STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF PICKENS)	
Deonda Weldon, Individually and as Personal Representative of the Estate of Earline Cooley,	C.A. Number: 2021-CP-39-01127 & 2021-CP-39-01128
Plaintiff,	**ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND DISMISSING CASES**
v.	
Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square, Dominion Senior Living, LLC, Dominion Clemson, II, LLC, Dominion Management Group, LLC And Dominion Group, LLC,	
Defendants.	

This matter was before the Court on October 20, 2021, upon Defendants' Motion to Compel Arbitration and Protective Order from Discovery. Counsel of record for all parties were present, including Matthew W. Christian for Plaintiff and Joshua T. Thompson for Defendants. Having reviewed the submissions by counsel and hearing all arguments advanced, the Court hereby GRANTS Defendants' Motion to Compel Arbitration and ORDERS that this matter be dismissed and compelled to binding arbitration in accordance with the below findings.

FINDINGS OF FACT

The Court has extensively reviewed the submissions of the parties, including exhibits. Of particular note, the Court has reviewed the Affidavit of Deonda Weldon, the Affidavit of Debra Galloway, Earline Cooley's Durable Power of Attorney attached to Defendants' Memorandum in Opposition as Exhibit 1, Ms. Cooley's Healthcare Power of Attorney (the "Healthcare POA") attached to Defendants Memorandum in Opposition as Exhibit 2, Ms. Cooley's Resident Admission Agreement attached to Defendants' Memorandum in Opposition as Exhibit 3, information on Ms. Cooley's

Emergency Contacts attached to Defendants' Memorandum in Opposition as Exhibit 4, and the various exhibits submitted by the parties which chronical the timeline for Defendants providing notice of investigating the arbitration issue through filing the present motion. Based upon said the arguments presented and said exhibits, the Court makes the following findings of fact:

On January 10, 2006, Earline Cooley ("Ms. Cooley") executed both a Durable Power of Attorney (the "POA") and Healthcare Power of Attorney (the "Healthcare POA"). The POA was filed in Greenville County, SC on August 1, 2014. The POA named Ms. Cooley's daughter, Deonda Weldon ("Ms. Weldon"), as Ms. Cooley's agent. Additionally, Ms. Cooley named her daughters, Phyllis Robin Cooley Elliott ("Ms. Elliott") and Debra Galloway ("Ms. Galloway"), in that order, as substitute or successor agents if Ms. Weldon was unable, unwilling, or unavailable. The POA granted the available agent all lawfully delegated powers not specifically limited in the POA. Ms. Cooley did not limit the available POA's power to admit her to a community residential care facility or limit the available POA's power to agree to any terms relevant to such admission. The powers expressly included the power to arbitrate; the power to abandon and/or compromise claims; the power to sign and execute contracts, agreements, releases, and waivers; and the power to pay medical expenses. The POA also stated that Ms. Cooley expressly provided that all actions taken by the available agent pursuant to the POA shall "bind me and my estate and my personal representative."

In the Healthcare POA, Ms. Cooley named Ms. Elliott as her agent. Ms. Cooley named Ms. Galloway and Ms. Weldon, in that order, as substitute or successor agents if Ms. Elliott was unable, unwilling, or unavailable. The Healthcare POA granted the power to provide a place of residence and to make arrangements at any nursing home or similar establishment. Like the POA, Ms. Cooley stated within the Healthcare POA that all actions taken by the available agent shall "bind me and my estate and my personal representative."

On February 14, 2019, Ms. Galloway, as the available durable power of attorney, executed the

Admission Agreement on behalf of Ms. Cooley as part of the process for admitting Ms. Cooley to Defendant Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square ("Dominion Clemson") for assisted living care. The Admission Agreement provided that Ms. Cooley was to be admitted to Dominion Clemson on March 8, 2019, for assisted living care that included accommodations, basic daily services such as meals, activities, and maintenance, and medication administration. The Admission Agreement also contained an arbitration clause within the same document, not as a separate document or exhibit. Based on the Admission Agreement, Ms. Cooley was admitted to Dominion Clemson for assisted living in March 2019. Ms. Cooley remained at Dominion Clemson until her discharge in March 2020.

In Paragraph 13 of the Admission Agreement, bolded and titled "**AGREEMENT TO ARBITRATE**," Ms. Galloway agreed that any claim or dispute "amongst the Parties, involving an amount in excess of $15,000, arising out of or related to this Agreement, the Establishment or the services/care provided to the Resident, shall be determined by arbitration in South Carolina, before a sole arbitrator." Ms. Galloway likewise agreed that the Federal Arbitration Act "shall govern the interpretation, enforcement, and proceedings pursuant to the arbitration provisions in this Agreement." Further, Ms. Galloway agreed that the parties would waive the right to be awarded punitive damages.

