUS

1. In the event Resident is unable to physically sign his/her name, Resident will sign below by making a mark. If this is the manner in which the Agreement is signed, the witness will verify that Resident was aware that he/she was signing an Agreement and that it was his/her intent to sign.

2. In the event Resident has appointed a Representative to control his/her assets and even if such appointment has not been made through a legal document, Representative will be fully bound to the extent of those assets to the terms of this Agreement, to the extent allowed by law in the State where Facility is located.

3. A copy of any court order appointing a guardian for the Resident's person or estate must be supplied to Facility. This court order must appoint the legal guardian to sign contracts on behalf of Resident. The legal guardian will only be given such rights under this Agreement as are set out in that court order. In addition, the legal guardian must file with Facility on an annual basis the same financial documents filed with the court showing the resources available to pay for Resident's care.

4. Representative will supply Facility with a copy of any power of attorney, durable power of attorney, durable power of attorney for health care or other legal documentation permitting him or her to act on Resident's behalf. It is understood that the Representative will pay for the care of Resident in accordance with this Agreement to the extent that he/she has access to Resident's income or resources. Failure to utilize the Resident's income or resources for payment to Facility may subject Representative to legal action. Facility may require an accounting from time to time as to the type of said resources. Failure to supply such an accounting will be a breach of this Agreement.

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5. In the event that ~~an~~ individual voluntarily agrees to become legally responsible for payment for the care and treatment of Resident, said Representative will be fully bound to the terms of this Agreement. Please note, Facility does not require a third-party guarantor.

6. Facility reserves the right to apply its indigent care policy, as appropriate, in its sole discretion.

XVIII. ENTIRE AGREEMENT

I/we hereby acknowledge that I/we have read this page and all preceding pages and acknowledge that this Agreement represents the entire agreement and understanding between the parties and supersedes all previous representations, understandings or agreements, oral or written, between the parties and may not be amended except by written agreement of the parties.

By signing below, I/we further acknowledge that I/we have made the above promises and representations in order to induce Facility to enter into this Agreement. The parties further understand that, by signing this Agreement, Facility is relying upon the truthfulness of the promises and representations I/we have made. The parties further agree that if any term or provision of the Agreement is found by a court or agency of competent jurisdiction to be legally unenforceable, the term and provision will be deemed severed from this Agreement and the remaining terms or provisions will be fully enforceable.

The undersigned further acknowledges that he/she has received and read the *Admission Handbook* and other Admissions materials and understand that these documents are made a part of this Agreement by reference herein.

Signature of Resident

Date

Annie Porter
Printed Name of Resident

Resident Social Security Number

Witness Signature

Date

Printed Name of Witness

OR


Signature of Representative, if any

Date

Printed Name of Representative

Witness Signature

Date

Printed Name of Witness

Representative Social Security No. (Voluntary Info.)

Signature of Facility Official

Date

Blake McClure, Admissions
Printed Name of Facility Official & Title

Original: Business File • Photocopy: Resident/Representative

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
Vermell Daniels as Personal Representative of the	)	C/A No. 2019-CP-40-02295
Estate of Annie Porter,	)	
	)	
Plaintiff,	)	PLAINTIFF'S MEMORANDUM IN
	)	OPPOSITION OF DEFENDANTS' MOTION
Versus	)	TO DISMISS AND COMPEL ARBITRATION
	)	
THI of South Carolina at Columbia, LLC d/b/a	)	
Midlands Health & Rehabilitation Center,	)	
	)	
Defendant.	)	

The Plaintiff, Vermell Daniels as Personal Representative of the Estate of Annie Porter hereby serves her Memorandum in Opposition to the Defendant, THI of South Carolina at Columbia, LLC d/b/a Midlands Health & Rehabilitation Center's Motion to Dismiss and Compel Arbitration.

FACTS

Annie Porter was admitted to the Defendant's skilled nursing facility in January of 2018. The Defendant operates a skilled nursing facility, licensed by the South Carolina Department of Health and Environmental Control, R.61-17, *Standards for Skilled Nursing Facilities*. While a resident in the Defendant's facility, Ms. Porter was allowed to develop pressure sores, which resulted in her decline and eventual death. Annie Porter died on March 28, 2018. Vermell Daniels, Annie Porter's daughter and Plaintiff in this matter was appointed as Personal Representative of the Estate of Annie Porter on August 18, 2018 by the Kershaw County Probate Court, and filed this action on his behalf, including causes of action for Wrongful Death and Survivorship.

