

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

Appeal from Spartanburg County
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2018-CP-42-04405
Appellate Case No. 2019-001731

RECEIVED
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SC Court of Appeals

The Estate of Mary Solesbee, by her personal
representative, Connie Bayne,

Respondent,

v.

Fundamental Clinical and Operational Services, LLC;
Fundamental Administrative Services, LLC; THI of
South Carolina at Magnolia Manor-Inman, LLC d/b/a
Magnolia Manor-Inman; Inpatient Consultants of North
Carolina, P.C.; and Angela Brown, ACNP,

Defendants,

Of which Fundamental Clinical and Operational
Services, LLC; Fundamental Administrative Services,
LLC; and THI of South Carolina at Magnolia Manor-
Inman, LLC d/b/a Magnolia Manor-Inman are the

Appellants.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
The Estate of Mary Solesbee, by her	)	
Personal Representative Connie Bayne,	)	CIVIL ACTION NO.: 2018-CP-42-04405
	)	
Plaintiff,	)	Order
vs.	)	
	)	
Fundamental Clinical & Operational	)	
Services, LLC; Fundamental Administrative	)	
Services, LLC; and THI of South Carolina	)	
At Magnolia Manor-Inman, LLC d/b/a	)	
Magnolia Manor-Inman; Impatient	)	
Consultants of North Carolina, P.C.; and	)	
Angela Brown, ACNP,	)	
Defendant/s.	)	

Hearing Date:	August 16 th , 2019, at 9:30 a.m.
Hearing Judge:	Grace Gilchrist Knie
Counsel for Plaintiff:	Matthew W. Christian
Counsel for Defendant/s:	Russell G. Hines
Court Reporter:	Michael R. Watts

This matter was before the Court on Friday, August 16th, 2019, at 9:30 a.m., in Spartanburg County, SC, the Seventh Judicial Circuit upon Defendant's Motions to Dismiss and Compel Arbitration. Attorney Matthew W. Christian of Christian and Davis, LLC was present representing the interests of Plaintiff. Attorney Russell G. Hines of Young Clement Rivers, LLP was present representing the interests of Defendant THI of South Carolina at Magnolia Manor. Michael R. Watts was the Court Reporter.

PROCEDURAL BACKGROUND:

This action was commenced by the filing of a Summons and Complaint dated December 27th, 2018, for wrongful death and survival actions. An Amended Summons and Complaint was filed January 3rd, 2019. Service on the Defendant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman was made personally on the registered agent on January 23rd, 2019, and filed on January 29th, 2019. Defendant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman filed an Answer and a Motion to Dismiss on February 22nd, 2019. A Second Amended Summons and Complaint was filed by Plaintiff on February 27th, 2019. Defendant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman filed an Answer to the Second Amended Complaint on March 14th, 2019. Defendant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman filed a Memorandum in Support of Motion to Compel Arbitration and Stay Court Proceeding on August 14th, 2019. The parties appeared in front of this Court on this Motion on August 16th, 2019.

FACTUAL BACKGROUND:

This matter arises out of two civil actions: a survival action and a wrongful death action. Both actions involve allegations of nursing home negligence and corporate negligence resulting in the death of Mary Solesbee (hereinafter "Decedent"). Connie Bayne (hereinafter "Daughter") was Decedent's daughter and serves as Personal Representative of Decedent's Estate.

Decedent was admitted to this Defendant's (THI of South Carolina at Magnolia Manor-Inman, LLC) Facility on June 27th, 2016, for skilled nursing care following her transfer from Pelham Regional Medical Center. Decedent was admitted with the assistance and aid of her son, Alan Dover (hereinafter "Son"). Decedent was admitted to Magnolia Manor for short-term rehabilitation after undergoing treatment for sepsis, resulting from a spider bite. Decedent was 71 years old. At the time of admission, Decedent's Son, signed an Admission Agreement and an Arbitration Agreement presented to him by an agent of Magnolia Manor. The Arbitration Agreement was signed by Son as "resident/representative," and by Libby Byars of the facility as "authorized agent of facility."

Plaintiff alleges that as a result of the Defendant's negligence, Decedent's wounds deteriorated, became infected, and she became septic, resulting in her emergency transport to the hospital and ultimately in her death.

Plaintiff filed the Notice of Intent to file suit on July 12th, 2018. The parties engaged in the mandatory pre-suit mediation, which was unsuccessful. Daughter as Personal Representative then filed the Complaints for wrongful death and survival action and timely served the Defendants. Defendant THI of South Carolina at Magnolia Manor-Inman, LLC filed its Motion to Compel Arbitration and Stay State Court Proceedings on August 14th, 2019. Defendants Fundamental Administrative Services, LLC and Fundamental Clinical and Operational Services, LLC filed their Motions to Stay on August 9th, 2019. Plaintiff contends that the Arbitration Agreement is unenforceable under state contract law.

LAW & ANALYSIS:

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See 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 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).

Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 668 (2007) ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause"). The courts, not arbitrators, are charged with deciding certain "gateway matters," including "whether the parties have a valid arbitration agreement or whether the arbitration clause applies to a certain type of controversy." Simpson, 373 S.C. at 23, 644 S.E.2d at 668; See also New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 629, 667 S.E.2d 1, 5 (Ct. App. 2008).

I. The first issue presented to the Court was whether the Son had actual or apparent and inherit authority to sign the Arbitration Agreement for Decedent.

The legal consequences of an agent's actions can only be attributed to the principle when the agent has actual or apparent authority. Charleston Registry v. Young Clement, 359 S.C. 635, 642, 598 S.E.2d 717 (Ct. App. 2004). Apparent authority is based on "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). Apparent authority exists when the principal is bound by the acts of its agent after the principal has placed the agent in such a position that "a person of ordinary prudence, reasonably familiar with business usages and custom is led to believe the agent has certain authority and in turn, deals with the agent based on the assumption." Muller v. Myrtle Beach Golf and Yacht Club, 303 S.C. 137, 142, 399 S.E.2d 430, 433 (Ct. App. 1990), *rev'd on other grounds*, citing Fernander v. Thigpen, 278 S.C. 140, 293 S.E.2d 424 (1982); Watkins v. Mobil Oil Corp., 291 S.C. 62, 352 S.E.2d 284 (Ct. App. 1986).