Likewise, Ms. Galloway agreed that the rights and obligations of the parties under the Admission Agreement "shall bind…the Parties hereto, their legal representatives, heirs, estates, successors and assigns. Ms. Galloway also agreed that should any provision of the Admission Agreement be found unenforceable, such unenforceable provisions would be severed and the remainder of the Admission Agreement would continue in full force and effect. Ms. Galloway agreed that "she was given the opportunity to read this Agreement before signing it." Ms. Galloway agreed in the Admission Agreement that all information provided to Dominion Clemson as part of the admission process, including Ms. Cooley's "application forms, health history and medical report, personal interview and emergency

information records, as applicable, is true and correct."

On October 13, 2021, Plaintiff commenced actions 2021-CP-39-01127 and 2021-CP-39-01128, both alleging claims of negligence against all Defendants related to the care that Ms. Cooley received while she was a resident at Dominion Clemson. Defendants timely filed their Answer on December 21, 2021, expressly raising the arbitration provision within the Admission Agreement as an affirmative defense. Along with the filed Answer, Defendants simultaneously served Plaintiff on the same day with Defendants' First Set of Interrogatories to Plaintiff and Defendants' First Set of Requests for Production to Plaintiff. These discovery requests specifically sought all powers of attorney executed by Ms. Cooley.

Plaintiff responded to Defendants' First Set of Interrogatories to Plaintiff and Defendants' First Set of Requests for Production to Plaintiff on April 25, 2022, and included document production that contained the POA. On June 9, 2022, Defense counsel emailed Plaintiff's counsel apologizing for a delayed response due to having Covid and informed Plaintiff's counsel that Defendants searched Plaintiff's county of residence, Pickens County, for a durable power of attorney and were unsuccessful in discovering such document. Defense counsel then stated that after reviewing Plaintiff's Responses to Defendants' First Set of Requests for Production Defendants, Defense counsel became aware of the Plaintiff's POA and planned to move to compel arbitration pursuant to the admission agreement. Defendants filed their Motion to Compel Arbitration and Protective Order from Discovery on June 9, 2022, which is now present before the Court.

Since these claims expressly fall within the scope of the Admission Agreement that contain an arbitration provision, the Court finds this matter should be dismissed and compelled to arbitration.

CONCLUSIONS OF LAW

As an initial matter, the Court recognizes that both Federal and South Carolina law favor arbitrating disputes. See O'Neil v. Hilton Head Hosp., 115 F.3d 272, 273 (4th Cir. 1997) ("The FAA embodies a strong federal policy in favor of arbitration, and, accordingly, there is a strong presumption

in favor of the validity of arbitration agreements."); Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) ("Furthermore, it is the policy of this state to favor arbitration of disputes.").

For this reason, both Federal and South Carolina courts have held that any doubts over arbitrability should be resolved in favor of compelling arbitration. See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 – 25 (1983) ("The Arbitration Act establishes that, as a matter of federal law, 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."); Towles v. United HealthCare Corp., 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999) ("[A]ny 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.").

Viewed through the lens of presumed enforceability outlined above, the Admission Agreement that contains an arbitration provision, by its terms and by law, are governed by the FAA, 9 U.S.C. §§ 1-16; Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014) (skilled nursing facility admission agreements and residencies implicate interstate commerce, and thus are governed by the FAA).

Pursuant to 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. 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). As discussed herein, the Admission Agreements satisfies these requirements, and the Court concludes that this matter should be dismissed and compelled to arbitration.

I. The arbitration provision in the Admission Agreement is not unconscionable.

As set forth above, the following facts are undisputed. Ms. Galloway was a competent adult on February 14, 2019. She reviewed a legal document based upon authority vested by Ms. Cooley's Power of Attorney. The legal document, an Admission Agreement, concerned Ms. Cooley's admission to an assisted living facility twenty-two (22) days later on March 8, 2019. The arbitration provision at issue was its own provision of the agreement, conspicuously bolded, and set forth in all capital letters. Ms. Galloway agreed she had time to review the document. Plaintiff, Ms. Cooley, and Ms. Galloway all benefited from the document for the year that Ms. Cooley was admitted to Dominion Clemson. Plaintiff and Ms. Galloway both presented Affidavits to this Court. Neither have claimed that Ms. Galloway did not sign the Admission Agreement. Neither have claimed that Ms. Galloway was suffering from mental infirmity at the time she signed the Admission Agreement. As detailed below, Ms. Galloway as Ms. Cooley's agent is held to her contract in such a circumstance.

Plaintiff argues that the arbitration provision contained in the Admission Agreement is unconscionable because there was an absence of meaningful choice on the part of Ms. Galloway and that the terms of the Admission Agreement are so oppressive that no fair or honest person would accept them. Plaintiff further argued that despite the Admission Agreement containing a severability provision that severability is not proper for an unconscionable provision and the arbitration "agreement" should be invalidated.