STANDARD OF REVIEW

In determining whether a particular dispute can be compelled into arbitration, this Court must first determine whether a valid agreement to arbitrate exists between the parties. All waivers of trial by jury must be known, voluntary, and intentional. The signatory must have legal authority or legal capacity to sign on behalf of the Plaintiff resident. **The burden of proof is on the party attempting to compel the**

arbitration to prove a valid contract. “A parties' right to a jury trial in South Carolina is governed by state law. See Pelfrey v. Bank of Greer, 270 S.C. 691, 693, 244 S.E.2d 315, 316 (1978).

In determining whether an agreement to arbitrate exists, “the court should apply ‘ordinary state-law principles that govern the formation of contracts.’” Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E. 2d 839, 844 (Ct. App., 1999). Arbitration is available only when the parties involved contractually agree to arbitrate. Id. South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. Player v. Chandler, 299 S.C. 101, 105, (1989). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a).

ANALYSIS

I. THERE IS NOT AN ENFORCEABLE ARBITRATION AGREEMENT

A. Vermell Daniels was not, at the time of admission, nor was she ever Annie Porter’s legal guardian.

Vermell Daniels executed documents on behalf of Annie Porter upon her entry to the Defendant’s facility on December 22, 2017, including an Arbitration Agreement (Exhibit A to Defendant’s Motion). The mere fact that an arbitration agreement exists does not automatically refer any dispute to arbitration. It must be valid and enforceable, signed by the parties who had the express and legal authority to do so. Vermell Daniels was not the legal guardian of Annie Porter, nor did she have any Power of Attorney Guardianship. (See Affidavit of Daniels, ¶ 4, Exhibit A). Further, Ms. Daniels was never asked by any Midlands Health & Rehabilitation employee if she was Annie Porter’s guardian, nor if she had any legal authority to bind her to arbitration (Id., ¶ 5). Annie Porter herself did not sign the Arbitration Agreement. Further, the Defendant’s own Arbitration Agreement is not executed by their own Authorized Agent of the Facility (Exhibit A to Defendant’s Motion).

B. An Admission Agreement and an Arbitration Agreement are two separate agreements and one cannot be bound by the other.

Our South Carolina Supreme Court has ruled the difference between a residency contract and an arbitration agreement, and that just because the two agreements are contained in one document does not make them one in the same. The Supreme Court has ruled that:

Assent to this contract [the admission agreement] was a condition for Decedent's admission to Facility. On the other hand, the AA was not required for Decedent's admission, contained no provision for medical, nursing, or health care services to be provided for Decedent, and did not require any financial commitment to pay for such services. The separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution.

Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014). A decision to admit a resident to a community residential care facility such as the Defendants is a healthcare decision. As such, signing an admission agreement to a skilled nursing facility is a healthcare related agreement, not a legal agreement. Conversely, agreeing to settle disputes through arbitration is a legal decision. The Defendants' argument that all of the Plaintiff's claims are dependent on the duties which arise from the Admission Agreement is fundamentally flawed; an admission agreement involves making a healthcare decision, and an arbitration agreement involves making legal decision. *see also* Thompson v. Pruitt Corp., 416 S.C. 43, 50, 784 S.E.2d 679, 683 (Ct. App. 2016) ("The Act confers authority on a health care surrogate to consent on the patient's behalf 'to the provision or withholding of health care' and to make financial decisions obligating the patient to pay for the medical care provided." (quoting Coleman, 407 S.C. at 351-52, 755 S.E.2d at 453)).

C. Vermell Daniels did not Possess Statutory Authority to Bind Annie Porter under the Arbitration Agreement.

i. S.C. Adult Health Care Consent Act

The South Carolina Adult Health Care Consent Act ("AHCCA"), defines "health care" as including intermediate or skilled nursing care. S.C. Code Ann. § 44-66-20(1). It also specifically includes

the placement or removal from a facility that provides these forms of care.” Id. A party may consent to health care on behalf of a patient, if the patient is deemed unable to consent to treatment after two licensed physicians have examined the patient and certify an inability to consent. S.C. Code Ann. § 44-66-20(8). S.C. Code Ann. § 44-66-30 lists the appropriate persons who may make health care decisions for patient who is unable to consent and provides an order of priority for who is able to make those decisions. It reads:

- (A) Where 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 pursuant to Article 5, Part 3 of the South Carolina Probate Code, if the decision is within the scope of the guardianship;
 - (2) an attorney-in-fact appointed by the patient in a durable power of attorney executed pursuant Section 62-5-501, if the decision is within the scope of his authority;
 - (3) a person given priority to make health care decision by another statutory provision;
 - (4) a spouse of the patient unless the spouse and the patient are separated pursuant to one of the following:
 - a. entry of a pendent lite order in a divorce or separate maintenance action;
 - b. formal signing of a written property or marital settlement agreement; or
 - c. entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties;
 - (5) an adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation;
 - (6) a parent of the patient;
 - (7) an adult sibling of the patient; or if the patient has more than one adult sibling, a majority of the adult siblings who are reasonably available for consultation;
 - (8) a grandparent of the patient; or if the patient has more than one grandparent, a majority of the grandparents who are reasonably available for consultation;
 - (9) any other adult relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship with the patient, or if the patient has more than one other adult relative, a majority of those adult relatives who are reasonably available for consultation.

Defendants have put forth no evidence that Ms. Porter was unable to consent to treatment after two licensed physicians have examined the patient and certify an inability to consent, as required by the statute. Additionally, the AHCCA only deals with “health care” related decisions, and not legal decisions. Nowhere in the entire AHCCA is the word “legal” or “arbitration” mentioned. Clearly the legislature intended this Act to govern only those decisions as they relate to health care. The Court in Coleman held that the sister of a nursing home resident could not bind the resident to an arbitration agreement at the

time of admission, and that the arbitration agreement was not valid because it exceeded the scope of the sister's authority under the AHCCA. According to the Court, AHCCA specifically limited surrogates' authority to making health care decisions and associated financial arrangements. Arbitration is not a health care or related financial decision, and thus exceeds the authority granted by the AHCCA. *Id.* At 351-52, 755, S.E. 2d at 453.

ii. **S.C. Bill of Rights for Residents of Long-Term Care Facilities**

South Carolina Bill of Rights for Residents of Long-Term Care Facilities is codified in S.C. Code Ann. §44-81-10, et seq. Under the Bill of Rights, a "representative" is defined as "a resident's legal guardian, committee, or next of kin, or other person acting as agent of a resident who does not have a legally appointed guardian." S.C. Code Ann. § 44-81-30(3). This is substantially the same as the AHCCA. Under the Bill of Rights, decision making is limited to health care decisions, not legal decisions.

II. **FEDERAL ARBITRATION AGREEMENT ACT DOES NOT MANDATE ENFORCEMENT OF THIS AGREEMENT**

Under the FAA, arbitration is required when there is a valid arbitration agreement and a dispute exists which is within the scope of the agreement. Under the arbitration clause, neither prong is satisfied. As discussed above in Section I, there is no valid arbitration agreement because Vermell Daniels did not have the legal authority to execute a valid arbitration. Second, Plaintiff's claims include negligence, negligence per se, fraud and misrepresentation, violations of the South Carolina Unfair Trade Practices Act, wrongful death and survivorship. Nowhere in the Defendants' arbitration agreement are those causes of action listed. Accordingly, the FAA does not apply.

III. **ATTORNEY'S FEES AND COSTS**

The Plaintiff respectfully requests the Court award attorney's fees and costs associated with the preparation and arguing of this motion. The undersigned has communicated with opposing counsel on multiple occasions regarding the invalidity of the arbitration agreement, and the Defendant's failure to meet

their burden of proof.

CONCLUSION

Based on the reasons set forth above, the Plaintiff respectfully requests the Defendant's Motion to Compel Arbitration be denied. This memorandum was filed prior to receiving any memorandum in support of the Defendant's Motion to Dismiss and Compel Arbitration. Should the Defendant file any such memorandums or replies, Plaintiff respectfully asks to be given time to adequately respond.

Respectfully Submitted,

s/Bradley H. Banyas

D. Nathan Hughey (SC Bar #68409)

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Attorneys for the Plaintiff

August 23, 2019

Mt. Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
Vermell Daniels as Personal Representative of the	)	C/A No. 2019-CP-40-02295
Estate of Annie Porter,	)	
	)	
Plaintiff,	)	AFFIDAVIT OF VERMELL DANIELS
	)	
Versus	)	
	)	
THI of South Carolina at Columbia, LLC d/b/a	)	
Midlands Health & Rehabilitation Center,	)	
	)	
Defendant.	)	

1. My name is Vermell Daniels and I am over the age of eighteen (18) and of sound mind and otherwise competent to make this affidavit under penalty of perjury. This affidavit is also based upon my own personal knowledge.

2. I reside at REDACTED

3. I am the daughter of Annie Porter.

4. I have never been the legal guardian of Annie Porter, nor have I ever had that power conferred on to me by any Power of Attorney or Court Appointed Guardianship or Conservatorship.