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 present 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, 567, 813 S.E.2d 292, 304 (Ct. App. 2018); and Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d, 679 (Ct. App. 2016). In all three of these cases, either the South Carolina Supreme Court or the South Carolina Court of Appeals 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 such. In all three cases, the Courts found that no implied authority and that no estoppel applied. As the Court noted in Thompson and in Hodge, there was no evidence that the resident being admitted to the nursing home took any action to create an agency relationship for Son. *See* Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d, 679 (Ct. App. 2016); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 567, 813 S.E.2d 292, 304 (Ct. App. 2018). The present case is nearly identical to Hodge and Thompson.

In Hodge, the Court 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 v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 567, 813 S.E.2d 292, 304 (Ct. App. 2018). As further noted by the South Carolina Court of Appeals in Hodge, the Dickerson Court, and The Supreme Court of Nebraska quoted in Hodge, "...a son

who had authority to sign health care documents on behalf of his mother did not have authority to sign an arbitration agreement on her behalf.” Hodge, 813 S.E.2d at 305, citing Dickerson, 995 A.2d at 738, also citing Koricic v. Beverly Enterprises-Nebraska, Inc., 773 N.W.2d 145, 149-52 (2009). The Hodge court also relied upon the Court of Appeals’ decision in Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d, 679, 686 (Ct. App. 2016), *cert. denied*, S.C. Sup. Ct. Order dated Dec. 2, 2016. The Thompson Court determined, ““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.”” Hodge, 813 S.E.2d at 307, quoting Thompson at 784 S.E.2d at 686.

Furthermore, as the Hodge Court noted, the Plaintiff is not suing under the Arbitration Agreement or attempting to invoke the Arbitration Agreement itself. In fact, Plaintiff has filed no action alleging a breach of contract under the Admissions Agreement. Therefore, Plaintiff is not seeking to invoke benefit of either of the contracts executed by Son. See Wilson v. Willis, 426 S.C. 326, 827 S.E.2d 167 (2019). As the Wilson Court noted, a non-signatory should be compelled to arbitrate a claim, only if, it seeks through the claim to derive a direct benefit from the contract containing the arbitration provision. Wilson, 426 S.C. at 344. Additionally, the Wilson Court noted, it is important to distinguish direct benefits from indirect benefits because when the benefits to a signatory are merely indirect, an Arbitration Agreement cannot be compelled. Wilson, 426 S.C. at 343. The Wilson Court explicitly found that the mere fact that the claim would not exist “but for” the contract, does not invoke the theory of estoppel. Wilson, 426 S.C. at 343. Further, as the Wilson Court noted, “Equitable estoppel is, ultimately, a theory designed to prevent injustice, and it should be used sparingly. See Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 71 A.3d 849, 852 (N.J. 2013) (Observing equitable estoppel should be used sparingly to compel arbitration and noting it ‘is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration’); 28 Am. Jur. 2d Estoppel and Waiver §29 (2011) (stating equitable estoppel should be used with restraint and only in exceptional circumstance).” Wilson, 426 S.C. at 345.

Based on the above cited law, the Son did not have the actual or apparent authority to sign the Arbitration Agreement on behalf of the Decedent.

II. The second issue presented to the Court was whether the Wrongful Death claims brought by the Decedent’s Beneficiaries are excluded under a valid Arbitration Agreement.

First, it should be noted that the Court has found no valid Arbitration Agreement in this case. However, even if the Arbitration Agreement was valid, the Wrongful Death claims of the Decedent’s Beneficiaries would not be excluded, as they are separate causes of action.

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. Bennett v. Spartanburg Railway Gas and Electric Co., 97 S.C. 27, 81 S.E. 189 (1914). While dealing with a separate arbitration issue in a nursing home case and finding the arbitration agreement to be unenforceable, the Court of Appeals in Hodge recognized the separateness of the statutory beneficiaries/estate’s claims from those of the patient/resident. Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 567, 813 S.E.2d 292 (Ct. App. 2018). In Dickerson, the Maryland Court of Appeals noted that the nursing home was attempting:

“[T]o use equitable estoppel against [the patient’s] estate based on actions that [daughter] took in her individual capacity. The fact that [daughter] is now the Personal Representative for [the patient’s] [e]state is of no moment; we will not hold this circumstance against [the patient’s] [e]state. Simply put, [the patient’s] [e]state is the plaintiff in this case, and Respondent has alleged no conduct on the part of [the patient’s] [e]state, or by [the patient’s companion] in her capacity as Personal Representative of [the patient’s] [e]state....” Hodge, 422 S.C. at 559-560, 813 S.E.2d at 300; quoting Dickerson v. Longoria, 414 Md. 419, 995 A.2d. 721, 743 (2010).

Other states have come to the same conclusion: Daniels v. Sunrise Senior Living, Inc., 212 Cal.App.4th 674, 151 Cal.Rptr.3d 273 (Cal.App.4 Dist, 2 Div., 2013) (Wrongful Death claims not bound to arbitration); Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009) (Wrongful Death claimants not bound by arbitration agreement).

The Defendant, however, argues that by including the clause, “successors, assigns, heirs, personal representatives, guardians or any other persons deriving their claims through or on behalf of Resident,” within the Arbitration Agreement therefore binds the parties wrongful death claim. The Supreme Court of Kentucky answered such argument regarding the binding of non-signatory wrongful death beneficiaries in Ping v. Beverly Enterprises, Inc.:

“[A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract’s procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract’s other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third party are appropriately subjected to the contract’s arbitration provisions, at least where the tort and the contract are significantly intertwined. See, *In re Weekley Homes, L.P.*, 180 S.W.3d 127 (Tex.2005) (negligent repair claim by homeowner’s daughter against contractor was subject to repair contract’s arbitration clause because daughter, although a non-party, was a direct and principal beneficiary under the contract). It is something else entirely, however, to say that incidental beneficiaries of a contract—individuals or entities with no substantive rights under the contract and no direct benefits—may have their tort claims against the parties swept up into the contract’s arbitration provisions merely by being mentioned in the contract as potential claimants. This is what Beverly purports to do. Arbitration is a matter of contract, however; it is something the contracting parties, or their proxies, must agree to. It is not something that one party may simply impose upon another. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” Citation and internal quotation marks omitted). Since Beverly’s theory would allow just that, i.e., would allow one party merely by referring to someone else in an arbitration clause to thereby bind that other person to arbitration as a “third party beneficiary” of the arbitration agreement, we reject it out of hand.” Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581, 599-600 (K.Y. 2012).

The wrongful death claims are separate claims apart from the Decedent’s claims.