The South Carolina Supreme Court recently issued an opinion regarding the severability of unconscionable provisions. Similar to this matter, in Damico, the Purchase and Sale Agreement

("Agreement") between the parties contained an arbitration provision that was governed by the FAA. Damico v. Lennar Carolinas, LLC, No. 2020-001048, 2022 WL 4231032, at *3 (S.C. Sept. 14, 2022). The South Carolina Supreme Court clearly stated that "[t]he validity of the arbitration clause is a matter for the courts, whereas the validity of the contract as a whole is a matter for the arbitrator" and that when "conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract." Damico, 2022 WL 4231032, at *4 (internal citations omitted). Thus, this Court's analysis is limited to the arbitration provision contained within the Admission Agreement.

As to the arbitration provision, the party arguing unconscionability bears the burden of proving "(1) she lacked a meaningful choice as to whether to arbitrate because the Agreement's provisions were one-sided, and (2) the terms were so oppressive no reasonable person would make them and no fair and honest person would accept them." Doe v. TCSC, LLC, 430 S.C. 602, 612, 846 S.E.2d 874, 879 (Ct. App. 2020). "[C]ourts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." Id.

Plaintiff attached the Affidavit of Ms. Galloway to her memorandum as an exhibit. In her Affidavit, Ms. Galloway testified that at the time of the execution of the Admission Agreement she was unaware that it contained an arbitration clause, that the admissions process was hurried, that this timeframe was extremely emotional for her family, and finally that had she been aware of the arbitration provision she would not have signed the Admission Agreement. Ms. Galloway fails to explain how she, as a competent adult, was unaware of the arbitration provision given that it was conspicuously set forth as a separate provision of the Admission Agreement under a bolded and capitalized heading that said, "**AGREEMENT TO ARBITRATE**."

South Carolina law is clear that anyone who enters into a written contract has a duty to read the contract which she signs. Maw, 252 S.C. at 284-285, 166 S.E.2d at 204. Likewise, anyone who is capable of reading and understanding, but fails to read a contract before signing is bound by the terms thereof. Sims v. Tyler, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981). Furthermore, arbitration clauses are not unconscionable and will be enforced if a person who can read fails to read the contract, regardless of whether he was advised of the arbitration terms by the contracting party. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (holding the plaintiff's failure to read an arbitration provision did not render it unconscionable even though the plaintiffs claimed they were not advised of those terms).

While Ms. Galloway claims that the admissions processed was hurried and an emotional time, Plaintiff fails to address the twenty-two (22) day time period between the execution of Ms. Cooley's Admission Agreement paperwork on February 14, 2019, and her admission on March 8, 2018. Plaintiff has not provided evidence showing that Ms. Galloway did not have the appropriate time to review the entire Admission Agreement that contained an arbitration provision during the twenty-two (22) day time period between the execution of the documentation and Ms. Cooley presenting to the facility for assisted living care.

The Court, therefore, finds and concludes the Plaintiff has failed to establish that the arbitration provision within the Admission Agreement is unconscionable. Pursuant to Damico, the Court declines to review the liability and damages limiting provisions of the Admission Agreement. Damico indicates that the arbitrator assigned to this matter will determine enforceability of those provisions.

II. The Defendants have not waived their right to compel arbitration.

The Plaintiff filed the Complaints against Defendants on October 13, 2021. After the Complaint was received, the parties corresponded via e-mail to discuss a 30-day extension for the responsive pleading. Defense counsel informed Plaintiff's counsel through e-mail that Defendants were aware of an

arbitration provision in the admission agreement but were only familiar with a healthcare power of attorney at that time and asked for an extension for filing a responsive pleading, including a motion to dismiss or compel arbitration. Defense counsel also stated that he was continuing to investigate the enforceability of the arbitration agreement. Plaintiff's counsel agreed to the request and said that he did not believe the arbitration agreement was "enforceable for several reasons." Plaintiff's counsel did not address whether a durable power of attorney existed.

Defendants timely filed their Answers to Plaintiff's Complaint on December 21, 2021, expressly raising the arbitration provision within the Admission Agreement as an affirmative defense. Along with the filed Answer, Defendants simultaneously served Plaintiff on the same day Defendants' First Set of Interrogatories to Plaintiff and Defendants' First Set of Requests for Production to Plaintiff. In Defendants' First Set of Requests for Production to Plaintiff, Defendants specifically requested "[a]ll powers of attorney, including but not limited to financial, durable, medical, and healthcare powers of attorney, executed by Earline Cooley at any time" in Request for Production No. 21. Over four (4) months later, Plaintiff responded to Defendants' First Set of Interrogatories to Plaintiff and Defendants' First Set of Requests for Production to Plaintiff on April 25, 2022. Plaintiff's response to Defendants' Request for Production No. 21 stated, "See Healthcare Power of Attorney and Durable Power of Attorney for Earline Cooley."

Defense counsel then emailed Plaintiff's counsel on June 9, 2022, apologizing for a delayed response due to being ill with coronavirus and informed Plaintiff's counsel that the Defendants searched Plaintiff's county of residence, Pickens County, for a durable power of attorney and were unsuccessful in discovering such document. Defense counsel then stated that after reviewing Plaintiff's Responses to Defendants' First Set of Requests for Production Defendants, he became aware of the Plaintiff's durable power of attorney and planned to move to compel arbitration pursuant to the admission agreement. Defendants filed the Motion to Compel Arbitration and Protective Order from Discovery at the earliest

possibility on June 9, 2022. Since filing the Motion to Compel Arbitration and Protective Order from Discovery all discovery in this matter ceased pending this Court's ruling on the above-mentioned motions.