5. I was never asked by any Midlands Health & Rehabilitation employee if I was Annie Porter's legal guardian, nor if I had legal authority to bind her to arbitration, which I did not.

6. I was not explained by any Midlands Health & Rehabilitation employee what an arbitration agreement was.

7. I did not have any actual or apparent legal authority to bind Annie Porter. to arbitration.

8. My mother suffered greatly and died as a result of the Defendant's failures, and I want her claim to be heard by a jury, as is my constitutional right.

[SIGNATURE PAGE TO FOLLOW]

Jermell Daniels
Jermell Daniels

Sworn to me this 15th day of August, 2019.

Olivia Supcoe
Notary Public for ~~South Carolina~~ 05 NORTH CAROLINA
My commission expires: 11/09/2021



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2019-CP-40-02295
VERMELL DANIELS as Personal	)	
Representative of the Estate of Annie Porter,	)	
	)	
Plaintiff,	)	
	)	DEFENDANT’S MOTION
vs.	)	TO ALTER, AMEND, AND/OR
	)	RECONSIDER ORDER DENYING
THI OF SOUTH CAROLINA AT	)	MOTION TO COMPEL ARBITRATION
COLUMBIA, LLC d/b/a MIDLANDS	)	
HEALTH & REHABILITATION CENTER,	)	
	)	
Defendant.	)	

TO: THE HONORABLE L. CASEY MANNING, Presiding Judge, and D. NATHAN HUGHEY, ESQUIRE; A. STUART HUDSON, ESQUIRE, and BRADLEY H. BANYAS, ESQUIRE, HUGHEY LAW FIRM, LLC, Attorneys for Plaintiff

NOW COMES Defendant, THI of South Carolina at Columbia, LLC d/b/a Midlands Health & Rehabilitation Center (“Defendant” or the “Facility”), by and through its undersigned counsel, pursuant to Rule 59(e), SCRCF, and, on the grounds set forth below, hereby moves this Honorable Court to alter, amend, and/or reconsider its Order, filed November 6, 2019, denying Defendant’s motion to compel arbitration (the “Subject Order”).¹

- 1. The Subject Order (a) incorrectly states that “[t]he legal consequences of an agent’s actions can only be attributed to the principle when the agent has actual or apparent authority”² and (b) otherwise relies on an unduly limited view of the theories under which a nonsignatory can be bound to an arbitration agreement under South Carolina law.**

This is an incorrect statement of law. It overlooks or misapprehends agency by estoppel and ratification. (See Def.’s Mem. in Supp. of Mot. to Compel Arbitration pp. 7–14.) Moreover,

¹ Defendant’s motion to compel arbitration, i.e., its “Motion to Dismiss Plaintiff’s Complaint, Compel Arbitration and Stay State Court Proceedings,” was filed June 5, 2019.

² (Subject Order p. 3.)

South Carolina recognizes numerous viable theories—absent not agency only but also absent power of attorney or judicial or statutory authorization—under which a nonsignatory can be bound to an arbitration agreement. *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) (“South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel.”); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014) (acknowledging the possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel).

2. **The Subject Order incorrectly states that “a review of the admissions and arbitration documents by the Defendant would have informed them that Vermell Daniels did not have actual authority by way of a Power of Attorney, nor Court Appointed Guardianship to bind her mother, nor did she ever indicate that she had any apparent authority to enter in to contracts on behalf of her mother.”³**

This statement is an incorrect statement of fact, unsupported by any evidence in the record. Indeed, it is directly contradicted by the Arbitration Agreement’s express language that “[i]t is the intention of the parties . . . to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident” and that “[b]y his/her signature below, the executing party represents that he/she has the authority to sign on Resident’s behalf so as to bind the Resident as well as the Representative.” (Def.’s Mot. to Compel Arbitration at Ex. A (Arbitration Agreement).)

³ (Subject Order p. 4.)

3. **In stating, “Defendant had the capacity to determine whether Ms. Daniels had authority to sign an arbitration agreement on Ms. Porter’s behalf,”⁴ the Subject Order overlooks or misapprehends (a) the duty of good faith and fair dealing implied in every contract, (b) that one who has signed a contract is presumed to have read, understood, and assented to its terms, and (c) the fact that, by way of the Arbitration Agreement itself, Defendant did in fact inquire of Ms. Daniels as to her authority to bind her mother, Ms. Porter, and Ms. Daniels expressly represented to Defendant that she had such authority.**