According to South Carolina's Wrongful Death Act:

"Whenever the death of a person shall be caused by the wrongful act, negligent or the fault of another and the act, negligent or the fault is such as would, if death had not ensued, had entitled party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued shall be liable to an action for damages..." S.C. Code Ann. §15-51-10 (1977).

The wrongful death beneficiaries are as follows:

"Every such action shall be for the benefit of the wife, or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none, for the benefit of the heirs of the person whose death shall have been so caused. Every such action shall be brought by or in the name of the executor or administrator of such person." S.C. Code Ann. §15-51-20 (Supp. 2001).

The general element of damages recoverable are "pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of the use and comfort of the Decedent's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries." Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d. 713, 714 (Ct. App. 1989) citing Smith v. Wells, 258 S.C. 316, 188 S.E.2d 470 (1972); Mishoe v. Atlantic Coast Line R.R. Co., 186 S.C. 402, 197 S.E. 97 (1938).

The wrongful death claim is a separate claim than the claims a decedent might bring on his own behalf under the survival statute. Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914). The South Carolina Supreme Court held that wrongful death and survival actions are different claims for different injuries. Id. The Court stated, "necessarily, therefore, there must be separate verdicts and separate judgments...there should be separate actions." Bennett, 97 S.C. at 31, 81 S.E. at 190; See also Strickland v. Southern Ry Co., 111 S.C. 248, 97 S.E. 695 (1918) (Supreme Court affirmed appeal from Circuit Court's ruling noting that survival claims are independent of wrongful death claims); Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539 (1928) (discussing the difference between survival and wrongful death claims as being independent of each other).

If the defendant has a defense that would completely bar the decedent's claim had the decedent survived, then the wrongful death beneficiaries may not bring a claim under the statute. Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 699 S.E.2d 143 (2010). For instance, in Stokes, the statute of limitations had run on the decedent's claim, and the wrongful death beneficiaries were accordingly barred from pursuing their claims under the statute. Id. The Supreme Court cited the following from United States District Court case of Quattlebaum v. Carey Canada, Inc., 685 F. Supp. 939 (D.S.C. 1988): "anything that would have defeated the decedent's recovery had he survived the accident, 'such as contributory negligence, a valid release, or similar acts on his part,' would defeat the right of recovery on behalf of his family in case of his death." The Court held, "Quattlebaum was correctly decided and adheres to the principle that a decedent's estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived." Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 349, 699 S.E.2d 143, 146 (2010). Here, however, the claim would not have failed had Decedent survived; therefore, it does not fail for the Decedent's beneficiaries.

The Defendants rely on cases where statutory beneficiaries are bound as third party beneficiaries. The Defendants cite Pearson v. Hilton Head Hosp., 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012). In Pearson, the Plaintiff who sought to avoid the arbitration agreement had filed suit for a breach of the contract that contained the arbitration clause. In the present case, there has been no claim for breach of contract. Further, the Plaintiff in Pearson personally received direct benefits from the contract. Here, the statutory beneficiaries personally received no benefit from any contract.

Here, the statutory beneficiaries' claims align with the claims of the non-signatory Plaintiffs in Wilson, where the South Carolina Supreme Court held the non-signatories could not be bound by the arbitration agreement. Wilson v. Willis, 426 S.C. 326, 827 S.E.2d 167 (2019). The statutory beneficiaries in this case are not attempting to exploit or receive a direct benefit from the agreement and were not aware of the existence of the arbitration provision. As further stated in Wilson, direct benefits estoppel does not apply simply because the claim relates to or arose because of the existence of the contract. Id.

Because the statutory beneficiaries have separate and independent claims and were not covered by the scope of this agreement or parties to this agreement, the Arbitration Agreement drafted by Defendant cannot reach the claims of the wrongful death statutory beneficiaries. Therefore, had the Arbitration Agreement been found to be valid, the Wrongful Death claims by the Decedent's Beneficiaries would not have been excluded. However, the Arbitration Agreement is invalid; therefore, the second argument is moot.

III. The third issue presented to the Court was whether the Defendants are entitled to conduct discovery as to the Arbitration Agreement.

The Defendants had the burden to prove that there was an enforceable Arbitration Agreement. Defendants had the opportunity to use the South Carolina Rules of Civil Procedure to conduct discovery related to arbitration. As argued by Plaintiff's counsel, Plaintiff's counsel sent discovery to the Defendants and the Defendants objected to produce any information related to the arbitration matter due to their pending Motion.

The Court noted in Hodge, discovery issues are within the discretion of the trial court. Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 576, 813 S.E.2d 292, 309 (Ct. App. 2018). Further, as noted in Hodge, additional discovery would likely not change the outcome of the Court's decision as issues related to Son and Daughter's actions are not relevant to any implied or apparent authority. Id. It is the actions of the Decedent that would be relevant; therefore, discovery is not necessary as the discoverable information would not change the outcome of the Court's decision as the discovery issues would not be dispositive of the matter.

ARGUMENTS OF COUNSEL:

Defendant argued the Arbitration Agreement was valid, as the Decedent's Son had the actual and apparent authority to bind the Decedent. Therefore, Defendant also argued the Arbitration Agreement is enforceable. Specifically, the Defendant argued that the Admission Agreement and Arbitration Agreement constituted validly executed contracts. The Defendant explained that the contracts were each signed by the Son, as representative of Decedent, and by Libby Byers, as a representative for the Facility on June 27th, 2016. Defendant argued Son explicitly represented that he was authorized to admit Decedent to the Facility and execute necessary documents on her behalf, including an Arbitration Agreement. The Defendant argued

that because the acts complained of by the Plaintiff fall within the scope of the Arbitration Agreement, the Court should dismiss the Plaintiff's action, or stay these proceedings, and compel this matter to arbitration. In the alternative, Defendant requests the ability to conduct additional discovery regarding the Arbitration Agreement.

Plaintiff first argued that the Arbitration Agreement is unenforceable under state contract law. Specifically, the Plaintiff stated that the Son lacked both actual and apparent authority to act as the Decedent's agent in signing the Arbitration Agreement. The Plaintiff's alternative argument, if the Court found a valid Arbitration Agreement, is that the Wrongful Death cause of action on behalf of the Decedent's Beneficiaries is separate from the Survival Action and not subjected to the Arbitration Agreement. Finally, the Plaintiff argued that Defendant had the opportunity to conduct discovery over the Arbitration Agreement issues, and failed to do so at the appropriate time.