Plaintiff argues that Defendants nonetheless waived the right to seek arbitration by serving discovery and subpoenas before learning of the POA. Plaintiff argues that this is true because Plaintiff's counsel attached a copy of the POA to a medical authorization sent to Dominion Clemson before the case was filed. Plaintiff argues that the attachment of the POA put the Defendants on notice of a the POA and that Defendants should not have had to wait for discovery production of the POA to know it existed.

As stated *supra*, both Federal and South Carolina law favor arbitrating disputes and there is no set rule as to what constitutes waiver of arbitration. See O'Neil; Liberty Builders. Even though there is no set rule regarding waiver, generally the factors South Carolina courts consider are:

> whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration. These factors, of course, are not mutually exclusive, as one factor may be inextricably connected to, and influenced by, the others. Thus, a party may waive its right to compel arbitration if a substantial length of time transpires between the commencement of the action and the commencement of the motion to compel arbitration. What is a substantial length of time varies from one case to the next, depending on the extent of discovery conducted and the corresponding presence or absence of prejudice to the party opposing arbitration.

Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 126, 647 S.E.2d 249, 251 (S.C. Ct. App. 2007).

Plaintiff cited to the recent U.S. Supreme Court decision, Morgan, in her memorandum and argued that the Supreme Court held that the prejudice requirement "was not appropriate in determining waiver…" and that "the prejudice requirement, no longer exists." See Plt's Mem. Opp. Page 6. However, this was not the Supreme Court's holding in Morgan. In Morgan, the Supreme Court granted

certiorari "to resolve the split over whether federal courts may adopt an arbitration-specific waiver rule demanding a showing of prejudice." Morgan v. Sundance. Inc., 212 L. Ed. 2d 753, 142 S. Ct. 1708, 1709 (2022). The Supreme Court stated that "a court must hold a party to its arbitration contract just as the court would to any other kind." Morgan, 142 S. Ct. 1708 at 1713. The Supreme Court held that prejudice is not a condition of finding that a party, by litigating too long, waived its right to stay litigation or compel arbitration under the FAA. Id. at 1714 (stating that the Supreme Court's "sole holding today is that it may not make up a new procedural rule based on the FAA's policy favoring arbitration.").

In addition to Morgan, Plaintiff cited four (4) South Carolina cases regarding waiver in her memorandum. Plaintiff is correct in her argument that nursing homes can waive arbitration rights. However, South Carolina courts have focused considerably on whether a substantial length of time has commenced in litigation, whether excessive discovery has taken place, and if the Plaintiff was prejudiced in the delay seeking arbitration. See Rhodes. Plaintiff also argued in her memorandum that the South Carolina Court of Appeals held in Liberty "that the party moving to compel arbitration waived their right after filing initial pleadings and responding to discovery." See Plt's Mem. Opp. Page 7. But, in Liberty, the parties filed initial pleadings, conducted discovery, and were on the brink of trial before a motion to stay in favor of arbitration was filed; a timeframe of over 2.5 years. See Liberty Builders, Inc. v. Horton, 336 S.C. 658, 521 S.E.2d 749 (S.C. Ct. App. 1999). The Court of Appeals stated, "Liberty's decision to file suit, participate in pretrial discovery, and engage in procedural maneuvering for ***two and one-half years*** is sufficient to support the trial court's finding of waiver." Liberty, 521 S.E.2d 749 at 754 (emphasis added).

Plaintiff's memorandum further cites Johnson, stating "the South Carolina Supreme Court held that the defendant nursing home waived its right to compel arbitration after, among other things, answering the Complaint, seeking limited discovery issues, serving discover, and waiting approximately ten (10) months to file the motion to compel arbitration…" See Plt's Mem. Opp. Page 7. Prior to the

filing of the Complaint, the parties in Johnson spent over a year and a half in litigation regarding a temporary restraining order and appointing a guardian *ad litem* and during that time the nursing home failed to exercise its arbitration provision. See Johnson v. Heritage Healthcare of Estill, LLC, 416 S.C. 508, 788 S.E.2d 216 (S.C. 2016). The South Carolina Supreme Court specifically stated in its analysis in Johnson that the plaintiff indicted they "intended to purse a defense of waiver" two months after the Complaint was filed and despite this information and acknowledgement from the defense, a motion to compel arbitration was not filed for another eight (8) months, "all while appearing in court and conducting discovery." Johnson, 788 S.E.2d 216 at 219.