There is, of course, an implied covenant of good faith and fair dealing in every contract. *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995). Moreover, “one who has signed a contract is presumed to have read, understood, and assented to its terms.” *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019). As noted above and elsewhere, when she signed the Arbitration Agreement, Ms. Daniels expressly represented that she had authority to sign on Ms. Porter’s behalf. The Subject Order wrongfully overlooks all this, unjustly rewarding Ms. Daniels for her false representations, while at the same time punishing Defendant for supposedly failing to meet some unspecified duty to investigate them. Defendant contends no such duty is in fact recognized under South Carolina law—and, indeed, no legal authority is cited in this part of the Subject Order. Moreover, because the Arbitration Agreement is covered by the FAA, it “must [be] place[d] . . . on equal footing with other contracts . . . and enforce[d] . . . according to [its] terms[.]” *AT&T Mobility, L.L.C. v. Concepcion*, 563 U.S. 333, 339 (2011). By holding Defendant to an elevated standard of determining Ms. Daniels’s authority to contract, the Subject Order fails to place the Arbitration Agreement on equal footing with other contracts and, thus, violates the FAA.

⁴ (Subject Order p. 5.)

4. The Subject Order’s discussion of estoppel misapprehends or overlooks South Carolina’s favorable view of the applicability of the direct benefits test for equitable estoppel in arbitration cases.

The Subject Order cites only the “traditional” six-factor test for equitable estoppel analyzed in *non*-arbitration cases. (Subject Order pp. 4–5.) South Carolina law plainly recognizes, however, the potential for equitable estoppel to be successfully invoked to enforce an arbitration agreement against a nonsignatory under the direct benefits test. *See Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 (observing that South Carolina has recognized a number of theories that could bind nonsignatories to arbitration agreements, including estoppel); *id.* at 340–345, 827 S.E.2d at 175–177 (favorably discussing the framework of the so-called direct benefits test—which was the test that the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, following its (the Court of Appeals’) prior decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which test Defendant contends Ms. Porter (her estate) is estopped from refusing to comply with the Arbitration Agreement here, where she received direct benefits (in the form of her admission and care/treatment at the Facility, to include, without limitation, room and board) from the Admission Agreement with which the Arbitration Agreement was merged); *id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner’s alternative argument based on the application of the state’s “traditional” six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., “[t]he traditional test referenced by [the] [p]etitioners,” “has been analyzed most-often in *non*-arbitration cases”) (emphasis added). Most respectfully, the Court should fully and fairly address and rule upon Defendant’s merger/equitable estoppel argument, and it should do so under the direct benefits test.

5. **Defendant expressly requests that the Court (re)consider and expressly rule on each and every distinct issue/argument raised in support of its motion to compel arbitration (whether raised in writing or orally at the motion hearing), all of which Defendant incorporates herein by reference, to include, without limitation, the following:**

- (a) **The Subject Order does not address, or at least does not address in meaningful detail, Defendant's merger/equitable estoppel argument.**

Although the Subject Order does include the sentence, "Thus, the arbitration agreement and admissions documents do not merge in to one,"⁵ it does so in the context of a discussion about whether the scope of an agent's authority extends beyond healthcare decisions to arbitration agreements. Most respectfully, this reference to merger is a non sequitur, a mere conclusion without legal or factual support.⁶ Thus, the Subject Order barely mentions merger, much less refutes Defendant's argument regarding merger/equitable estoppel of the merged agreement—which Defendant duly briefed in support of its motion to compel arbitration (*see* Def.'s Mem. in Supp. of Mot. to Compel Arbitration pp. 14–20) and further advanced via oral argument at the motion hearing—and, most respectfully, the Court should (re)consider and expressly rule on this issue/argument—and, again, it should do so in light of the applicability of the direct benefits test. Defendant contends, of course, that the Court should rule in its favor in this regard and grant its motion, but at a minimum, i.e., even if the Court is not inclined to rule in Defendant's favor on merger/equitable estoppel, it should meaningfully address and clearly rule upon all material facets of this subject. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004)

⁵ (Subject Order p. 4.)

⁶ Defendant recognizes that, at the beginning of the paragraph wherein this conclusion is stated, the Court "finds that the present case is nearly identical to Hodge[v. UniHealth Post-Acute Care of Bamberg, LLC], 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018)] and Thompson[v. Pruitt Corp.], 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016)," two cases in which merger was discussed by the Court of Appeals; however, this is immediately followed not by any analysis of merger in reference to *Hodge* and *Thompson* but only by portions of those decisions addressing the scope of an agent's authority.

(“[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.”) (emphasis in original).