CONCLUSION:

The Court acknowledges and appreciates the amount of research and preparation for the hearing by counsel, as well as, the professionalism of counsel in their presentations to the Court.

After consideration of the pleadings, motions, and arguments of counsel, I find that there is no valid Arbitration Agreement.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendants' Motions to Dismiss and Compel Arbitration are denied; and further

Defendants' Motion to conduct additional discovery as to Arbitration Agreement issues is denied.

IT IS SO ORDERED.

/s/ Grace Gilchrist Knie

Honorable Grace Gilchrist Knie

Resident Judge, Seventh Judicial Circuit

September 9, 2019
Spartanburg, South Carolina



Spartanburg Common Pleas

Case Caption: Connie Bayne , plaintiff, et al VS Fundamental Clincl And
Operational Services, Llc , defendant, et al
Case Number: 2018CP4204405
Type: Order/Other

IT IS SO ORDERED.

S/GRACE GILCHRIST KNIE - 2760

Electronically signed on 2019-09-10 17:31:39 page 9 of 9

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
The Estate of Mary Solesbee, by her)
Personal Representative Connie)
Bayne,)
Plaintiff,)
v.)
Fundamental Clinical and Operational)
Services, LLC; Fundamental)
Administrative Services, LLC; and)
THI of South Carolina at Magnolia)
Manor – Inman, LLC d/b/a Magnolia)
Manor – Inman; IPC HealthCare Inc.;)
and Angela Brown, ACNP,)
Defendant(s).)

IN THE COURT OF COMMON PLEAS

C.A. No.:

SUMMONS
(Jury Trial Demanded)

TO THE DEFENDANT(S) ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Plaintiff upon the subscriber, at his office at 1007 East Washington Street, Greenville, South Carolina, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

CHRISTIAN & DAVIS
Attorneys at Law
Post Office Box 332
Greenville, South Carolina 29602
(864) 232-7363

s/W. Harold Christian, Jr.
W. Harold Christian, Jr.
Attorney for Plaintiff
S.C. Bar No.: 01230

Greenville, South Carolina
Date: December 27, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C.A. No.:
	)	
The Estate of Mary Solesbee, by her	)	
Personal Representative Connie	)	
Bayne,	)	
	)	
Plaintiff,	)	COMPLAINT
	)	WRONGFUL DEATH ACTION
	)	AND
	)	SURVIVAL ACTION
	)	
v.	)	
	)	
Fundamental Clinical and Operational	)	
Services, LLC; Fundamental	)	
Administrative Services, LLC; and	)	
THI of South Carolina at Magnolia	)	
Manor – Inman, LLC d/b/a Magnolia	)	
Manor – Inman; IPC HealthCare, Inc.;	)	
and Angela Brown, ACNP,	)	
	)	
Defendant(s).	)	

That the Plaintiff above-named, complaining of the Defendants herein, would respectfully show this Court as follows:

1. That the Plaintiff, Connie Bayne, is a citizen and resident of the County of Spartanburg, State of South Carolina. At all times relevant herein, Connie Bayne is and was the daughter of Mary Solesbee and is the duly appointed Personal Representative of the Estate of Mary Solesbee, who at the time of her death was a resident of the County of Spartanburg, State of South Carolina.
2. The defendant, Magnolia Manor - Inman, LLC d/b/a Magnolia Manor – Inman (hereinafter collectively Magnolia Manor), is a business organized and existing

under the laws of one of The States of The United States. At all times relevant herein, this defendant is and was a business which employs and/or contracts for the employment of physicians, nurses, therapists, and related staff to provide health care needs to patients and residents and operates nursing home facilities in the State of South Carolina. This business holds itself as being highly capable and highly skilled at providing physician services, nursing services, long-term skilled care, and rehabilitative services to the public at large and to persons such as, Mary Solesbee, deceased. Further, this defendant owns and/or leases property, advertises, maintains agents, and transacts business deriving substantial revenue in Greenville and Spartanburg County, South Carolina. Both through its individual actions and in connection with its affiliated and/or parent and/or subsidiary entities including, Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Manor – Inman, LCC. At all times relevant herein, agents, employees, servants, and apparent agents of Magnolia Manor and/or all Fundamental Clinical Operational Services LLC, Fundamental Administrative Services LLC, and THI of South Carolina at Magnolia Manor – Inman, LLC (hereinafter collectively known as Fundamental and THI respectively) acted on behalf of themselves and on behalf of Magnolia Manor.

3. Furthermore, at all times relevant herein, Fundamental, THI, and Magnolia Manor were acting in a joint enterprise to operate and manage the facility doing business as Magnolia Manor – Inman, LLC, located in Inman, South Carolina, in order to provide care and treatment to vulnerable adults including Mary Solesbee. That

such facility held itself as being qualified to provide appropriate care to persons such as Mary Solesbee and employed and/or contracted with IPC HealthCare, Inc., and Angela Brown ACNP to provide nursing and/or physician and/or mid-level medical care to its residents and patients including Mary Solesbee.

4. Angela Brown, hereinafter Nurse Brown, is a licensed Nurse Practitioner residing in the County of Spartanburg, State of South Carolina and was at all time relevant herein providing care at Magnolia Manor – Inman facility, including providing medical care and services to residents and patients such as and including Mary Solesbee.
5. Further at all times relevant herein, Angela Brown was acting as an employee, agent and servant of IPC HealthCare, Inc. That IPC Healthcare Inc. (hereinafter IPC) is a corporation incorporated under the laws of one of The States of The United States does business in the County of Spartanburg, State of South Carolina.
6. Hereinafter, the defendants Fundamental, THI, and Magnolia Manor, shall be collectively identified and referred to as “Nursing Home Defendants”.
7. Hereinafter, defendants Angela Brown and IPC shall be collectively identified and referred to as “Physician Defendants”.
8. As relates to the care and treatment provided to the deceased Plaintiff herein, the unfolding sequence of events flowed from multiple and different acts of negligence by the same party and by different parties creating a number of events.