Lastly, Plaintiff relied on Flexon in her memorandum in opposition and stated that "the South Carolina Court of Appeals recognized and affirmed the order that the party moving for arbitration waived its right to arbitration by engaging in discovery without reservation or limitation. See Plt's Mem. Opp. Page 7. The Flexon holding is complex since it involved several defendants, including a former and subsequent parent company. Flexon v. PHC-Jasper, Inc., 413 S.C. 561, 776 S.E.2d 397 (S.C. Ct. App. 2015). In Flexon, a breach of contract action was filed in May 2009 against numerous defendants. Flexon, 776 S.E.2d 397 at 400. Two (2) months later, one of the defendants, a former subsidiary of one of the co-defendants, filed a motion to compel arbitration and a hearing was held on the matter where a non-moving co-defendant spoke supporting the motion and indicated that he would file his own motion to compel. Id.

In June 2010, the non-moving co-defendant filed his own motion to compel and subsequently the circuit court ruled on the initial motion to compel; denying it not based on time but because of a lack of interstate commerce language and that the parties agreed to litigate the matter in South Carolina. Id. at 401. The initial motion was appealed, upheld, and the second motion to compel was withdrawn without prejudice. Id. The parties then undertook depositions and after the depositions took place, a renewed motion to compel was filed. Id. The South Carolina Court of Appeals focused on the co-defendant

articulating to the court during the initial hearing that he would file a motion to compel, and that motion to compel was not filed for seven (7) months after it's co-defendant's initial motion to compel, and that the parties continued with discovery and depositions after the second motion to compel withdrawn. The Court of Appeals ultimately held that the co-defendant failed to take "the steps necessary to protect its own interests in a timely manner." Id. at 406.

In this matter, Defendants have moved swiftly to protect its interests in a timely manner. As detailed above, Defendants specifically requested from Plaintiff, during the initial discovery process, information regarding power of attorney documentation in December 2021. Defendants did not receive any documentation from Plaintiff, for over four (4) months, until April 2022 when Plaintiff produced her discovery responses. After receiving Plaintiff's discovery responses, the parties began corresponding regarding the scheduling of depositions. Unlike Flexon, no depositions were ever taken in this matter. Defendants specifically requested a stay in discovery pending the outcome of its Motion to Compel Arbitration.

The defendants in Liberty, waited over 2.5 years to file a motion to compel, all while conducting discovery and appearing before the court regarding other matters. The defendants in Johnson went through a lengthy temporary restraining order and guardian *ad litem* process before the Complaint was filed and then waited an *additional year* after the Complaint was filed to compel arbitration. In stark contrast to those cases, Defendants' counsel put Plaintiff's counsel on notice of the potential arbitration issue and what Defendants' counsel was doing to investigate it within their first communication on the case. Defendants also raised arbitration as an affirmative defense in their Answers filed on December 21, 2021. Further, Plaintiff knew from email correspondence and discovery that Defendants were seeking information on any applicable durable powers of attorney during the discovery process.

Defendants informed Plaintiff less than six (6) weeks after receiving Plaintiff's document production, that produced a tangible durable power of attorney for the first time in litigation, that it would

be moving to compel arbitration. Additionally, during those six (6) weeks from Plaintiff's document production to Defendant's filing a Motion to Compel, Defense counsel was ill with coronavirus and yet was still able to file Defendants' Motion to Compel Arbitration months faster than any of the defendants did in Liberty, Johnson, and Flexon.

In accordance with Rhodes, the Plaintiff has failed to show that a substantial length of time transpired between the commencement of this action and Defendants' Motion to Compel Arbitration. Six (6) weeks from the discovery of the durable power of attorney to filing the Motion to Compel Arbitration hardly stacks up to the years of delay in the cases discussed *supra* that Plaintiff relied on to show the Defendants waived its right to compel arbitration. Rhodes also requires this Court to consider whether the party requesting arbitration engaged in extensive discovery prior to moving to compel. Unlike Liberty, Johnson, or Flexon, no additional discovery has taken place in this matter since Defendants filed its Motion to Compel Arbitration on June 9, 2022. Only the initial discovery responses have been produced and no witnesses in this matter have been deposed. The Plaintiff has failed to prove that extensive discovery was conducted prior to Defendants filing its motion.

Finally, Plaintiff's rely on Morgan to claim that the prejudice requirement no longer exists. While this is not how the U.S. Supreme Court articulated it's holding, the Plaintiff has still failed to show any procedural preference to arbitration in this matter. Plaintiff has been unable to produce any evidence showing substantial delay, extensive discovery, or procedural prejudice by Defendants and therefore has failed to prove that the Defendants waived its right to compel arbitration.

The Court, therefore, finds and concludes that Plaintiff has failed to prove that the Defendants waived its right to compel arbitration.

III. All Defendants have the right to join in the request for arbitration pursuant to the Admission Agreement.

Plaintiff argues that the arbitration provision contained in the Admissions Agreement does not apply to the remaining Defendants in this matter. The court in Pearson v. Hilton Head Hosp., 400 S.C.