(b) The Subject Order does not address Defendant’s alternative argument about being permitted to conduct discovery targeted to Ms. Daniels’s agency relationship with Ms. Porter and the circumstances surrounding Ms. Porter’s admission to/stay at the Facility.

The Subject Order does not address Defendant’s alternative argument about being permitted to conduct discovery targeted to Ms. Daniels’s agency relationship with Ms. Porter and the circumstances surrounding Ms. Porter’s admission to/stay at the Facility—which Defendant duly briefed in support of its motion to compel arbitration (*see* Def.’s Mem. in Supp. of Mot. to Compel Arbitration pp. 20–21) and further advanced via oral argument at the motion hearing—and, most respectfully, the Court should (re)consider fully and fairly and expressly rule on. *See Elam*, 361 S.C. at 24, 602 S.E.2d at 780.

As explained, the Arbitration Agreement is valid on its face, containing Ms. Daniels’s express representation of her authority to bind her mother, Ms. Porter,⁷ and any questions as to Ms. Daniels’s agency (whether actual, apparent, or by estoppel) and/or Ms. Porter’s ratification (whether explicitly or implicitly) of Ms. Daniels’s acts on her behalf are all fact dependent. (*See* Def.’s Mem. in Supp. of Mot. to Compel Arbitration pp. 7–14.) The only evidence that Ms. Daniels lacked authority to bind Ms. Porter is her own affidavit (filed August 23, 2019, just three

⁷ (*See* Def.’s Mot. to Compel Arbitration at Ex. A.)

days before the hearing on Defendant's motion to compel arbitration (*See* Aff. of Vermell Daniels)) contradicting her prior representation that she had authority to sign the Arbitration Agreement on her mother's behalf.

It is manifestly unfair and unjust for the Subject Order to rely on Ms. Daniel's unchecked affidavit without allowing Defendant any opportunity to question her about it or otherwise follow pertinent evidentiary leads. The Subject Order itself makes much of the validity of a disputed arbitration agreement being a matter for judicial determination and of it being Defendant's burden to establish the validity of the Arbitration Agreement. (*See* Subject Order p. 2.) It cannot be the case that the proponent of arbitration (who, it must be remembered, may well be attempting to vindicate a valid right to arbitrate that the arbitration opponent has wrongfully denied—as is the case here, Defendant submits) has the burden to establish that right in a fact-based judicial proceeding in which it is disallowed use of the fact-finding tools (discovery procedures) available in other judicial proceedings. Obviously, if this were an action to determine the validity of a contract other than an arbitration agreement there would be no question about Defendant's ability to conduct discovery relevant to the facts/circumstances bearing on the contract's validity. Moreover, Defendant's alternative request to be allowed appropriately tailored discovery is essential to protect its legitimate interest in avoiding absurd the Catch-22 that would accompany an effort to show its valid contractual right to arbitrate. Without the Court's blessing, Defendant stands to be accused of waiving its arbitration rights simply by trying to prove them. To force Defendant into a situation where its arbitration rights are at the mercy of an unchecked affidavit (filed by an affiant directly contradicting her own prior representations) and where it cannot otherwise conduct relevant discovery to vindicate those rights without risking waiving them at the

same time as it proves them is not only patently unjust but also a violation of the FAA's requirement that arbitration agreements must be placed on equal footing with other contracts.

WHEREFORE, for the foregoing reasons (and, for that matter, for all of the reasons previously advanced to the Court in support of Defendant's motion, whether in written or oral form, all of which Defendant now asks the Court to (re)consider and expressly rule upon), Defendant asks that the Court alter, amend, and/or reconsider the Subject Order and vacate it in favor of an order granting Defendant's motion to compel arbitration.

PLEASE NOTE: Defendant reserves all rights to provide further support for this motion via such briefing, argument (to include oral argument), and/or additional submissions as the Court may permit or require.

Respectfully submitted,
YOUNG CLEMENT RIVERS, LLP

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Charleston, South Carolina

November 18, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
Vermell Daniels as Personal Representative of the	)	C/A No. 2019-CP-40-02295
Estate of Annie Porter,	)	
	)	
	)	PLAINTIFF'S RESPONSE TO
	)	DEFENDANT'S MOTION TO ALTER,
Versus	)	AMEND, AND/OR RECONSIDER ORDER
	)	DENYING MOTION TO COMPEL
	)	ARBITRATION
THI of South Carolina at Columbia, LLC d/b/a	)	
Midlands Health & Rehabilitation Center,	)	
	)	
Defendant.	)	

The Plaintiff, Vermell Daniels as Personal Representative of the Estate of Annie Porter hereby serves her Response to the Defendant, THI of South Carolina at Columbia, LLC d/b/a Midlands Health & Rehabilitation Center's Motion to Alter, Amend, and/or Reconsider Order Denying Motion to Compel Arbitration.