FACTUAL BACKGROUND

9. On the 27th day of June, 2016, Mary Solesbee was admitted to Magnolia Manor – Inman with a left thigh wound which was abscessed. She remained there as a resident/patient until July 14th, 2016 when she was transported to a hospital.
10. At the time of her admission to Magnolia Manor – Inman, she was not properly assessed by a registered nurse.
11. It was noted that Ms. Solesbee had clear drainage from her leg wound.
12. That upon and after admission a registered nurse did not participate in and/or sign off on the plan of care for Ms. Solesbee.
13. That on many and numerous occasions, the Nursing Home Defendants committed and violated the care necessary for Ms. Solesbee in that it failed to perform and/or record vital signs, creating numerous events of negligence.
14. That the Nursing Home Defendants, on many and numerous occasions, failed to provide wound treatment and to properly record the progress with accurate and complete documentation, creating numerous events of negligence.
15. That the Nursing Home Defendants allowed Ms. Solesbee to sustain a 12-pound weight loss in 8 days, without and on numerous and separate occasions failed to respond the same.
16. That the Nursing Home Defendants, and IPC provided improper care for the wound by using a contra-indicated mixture of medications of her treatment for the purpose of healing.
17. That during the course of her stay, Ms. Solesbee became unstable and experienced drops of blood pressure, and the Nursing Home Defendants and IPC failed to

appropriately respond and understand the reasons and therefore, failed to act appropriately.

18. That Ms. Solesbee, on more than one occasion, experienced elevations of temperature and other adverse changes which were either unrecognized and/or were not responded to.
19. That on July 14th, 2016, Ms. Solesbee was admitted to Pelham Regional Medical Center from Magnolia Manor – Inman with sepsis secondary to cellulitis and an infected leg wound. That ultimately Ms. Solesbee passed away while in the hospital on August 1st, 2016, as a direct and proximate result of the sepsis resulting from the improperly treated leg wound and infection, which the defendants had failed to timely recognize and treat on numerous occasions, as is more fully set forth above.
20. That the plaintiff would show that the standard care of reasonably prudent nursing homes, skilled nursing facilities, nurses/practitioners and other caregivers, including the Nursing Home Defendants, IPC and Nurse Brown, in the same or similar circumstances required, at a minimum the following:
 - a. Timely evaluation and assessment of Mary Solesbee, outlining all risk factors with which she presented in order to design an appropriate plan of care;
 - b. Provision of complete and comprehensive monitoring of Mary Solesbee;
 - c. Implementing a care plan designed to prevent injuries;
 - d. Timely and appropriate intervention, care planning and care for a resident at risk for infection, and in need of assistance in daily activities;
 - e. Notification to physicians of changes in conditions, including vital signs and skin and wound appearance;

- f. Addressing changes in weight loss;
- g. Providing appropriate wound care;
- h. Keeping true and accurate records; and
- i. Timely and properly assessing Mary Solesbee's wound.

21. That the Nursing Home Defendants, IPC and Nurse Brown, on numerous and repeated occasions and in numerous ways, creating numerous events herein during Ms. Solesbee's stay at Magnolia Manor – Inman, from June 27th, 2016 to July 14th, 2016, fell below the accepted standard of care for reasonably prudent nursing homes, caregivers, nurse practitioners, and care providers and were willful, wanton, negligent, careless and grossly negligent in the following ways:

- a. In failing to timely evaluate and assess Mary Solesbee, outlining all risk factors with which she presented in order to design an appropriate plan of care;
- b. In failing to provide complete and comprehensive monitoring of Mary Solesbee;
- c. In failing to implement a care plan designed to prevent injuries;
- d. In failing to provide timely and appropriate intervention, care planning and care for a resident at risk for infection, and in need of assistance in daily activities;
- e. In failing to provide notification to physicians of changes in conditions, including vital signs and skin and wound appearance;
- f. In failing to address changes in weight loss;
- g. In failing to provide appropriate wound care;
- h. In failing to keep true and accurate records; and
- i. In failing to timely and properly assess Mary Solesbee's wound.

22. That the acts of the above were willful, wanton, careless, negligent and grossly negligent and involving the care and treatment of the Nursing Home Defendants, including the facilities identified herein, Nurse Brown and IPC, and were below the accepted standard of care for reasonably prudent caregivers, facilities, nursing homes, and nurse practitioners. These breaches of the standard care include, but are not limited to: neglect, corporate negligence, and mismanagement; failure to exercise independent judgement as patient advocates; failure to ensure proper preventative measures in place to keep residents safe; failure to assess the residents; failure to assess the residents; failure to properly train staff; failure to properly supervise; and failure to abide by applicable federal and state laws governing long term care facilities and skilled nursing facilities. The above deficiencies, neglect and failures, occurred on numerous occasions, and in numerous ways, creating multiple events, and caused Mary Solesbee's pain and suffering, and further caused her to become septic, require medical care, incur medical expenses, and led to and caused her death.

23. That as a direct and proximate result of the Nursing Home Defendants and Physician Defendant's acts and/or omissions. Ms. Solesbee suffered the following injuries and damages:

- a. Sepsis;
- b. Death;
- c. Trauma and wounds to her leg;
- d. Decreased levels of cognition, health and consciousness;

- e. Pain, suffering, physical and mental stress, loss of enjoyment of life, and anxiety;
- f. Injuries to her body;
- g. Loss of dignity
- h. Hospitalization
- i. Underwent medical care and procedures which otherwise she would not have to undergo
- j. Medical Expenses
- k. In such other and further ways as discovered in trials.

SURVIVAL ACTION

24. The plaintiff will show that this action was brought pursuant to the Survival Action Provisions of the South Carolina Law pursuant to both statutory and common laws. Further, this actions brought on behalf of the Estate of the deceased, Mary Solesbee, pursuant to the laws of the State of South Carolina.

WRONGFUL DEATH ACTION

25. This actions is further brought pursuant to the Wrongful Death Provisions of the § 15-79-125 *et seq* South Carolina Code of Laws, as amended, and pursuant to the common laws of the State of South Carolina. Further, this action is brought on behalf of the statutory beneficiaries of the estate of Mary Solesbee, namely and including, her daughter, Connie Bayne and her son Allen Dover.