281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012), relying on International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416-17 (4th Cir. 2000), held that "well-established common law principles dictate that in an appropriate case a non-signatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." These include principles such as incorporation by reference, assumption, agency, veil piercing/alter ego, and equitable estoppel. International Paper, Id. Further, "[i]t does not follow . . . that under the [FAA] an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision." Id. at 416.

Pearson cited and relied upon the South Carolina District Court's opinion in Goer v. Jasco Indus., Inc., 395 F. Supp. 2d 308, 314 n.9 (D.S.C. 2005), which held that "equitable estoppel allows a non-signatory to compel arbitration . . . when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory." The court also held that "application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. Otherwise, arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration is effectively thwarted." Id. at 295; see also, J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-321 (4th Cir. 1988).

In S.C. Pub. Serv. Authority v. Great Western Coal, et al., the plaintiff contracted with Great Western Coal for the provision of coal. 312 S.C. 559, 437 S.E.2d 22 (Ct. App. 1993). The contract contained an arbitration clause. The plaintiff later brought suit against Great Western Coal, its president, and another employee, alleging that they had increased coal prices while lowering quality. Id. at 561, 437 S.E.2d at 23 – 24. Defendant president, a non-signatory to the contract, filed a motion to dismiss and compel arbitration. Id. at 561, 437 S.E.2d at 24. The trial judge denied defendant president's motion because he did not sign the contract in his individual capacity, and defendant president appealed. Id. at

563, 437 S.E.2d at 24 – 25.

The South Carolina Court of Appeals reasoned that "a party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint, or signatory parties in their individual capacity because this would nullify the rule requiring arbitration." Id. at 563, 437 S.E.2d at 24 - 25, citing Arnold v. Arnold Corp., 920 F.2d 1269 (6th Cir. 1990). The Court of Appeals further reasoned that "when the nonsignatory parties are willing to submit to arbitration, the case should be arbitrated." Id. The Court of Appeals therefore, concluded, that the defendant president was seeking arbitration and held that the trial judge erred in denying the same simply because the defendant president did not sign the contract. Id.

Looking to (1) the language of the Admission Agreement, (2) the claims Plaintiff has raised against Defendants, and (3) applying this law, it is clear that any claims against Dominion Senior Living, LLC, Dominion Clemson, II, LLC, Dominion Management Group, LLC, and Dominion Group, LLC are substantially intertwined with Plaintiff's pending claims against Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square, the other signatory to the Admission Agreement.

In Plaintiff's Complaint, she has alleged that Ms. Cooley was a resident at Dominion Clemson, and that the actions of the remaining Defendants "directly affected resident care such as that of Earline Cooley," and that the parties were engaged in a "joint enterprise." Plaintiff thereafter refers to all Defendants as simply "Defendants" within the remaining allegations. Plaintiff's own allegations of the substantially interdependent and concerted alleged misconduct of Defendants, through which Plaintiff alleges joint liability for those alleged wrongs, compels the construction of the arbitration provision of the Admission Agreement to be equally enforceable by all Defendants. Further, based upon the Motion to Compel Arbitration, it is clear that all Defendants join in the Motion.

The Court, therefore, finds that all Defendants have the right to join in the request for arbitration pursuant to the Admission Agreement.

IV. The arbitration agreement is enforceable as to the statutory beneficiaries' claims in the wrongful death action.

Plaintiff alleged wrongful death claims in case action number 2021-CP-39-01128. Plaintiff argues in her memorandum, citing Bennett, that "South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries and that such claims are distinct and separate from those brought under survival claims." Plaintiff further argues that even if Ms. Galloway had agreed to arbitration, she did not have the legal authority to bind the statutory beneficiaries who are not parties to the Arbitration Agreement."

As discussed in more detail *infra*, Ms. Galloway, as Ms. Cooley's available agent, had the authority under the POA to obligate Ms. Cooley's wrongful death beneficiaries to arbitration based upon the plain language of the POA and Admission Agreement and because South Carolina's Wrongful Death Statute is a derivative action. See S.C. Code Ann. § 15-51-10 (The South Carolina Wrongful Death Act requires, as a condition of any suit, that the decedent herself, had she lived, could have "maintain[ed] an action and recover[ed] damages."); Estate of Stokes v. Pee Dee Family Physicians, LLP, 389 S.C. 343, 347 (2010) ("[O]ur law has remained steadfast to the principle of limiting the right of recovery under the wrongful death statute to those cases in which the party injured would have been entitled to recover if death had not ensued." (cataloguing cases)); Rish v. Seaboard Air Line Ry., 90 S.E. 704, 704-05 (S.C. 1916) ("The [Wrongful Death Act] gives a right of action where none existed before, and limited the right of recovery to those cases in which the party injured would have been entitled to recover if death had not ensued.")

Although the case law in South Carolina has not directly addressed the issue at hand, the court has not been hesitant to prohibit wrongful death actions in which the decedent had in some way barred herself from pursuing the underlying cause of action. In Price v. Richmond & D.R. Co., 33 S.C. 556, 12 S.E. 413 (1889), the court determined that a release executed by the decedent prior to his death prevented a wrongful death action brought by the decedent's wife. The Court's decision was premised upon the

limiting language of the wrongful death statute. The Price court held that if the defendant in some way deprived himself of the right to pursue a cause of action, "his administrator is, likewise, [also] barred of his right of action." Id. at 560, 12 S.E. at 413.