Plaintiff respectfully requests the Court deny the Defendant's Motion and find that the Court's Order filed November 6, 2019 sufficiently addresses all issues that were raised by both parties' written submissions and oral arguments. Annie Porter herself did not sign the arbitration agreement. Defendant has failed to put forth any evidence into the record that Vermell Daniels had any authority, actual or apparent, to bind Annie Porter to arbitration. In fact, based Ms. Daniels' affidavit, which was previously filed with the Plaintiff's Memorandum in Opposition, the record shows that Ms. Daniels did not have any actual or apparent legal authority to bind Annie Porter to arbitration. As such, the Defendant's Motion to Dismiss and Compel Arbitration as properly denied, as per this Court's Order of November 6, 2019.

CONCLUSION

Based on the reasons set forth above, the Plaintiff respectfully requests the Defendant's Motion to Alter, Amend, and/or Reconsider Order Denying Motion to Compel Arbitration be denied.

Respectfully Submitted,

s/Bradley H. Banyas

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A. Stuart Hudson (SC Bar #71691)

Bradley H. Banyas (SC Bar #101668)

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Attorneys for the Plaintiff

December 2, 2019

Mt. Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2019-CP-40-02295
VERMELL DANIELS as Personal	)	
Representative of the Estate of Annie Porter,	)	
	)	
Plaintiff,	)	DEFENDANT'S SUPPLEMENTAL
	)	FILING IN SUPPORT OF MOTION
vs.	)	TO ALTER, AMEND, AND/OR
	)	RECONSIDER ORDER DENYING
THI OF SOUTH CAROLINA AT	)	MOTION TO COMPEL ARBITRATION
COLUMBIA, LLC d/b/a MIDLANDS	)	
HEALTH & REHABILITATION CENTER,	)	
	)	
Defendant.	)	

TO: THE HONORABLE L. CASEY MANNING, Presiding Judge, and D. NATHAN HUGHEY, ESQUIRE; A. STUART HUDSON, ESQUIRE, and BRADLEY H. BANYAS, ESQUIRE, HUGHEY LAW FIRM, LLC, Attorneys for Plaintiff

NOW COMES Defendant, THI of South Carolina at Columbia, LLC d/b/a Midlands Health & Rehabilitation Center ("Defendant" or the "Facility"), by and through its undersigned counsel, within five (5) days of the hearing held February 13, 2020, on Defendant's Motion to Alter, Amend, and/or Reconsider Order Denying Motion to Compel Arbitration (the "Subject Motion"),^{1 2} and hereby submits this supplemental filing in support of the Subject Motion.³

¹ The Subject Motion was filed November 18, 2019. It was timely made in response to the Court's November 6, 2019, order denying Defendant's motion to compel arbitration (the "Underlying Motion").

² During the hearing on the Subject Motion, the Court advised counsel that it would allow the parties five (5) days to supplement the record.

³ To be clear, the instant filing is supplementary to (and in no way withdraws or detracts from any of) the grounds advanced or relief sought in the Subject Motion or in the oral argument already had thereon, to include, without limitation, Defendant's request that the Court (re)consider and expressly rule on each and every distinct issue/argument raised in support of the Underlying Motion (whether raised in writing or orally at the motion hearing), as well as on the issues/arguments raised grounds 1-4 of the Subject Motion.

In further support of Defendant's **merger/equitable estoppel** argument,⁴ Defendant submits for the Court's consideration a copy (attached hereto as Exhibit 1) of the Honorable Roger E. Henderson's order, filed January 10, 2020, in the case of *Spears v. Rehab Center of Cheraw, LLC*, Case No. 2019-CP-13-00308, granting the defendant's motion to compel arbitration on the basis of merger and equitable estoppel (the "Spears Order").

As the Court will see, the material facts of the Spears Order are in line with those of the instant matter. In both cases, the resident was a nonsignatory to an Admission Agreement and Arbitration Agreement⁵ signed on their behalf by a family member who did not have power of attorney⁶ and who, despite having represented themselves as having authority to sign for the resident at the time the Admission Agreement and Arbitration Agreement were executed,⁷ would later deny having such authority in the face of the defendant's motion to compel arbitration.

⁴ (See Subject Motion pp. 5–6; Underlying Motion 14–20.)

⁵ The Admission Agreement and Arbitration Agreement in *Spears* are the exact same as the Admission Agreement and Arbitration Agreement in this case.