FIRST CAUSE OF ACTION (NEGLIGENCE AS TO NURSING HOME DEFENDANTS)

26. Plaintiff restates and re-alleges each and every paragraph previously pleaded above as if repeated verbatim.

27. That the Nursing Home Defendants were willful, wanton, careless, negligent, grossly negligent, and provided care below the required standard of care in the following way:

- a. In failing to properly treat, evaluate, and take diagnostic measures at the appropriate times to care for Mary Solesbee;
- b. In failing to timely obtain appropriate and necessary consultations by specialists and all other qualified physicians for the care, evaluation and treatment of Mary Solesbee;
- c. In failing to timely and properly communicate about the care, symptoms and treatment of Mary Solesbee, among treating and referring physicians and related medical and care staff;
- d. In failing, on multiple occasions, to obtain and follow labs and monitor the effect of the infection;
- e. In failing, on multiple occasions, to provide proper wound care;
- f. In failing, on multiple occasions, to have and/or implement appropriate policies and procedures applicable to Mary Solesbee's condition;
- g. In failing to provide a safe and clean environment;
- h. In failing to provide the most basic care, which does not require medical training or education, but is care that if not provided will lead to suffering and decline of health as did occur in this matter;
- i. Negligently hiring, training, and supervising the staff for the defendant's facility;

- j. In failing to provide adequate staffing, adequately paid, compensated or trained staff at facilities to care for residents, such as Mary Solesbee; and in doing so with the full knowledge of such inadequate staffing practices which placed patients, such as Mary Solesbee at risk;
- k. In failing, on multiple occasions, to provide proper comprehensive and timely assessments and evaluations outlining all factors in Mary Solesbee's case;
- l. In failing to properly design, modify, or adhere to an appropriate care plan;
- m. In failing to timely and appropriately implement and provide intervention for a patient/resident with obvious declining health;
- n. In failing to properly monitor, evaluate, understand and treat Mary Solesbee's wound and skin condition, and failing to timely notify her physicians and family about her adverse conditions;
- o. In failing to timely and properly assess and appreciate the severity of her wound and infection;
- p. In failing to have and/or implement adequate and effective policies, procedures, staff and equipment to appropriately and adequately monitor, supervise and treat Mary Solesbee;
- q. In failing to follow and comply with its own policies and procedures directed at the care and treatment of residents/patients;
- r. In failing to consult a physician and/or specialist in a timely matter;

- s. In failing to timely have Mary Solesbee transported to a hospital; or other care facilities;
- t. In failing to properly and appropriately act upon Mary Solesbee's obvious decline and advance in conditions, on numerous occasions;
- u. In failing to properly train staff and operate the management facility to the extent that resident care was adversely impacted and effected and caused injuries to Mary Solesbee;
- v. Negligently administrating and operating as well as negligently, recklessly and carelessly administering and operating the defendant nursing home; and
- w. In failing to comply with applicable statutes and regulations designed to protect persons such as Mary Solesbee.

**SECOND CAUSE OF ACTION
(NEGLIGENCE AS TO PHYSICIAN DEFENDANTS)**

- 28. Plaintiff restates and re-alleges each and every paragraph above, previously pleaded above as if repeated verbatim.
- 29. The Physician Defendants were willful, wanton, careless, negligent and grossly negligent, fell below the applicable standard of care in the following:
 - a. In failing to provide proper comprehensive and timely assessments and evaluations outlining all of these factors for Mary Solesbee and failing to appropriately design a plan of care;
 - b. In failing to timely and properly follow any plan of care, all of which occurred on numerous occasions;

- c. In failing to timely and properly order and/or implement intervention for the patient related to the obvious risks of increasing and growing compromise of her infection;
- d. In failing to properly evaluate, record and document Mary Solesbee's health and condition;
- e. In failing to timely and properly order diagnostic procedures for Mary Solesbee, all of which occurred on numerous occasions, creating numerous events;
- f. In failing to properly oversee and coordinate the medical care at Magnolia Manor – Inman;
- g. In failing to order treatment procedures for Mary Solesbee in a timely and appropriate manner;
- h. And negligently hiring, training and supervising its employees and contractors;
- i. In failing to recognize and act upon Mary Solesbee's conditions;
- j. In failing to act as reasonably prudent physician and/or nurse practitioner would do under the same or similar circumstances;
- k. In failing to implement a care plan designed to prevent avoidable injuries and complications;
- l. In failing to have a timely and appropriate intervention and/or care plan for a resident specifically at risk for a growing infection, and in need of assistance and daily activity;

- m. In failing to respond to changes and conditions, including vital signs and skin wound appearance;
- n. In failing to address changes in weight loss;
- o. In failing to provide appropriate wound care;
- p. In failing to keep true and accurate records;
- q. In failing to provide proper antibiotic care and coverage;
- r. In failing to timely transport Mary Solesbee to a hospital or a care facility;
- s. In failing to recognize evidence of potential sepsis;
- t. In failing to recognize the significance of vital signs changes;
- u. In failing to timely and properly obtain blood cultures, wound cultures, and other needed tests;
- v. In failing to recognize the significance of weight loss;
- w. In failing to timely and properly apply appropriate dressing and treatment for the leg wound;
- x. In failing to have or require appropriate RN oversight;
- y. In failing to timely and properly document Mary Solesbee's condition;
- z. In failing to provide or correct inaccurate documents;
- aa. In failing to practice within the scope of care;
- bb. In failing to notify physicians of change of condition; and
- cc. In prescribing contra-indicated treatments.

**THIRD CAUSE OF ACTION
(NEGLIGENCE PER SE AS TO NURSING HOME DEFENDANTS
AND PHYSICIAN DEFENDANTS)**

30. Plaintiff restates and re-alleges each paragraph previously pled above as if were repeated verbatim.
31. The conduct of the defendants is governed by the Adult Protection Act of South Carolina Code § 43-35-5, et seq, the Bill of Rights for Residents of Long Term Care Facilities at South Carolina Code § 44-81-10, et seq, South Carolina Department of Health and Environmental Control Regulations at regulations 61-17, et seq, as well as similar protective state and federal regulations and statutes.
32. The statutes and regulations set out above are enacted for the benefit and protection of the class of the public of which Mary Solesbee was a member at all times relevant to this action. The defendants violated these Statutes and Regulations in that their failure to properly care for Mary Solesbee and other similar situated patients at their facility.
33. As a direct and proximate result of the violation of the statutes and regulations by the defendants, which constitutes negligence *per se*, Mary Solesbee suffered injuries, damages and death as said above.