Furthermore, the court in Reed v. Northeastern R. Co., 37 S.C. 42, 16 S.E. 289 (1892) affirmed the Price holding and found that "[a]nything that would have defeated [the decedent's] recovery would defeat that in behalf of his family in case he failed to survive." Reed at 53, 16 S.E. at 291. In Quattlebaum v. Carey Canada, Inc., 685 F. Supp. 939 (D.S.C. 1988), the South Carolina District Court interpreted the Wrongful Death statute, and held that a survivor cannot bring an action under the wrongful death statute to recover for the same wrong sued upon earlier by the decedent, if the personal injury statute of limitations has expired, but the specific wrongful death limitations period has not expired. This clearly establishes that Wrongful Death cause of action is wholly derivative. The District Court, sitting in diversity, examined the issue as the highest court of South Carolina would if confronted with the same situation. It then traced the history of wrongful death claims starting with Lord Campbell's Act. It further held that the same defenses that would have been available to use against the decedent, had he lived, were also available against those asserting the wrongful death claim.

Based on the legal nature of a wrongful death claim, the South Carolina Supreme Court has found that where a decedent or her agent executes an arbitration agreement in connection with the decedent's admission to a nursing home, wrongful death actions brought by the personal representative can be subject to binding arbitration. Dean, 408 S.C. 371, 759 S.E.2d 727 at n. 3. District Courts in South Carolina interpreting Dean have found that statutory beneficiaries are subject to arbitration. See, e.g., THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert, 2015 WL 1268185, at *3 (D.S.C. Mar. 19, 2015) ("Additionally, the South Carolina Supreme Court made clear in Dean that, under South Carolina law, an arbitral agreement is still indeed binding on a decedent's estate for a claim in wrongful death.")

Ms. Cooley authorized Ms. Galloway as her available agent under the POA to take acts which

"bind me and my estate and my personal representative." Ms. Galloway as Ms. Cooley's available agent then used that authority to sign an Admission Agreement containing an arbitration provision which bound "the Parties hereto, their legal representatives, heirs, estates, successors and assigns."

Ms. Galloway's execution of the Admission Agreement, as Ms. Cooley's attorney-in-fact, defeated Plaintiff's ability as the personal representative to later disavow her actions. Since the execution of the Admission Agreement, which contains an arbitration provision, lawfully bound Ms. Cooley to arbitrate any action arising from Dominion Clemson's alleged negligence and expressly bound her estate, heirs, successors, and assigns, it also controls the availability of the wrongful death action to her heirs. Because Ms. Galloway signed the Admission Agreement in her legal capacity on behalf of Ms. Cooley with express authority to bind Ms. Cooley's estate, heirs, and assigns—and not in her own capacity—she had every right to exercise her mother's option and authority to bind her heirs to the decision to defer a wrongful death claim to arbitration. Courts across the country hold this premise true. See Diversicare Leasing Corp. v. Hubbard, 189 So.3d 24 (Ala. 2015) (holding that "an arbitration agreement that binds the nursing-home resident also binds the resident's representative"), citing Entrekin v. Internal Medicine Associates of Dothan, P.A., 689 F.3d 1248, 1259 (11th Cir. 2012).

The court in Diversicare further held that personal representatives of estates of deceased nursing home residents who properly signed arbitration agreements on behalf of residents "were bound to arbitrate the wrongful-death claims" of the resident's estates. Id. at 28, 30; see also Briarcliff Nursing Home, Inc. v. Turcotte, 894 So.2d 661 (Ala. 2004) (holding that personal representatives of nursing home residents were bound by arbitration provisions contained in admission contracts, arbitration provision was not unconscionable, and not a contract of adhesion); Owens v. Coosa Valley Heath Care, Inc., 890 So.2d 983 (Ala. 2004) (holding that arbitration agreement bound both resident and representative); Estate of Eckstein ex rel. Luckey v. Life Care Centers of America, Inc., 623 F. Supp. 2d 1235 (E.D. Wash. 2009) (holding that claims for neglect, corporate negligence, and wrongful death were

subject to arbitration based on arbitration agreement signed by resident's attorney-in-fact that was binding on the estate); Laizure v. Avante at Leesburg, Inc., 109 So.3d 752 (Fla. 2013) (arbitration agreement covered wrongful death claims, and estate and statutory heirs were bound by the arbitration agreement).