⁶ Unlike in the present case, in *Spears*, Mrs. Spears did ultimately become Mr. Spears's attorney-in-fact. This, however, does not constitute a material factual difference from the present case because Mr. Spears did not execute a power of attorney in favor of Mrs. Spears until *after* Mrs. Spears had already signed the Admission Agreement and Arbitration Agreement on his behalf. Accordingly, at the operative time, i.e., when the Admission Agreements and Arbitration Agreements were signed (by Mrs. Spears for Mr. Spears and by Ms. Daniels for Ms. Porter), neither Mrs. Spears nor Ms. Daniels was operating pursuant to a valid power of attorney. As set forth in the Spears Order, Judge Henderson found the Arbitration Agreement enforceable against Mr. Spears nonetheless, based on merger and equitable estoppel, and Defendant asks the Court to do the same with respect to Ms. Porter here.

⁷ As discussed during the November 13th argument on the Subject Motion (and also set forth in Defendants' prior filings), the Arbitration Agreement contains the following language: "By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative." (Underlying Motion at Ex. A; Mem. in Supp. of Underlying Mot. at Ex. 2.) "[O]ne who has signed a contract," as of course Ms. Daniels did here, "is presumed to have read, understood, and assented to its terms." *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019).

Defendant submits that the reasoning of the Spears Order applies with equal force to the circumstances of this case.

Respectfully submitted,
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February 18, 2020

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Richland County
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2019-CP-40-02295

Vermell Daniels
as Personal Representative of the Estate of Annie Porter,

Respondent,

v.
THI of South Carolina at Columbia, LLC
d/b/a Midlands Health & Rehabilitation Center,

Appellant.

NOTICE OF APPEAL

YOUNG CLEMENT RIVERS, LLP
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Attorneys for Appellant

Other Counsel of Record:

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Attorneys for Respondent

Defendant, THI of South Carolina at Columbia, LLC d/b/a Midlands Health & Rehabilitation Center ("Appellant"), hereby appeals the following orders of the Honorable L. Casey Manning, Circuit Court Judge:

- **Order Denying Defendant's Motion to Dismiss Plaintiff's Complaint, Compel Arbitration and Stay State Court Proceedings**, filed November 6, 2019, and
- **Order Denying Defendant's Motion to Alter, Amend, and/or Reconsider Order Denying Motion to Compel Arbitration**, filed February 24, 2020.

Copies of the appealed orders are attached hereto and incorporated herein by reference. Appellant received written notice of entry of the most recent order on February 24, 2020.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 

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Attorneys for Appellant

Charleston, South Carolina

Dated: 3/16/20

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Richland County
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2019-CP-40-02295

EXHIBIT

C

Vermell Daniels
as Personal Representative of the Estate of Annie Porter,

Respondent,

v.

THI of South Carolina at Columbia, LLC
d/b/a Midlands Health & Rehabilitation Center,

Appellant.

PROOF OF SERVICE

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Attorneys for Appellant

I, Russell G. Hines, of Young Clement Rivers, LLP, attorneys for Appellant, hereby certify that the foregoing **NOTICE OF APPEAL** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on March 16, 2020, properly posted for delivery to the following addressees:

D. Nathan Hughey, Esquire
A. Stuart Hudson, Esquire
Bradley H. Banyas, Esquire
Hughey Law Firm, LLC
1311 Chuck Dawley Boulevard, Suite 201
Mt. Pleasant, SC 29464
Attorneys for Respondent

I also certify that a copy of this **NOTICE OF APPEAL** is this day, March 16, 2020, being E-Filed with the lower court (which will also, i.e., in addition to service by mail, effect service of the notice electronically on all counsel of record).

Respectfully submitted,
YOUNG CLEMENT RIVERS, LLP

By: _____



Russell G. Hines (SC Bar No. 72100)

Attorneys for Appellant

Charleston, South Carolina

Dated: 3/16/20

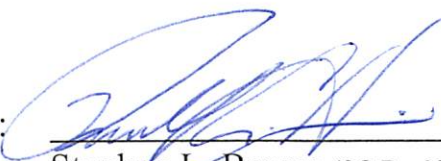
Jan 13 2021

SC Court of Appeals

Certificate of Counsel

The undersigned counsel for Appellant certifies that, in accordance with Rule 210(c), SCACR, this **Record on Appeal** contains all material proposed to be included by any party that was presented to the lower court and not any other material. The undersigned also certifies that this **Record on Appeal** complies with the Supreme Court of South Carolina's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings issued April 15, 2014.

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