**FOURTH CAUSE OF ACTION
(NEGLIGENT REPRESENTATION TO NURSING HOME
DEFENDANTS)**

34. Plaintiff restates and re-alleges each paragraph previously pled as if repeated verbatim.

35. Prior to, around the time of Mary Solesbee's admission to the Defendant's facility, and at the time of Mary Solebee's sustained injuries at the facility, agents of the facility made untrue statements to Mary Solesbee and/or to her family and all representatives about the quality of care that Ms. Solesbee would receive at the Defendant's facility. Such statements were intended by those making them to be relied upon by Mary Solesbee, her family and all representatives and upon which they did rely.
36. The defendants represented to Mary Solesbee and to the family and all representatives that she would receive appropriate care within professional standards, that such care would be designed to properly provide the care and treatment under the conditions with which she presented, that the facility had adequate staffing and adequate funding, that Mary Solesbee would be carefully monitored, that Mary Solesbee would receive adequate nutrition, hydration, therapies, evaluation and preventive interventions, and that Mary Solesbee would be safe and secure and that problems or insufficiencies that the defendant's facility may have had in the past have been corrected.
37. That these statements were untrue, that the defendants knew that such statements were untrue and yet they intended they be relied upon by Mary Solesbee and her family and all representatives and upon them, they did rely on choosing to admit Mary Solesbee to the facility.
38. These representations were willful, wanton, careless, reckless, and negligent in that these defendants knew or should have known that they would not be able to meet these representations and did in fact fail to meet these representations.

39. That it is a direct and proximate result of these defendant's misrepresentations and/or suffered injuries and damages as set forth above.

**FIFTH CAUSE OF ACTION
(CORPORATE NEGLIGENCE AS TO THE NURSING HOME
DEFENDANTS)**

40. Plaintiff restates and re-alleges each and every paragraph previously pleaded above as if repeated verbatim.
41. That the Defendants were willful, wanton, negligent, careless, grossly negligent and intentional in their failure to provide Magnolia Manor – Inman with adequate and proper management, funding, staffing, and supplies necessary to provide the appropriate care for residents such as Mary Solesbee and to provide such care within the standard of care.
42. That these Defendants, especially those other than Magnolia Manor – Inman exercised sufficient control over Magnolia Manor – Inman and divested Magnolia Manor – Inman of the necessary monies, finances, staff, supplies to provide appropriate care to the residents within the required standard of care and the necessary care to meet federal and state regulations and statutes which applied to Magnolia Manor – Inman and were necessary for the care of Mary Solesbee.
43. That the Defendants other than Magnolia Manor – Inman did this through a complex corporate scheme whereby such funds were divested from Magnolia Manor – Inman, in which such funds were necessary for resident/patient care and were syphoned from the facility through a central cash management system, and/or self-corporate system, where the income for the facility was swept up into one or more central accounts for the corporate defendants, whereby other money

from Magnolia Manor – Inman were syphoned from the facility through exorbitant management fees, and other exorbitant charges and monies taken by the corporate defendants from Magnolia Manor – Inman. That these monies were divested from this facility with the full knowledge of such money was necessary for the resident care, but would not be available.

44. That as a direct and proximate result of the defendant's corporate acts and/or omissions, plaintiff suffered the injuries and damages set forth above, including her death.

WHEREFORE, the plaintiff prays for judgement against each and every defendant in the following particulars:

- a. For actual, punitive and special damages in the amount to be determined by the trier of facts;
- b. For the costs and disbursements of this action;
- c. For attorney's fees and costs;
- d. For such other and further relief as the court deems just and proper;
- e. Plaintiff requests a jury trial.

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s/W. Harold Christian, Jr.
W. Harold Christian, Jr.
Attorney for Plaintiff
S.C. Bar No.: 01230

Greenville, South Carolina
Date: December 27, 2018

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
The Estate of Mary Solesbee, by her)
Personal Representative Connie)
Bayne,)
Plaintiff,)
v.)
Fundamental Clinical and Operational)
Services, LLC; Fundamental)
Administrative Services, LLC; and)
THI of South Carolina at Magnolia)
Manor – Inman, LLC d/b/a Magnolia)
Manor – Inman; Inpatient Consultants)
of North Carolina, P.C.; and Angela)
Brown, ACNP,)
Defendant(s).)

IN THE COURT OF COMMON PLEAS

C.A. No.:

**AMENDED
COMPLAINT
WRONGFUL DEATH ACTION
AND
SURVIVAL ACTION**

That the Plaintiff above-named, complaining of the Defendants herein, would respectfully show this Court as follows:

1. That the Plaintiff, Connie Bayne, is a citizen and resident of the County of Spartanburg, State of South Carolina. At all times relevant herein, Connie Bayne is and was the daughter of Mary Solesbee and is the duly appointed Personal Representative of the Estate of Mary Solesbee, who at the time of her death was a resident of the County of Spartanburg, State of South Carolina.

2. The defendant, Magnolia Manor - Inman, LLC d/b/a Magnolia Manor – Inman (hereinafter collectively Magnolia Manor), is a business organized and existing under the laws of one of The States of The United States. At all times relevant herein, this defendant is and was a business which employs and/or contracts for the employment of physicians, nurses, therapists, and related staff to provide health care needs to patients and residents and operates nursing home facilities in the State of South Carolina. This business holds itself as being highly capable and highly skilled at providing physician services, nursing services, long-term skilled care, and rehabilitative services to the public at large and to persons such as, Mary Solesbee, deceased. Further, this defendant owns and/or leases property, advertises, maintains agents, and transacts business deriving substantial revenue in Greenville and Spartanburg County, South Carolina. Both through its individual actions and in connection with its affiliated and/or parent and/or subsidiary entities including, Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Manor – Inman, LCC. At all times relevant herein, agents, employees, servants, and apparent agents of Magnolia Manor and/or all Fundamental Clinical Operational Services LLC, Fundamental Administrative Services LLC, and THI of South Carolina at Magnolia Manor – Inman, LLC (hereinafter collectively known as Fundamental and THI respectively) acted on behalf of themselves and on behalf of Magnolia Manor.
3. Furthermore, at all times relevant herein, Fundamental, THI, and Magnolia Manor were acting in a joint enterprise to operate and manage the facility doing business as Magnolia Manor – Inman, LLC, located in Inman, South Carolina, in order to provide care and treatment to vulnerable adults including Mary Solesbee. That such facility held itself as

being qualified to provide appropriate care to persons such as Mary Solesbee and employed and/or contracted with Inpatient Consultants of North Carolina, P.C., and Angela Brown ACNP to provide nursing and/or physician and/or mid-level medical care to its residents and patients including Mary Solesbee.