Plaintiff's argument that an Estate and Personal Representative cannot be bound to an arbitration provision in an Admission Agreement ignores the clear language and the practicalities of arbitration provisions in the long term care context. "[T]o hold otherwise would eviscerate a long term care provider's contractual rights when presented with a wrongful death claim of a resident, the very claim anticipated by the Agreement." Estate of Eckstein, 623 F. Supp. at 1239. See also Sanford v. Castleton Health Care Center, LLC, 813 N.E.2d 411, 420 (Ind. Ct. App. 2004) (holding the estate's wrongful death claim was subject to arbitration because "regardless of whether [the personal representative], was privy to the contract containing the arbitration clause, the Estate's survival and wrongful death claims arose out of [Defendant's] alleged negligent treatment of [the resident]").

The wrongful death statute is clearly derivative. A claim under it only arises if there is a wrongful act that would have been actionable by the decedent if she had not died. Likewise, if a wrongdoer dies, a wrongful death action survives against the personal representative subject to actions taken by – or not taken by – the decedent during his lifetime. Execution of a nursing home arbitration agreement by a party with the capacity to contract on behalf of the decedent binds the decedent's estate and statutory heirs in a subsequent wrongful death action arising from an alleged tort within the scope of an otherwise valid arbitration agreement.

Plaintiff further relied on Boyle in her memorandum to argue that "wrongful death beneficiaries' claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants." However, Boyle does not mention the issue of whether a wrongful death claim can be subject to arbitration and the court's holding has no relevance to the issue of whether a decedent

can submit wrongful death claims to arbitration. Ultimately, a wrongful death claim is derivative and there would be no claim but for an injury to the decedent.

The Court, therefore, finds that the arbitration agreement is enforceable as to the statutory beneficiaries' claims in the wrongful death action.

V. Debra Galloway did possess the appropriate authority to execute the Arbitration Agreement on behalf of Earline Cooley.

Plaintiff argued that the arbitration provision, which is contained in Paragraph 13 of the Admission Agreement, was unenforceable because Ms. Galloway did not possess the appropriate authority to execute the Admission Agreement on behalf of Ms. Cooley.

On January 10, 2006, Ms. also executed a durable POA, which was filed in Greenville County, SC on August 1, 2014. The POA named Ms. Weldon as Ms. Cooley's agent. Additionally, Ms. Cooley named Ms. Elliott and Ms. Galloway, in that order, as substitute or successor agents if Ms. Weldon was unable, unwilling, or unavailable. The POA granted the available agent all lawfully delegated powers not specifically limited in the POA including the power to arbitrate, the power to abandon and/or compromise claims, the power to sign and execute contracts, agreements, releases, and waivers, and the power to pay medical expenses. Ms. Cooley did not limit the available POA's power to admit her to a community residential care facility or limit the available POA's power to agree to any terms relevant to such admission. Like the Healthcare POA, the POA clearly provided that all actions taken by the available agent pursuant to the POA shall "bind me and my estate and my personal representative."

On February 14, 2019, twenty-two (22) days before Ms. Cooley's admission to Dominion Clemson, Ms. Galloway, as a durable power of attorney, executed the Admission Agreement on behalf of Ms. Cooley as part of the process for admitting Ms. Cooley to Dominion Clemson for assisted living care. Based upon the information provided to Dominion Clemson during the admissions process, the Court finds and concludes that Ms. Galloway was an available agent under the POA and had the appropriate authority to execute the Admission Agreement, which contains an arbitration provision, on

behalf of Ms. Cooley.

VI. Plaintiff's Motion to Compel and Defendants' Request for a Protective Order from Discovery are denied as moot.

In addition to Defendants' Motion to Compel Arbitration, two (2) other related motions are pending before this Court in this matter, which are Plaintiff's March 22, 2022, Motion to Compel referencing Plaintiff's First Interrogatories and First Requests for Production to Defendants and the remainder of Defendant's June 9, 2022 Motion to Compel Arbitration requesting a Protective Order from Discovery.

At the Court's October 20, 2022, hearing, Defendants argued that they had to abstain from further discovery consultations and production once filing the Motion to Compel Arbitration at the risk of a waiver argument. Plaintiff indeed made this argument in her Memorandum in Opposition. As this Court instructed orally at the hearing on October 20, 2022, the Court only intends to rule on the Motion to Compel Arbitration and granted leave to re-file the Plaintiff's Motion to Compel and Defendants' Motion for a Protective Order pending the Court's ruling on the Motion to Compel Arbitration. Given the Court's ruling granting the Motion to Compel Arbitration and Dismissing these Actions, Plaintiff's Motion to Compel and Defendants' Motion for a Protective Order are now denied as moot.

CONCLUSION

For the reasons set forth herein, Defendants' Motion to Compel Arbitration is hereby **GRANTED** and this matter is **DISMISSED.** Should Plaintiff opt to pursue this claim in arbitration, she is **COMPELLED** to do so by initiating her claim pursuant to the procedures set forth in Paragraph 13 of the Admission Agreement entitled "AGREEMENT TO ARBITRATE".

IT IS SO ORDERED!

Pickens Common Pleas

Case Caption: Deonda Weldon , plaintiff, et al VS Dominion Clemson, Llc , defendant, et al

Case Number: 2021CP3901127

Type: Order/Compel

So Ordered

G.D. Morgan Jr.