4. Angela Brown, hereinafter Nurse Brown, is a licensed Nurse Practitioner residing in the County of Spartanburg, State of South Carolina and was at all time relevant herein providing care at Magnolia Manor -- Inman facility, including providing medical care and services to residents and patients such as and including Mary Solesbee.
5. Further at all times relevant herein, Angela Brown was acting as an employee, agent and servant of Inpatient Consultants of North Carolina, P.C. That Inpatient Consultants of North Carolina, P.C. is a corporation incorporated under the laws of one of The States of the United States and does business in the County of Spartanburg, State of South Carolina.
6. Hereinafter, the defendants Fundamental, THI, and Magnolia Manor, shall be collectively identified and referred to as "Nursing Home Defendants".
7. Hereinafter, defendants Angela Brown and Inpatient Consultants of North Carolina, P.C. shall be collectively identified and referred to as "Physician Defendants".
8. As relates to the care and treatment provided to the deceased Plaintiff herein, the unfolding sequence of events flowed from multiple and different acts of negligence by the same party and by different parties creating a number of events.

FACTUAL BACKGROUND

9. On the 27th day of June, 2016, Mary Solesbee was admitted to Magnolia Manor – Inman with a left thigh wound which was abscessed. She remained there as a resident/patient until July 14th, 2016 when she was transported to a hospital.
10. At the time of her admission to Magnolia Manor – Inman, she was not properly assessed by a registered nurse.
11. It was noted that Ms. Solesbee had clear drainage from her leg wound.
12. That upon and after admission a registered nurse did not participate in and/or sign off on the plan of care for Ms. Solesbee.
13. That on many and numerous occasions, the Nursing Home Defendants violated standard of care necessary for Ms. Solesbee in that it failed to perform and/or record vital signs, creating numerous events of negligence.
14. That the Nursing Home Defendants, on many and numerous occasions, failed to provide wound treatment and to properly record the progress with accurate and complete documentation, creating numerous events of negligence.
15. That the Nursing Home Defendants allowed Ms. Solesbee to sustain a 12-pound weight loss in 8 days, without and on numerous and separate occasions failed to respond the same.
16. That the Nursing Home Defendants provided improper care for the wound by using a contra-indicated mixture of medications of her treatment for the purpose of healing.

17. That during the course of her stay, Ms. Solesbee became unstable and experienced drops of blood pressure, and the Nursing Home Defendants failed to appropriately respond and understand the reasons and therefore, failed to act appropriately.
18. That Ms. Solesbee, on more than one occasion, experienced elevations of temperature and other adverse changes which were either unrecognized and/or were not responded to.
19. That on July 14th, 2016, Ms. Solesbee was admitted to Pelham Regional Medical Center from Magnolia Manor – Inman with sepsis secondary to cellulitis and an infected leg wound. That ultimately Ms. Solesbee passed away while in the hospital on August 1st, 2016, as a direct and proximate result of the sepsis resulting from the improperly treated leg wound and infection, which the defendants had failed to timely recognize and treat on numerous occasions, as is more fully set forth above.
20. That the plaintiff would show that the standard care of reasonably prudent nursing homes, skilled nursing facilities, nurses/practitioners and other caregivers, including the Nursing Home Defendants, in the same or similar circumstances required, at a minimum the following:
 - a. Timely evaluation and assessment of Mary Solesbee, outlining all risk factors with which she presented in order to design an appropriate plan of care;
 - b. Provision of complete and comprehensive monitoring of Mary Solesbee;
 - c. Implementing a care plan designed to prevent harm and injuries;
 - d. Timely and appropriate intervention, care planning and care for a resident at risk for infection, and in need of assistance in daily activities;
 - e. Notification to physicians of changes in conditions, including vital signs and skin and wound appearance;
 - f. Addressing changes in weight loss;
 - g. Providing appropriate wound care;

- h. Keeping true and accurate records; and
- i. Timely and properly assessing Mary Solesbee's wound.

21. That the Nursing Home Defendants on numerous and repeated occasions and in numerous ways, creating numerous events herein during Ms. Solesbee's stay at Magnolia Manor -- Inman, from June 27th, 2016 to July 14th, 2016, fell below the accepted standard of care for reasonably prudent nursing homes, caregivers, nurse practitioners, physicians, and care providers and were willful, wanton, negligent, careless and grossly negligent in the following ways:

- a. In failing to timely evaluate and assess Mary Solesbee, outlining all risk factors with which she presented in order to design an appropriate plan of care;
- b. In failing to provide complete and comprehensive monitoring of Mary Solesbee;
- c. In failing to implement a care plan designed to prevent harm and injuries;
- d. In failing to provide timely and appropriate intervention, care planning and care for a resident at risk for infection; and in need of assistance in daily activities;
- e. In failing to provide notification to physicians of changes in conditions, including vital signs and skin and wound appearance;
- f. In failing to address changes in weight loss;
- g. In failing to provide appropriate wound care;
- h. In failing to keep true and accurate records; and
- i. In failing to timely and properly assess Mary Solesbee's wound.

22. That the acts of the above were willful, wanton, careless, negligent and grossly negligent and involving the care and treatment of the Nursing Home Defendants, including the facilities identified herein, and Physician Defendants, were below the accepted standard

of care for reasonably prudent caregivers, facilities, nursing homes, physicians, and nurse practitioners. These breaches of the standard care include, but are not limited to: neglect, corporate negligence, and mismanagement; failure to exercise independent judgement as patient advocates; failure to ensure proper preventative measures in place to keep residents safe; failure to assess the residents; failure to properly train staff; failure to properly supervise; and failure to abide by applicable federal and state laws governing long term care facilities and skilled nursing facilities. The above deficiencies, neglect and failures, occurred on numerous occasions, and in numerous ways, creating multiple events, and caused Mary Solesbee's pain and suffering, and further caused her to become septic, require medical care, incur medical expenses, and led to and caused her death.

23. That as a direct and proximate result of the Nursing Home Defendants and Physician Defendant's acts and/or omissions. Ms. Solesbee suffered the following injuries and damages:

- a. Sepsis;
- b. Death;
- c. Trauma and wounds to her leg;
- d. Decreased levels of cognition, health and consciousness;
- e. Pain, suffering, physical and mental stress, loss of enjoyment of life, and anxiety;
- f. Injuries to her body;
- g. Loss of dignity
- h. Hospitalization
- i. Underwent medical care and procedures which otherwise she would not have to undergo

j. Medical Expenses

k. In such other and further ways as discovered in trials.

SURVIVAL ACTION

24. The plaintiff will show that this action was brought pursuant to the Survival Action Provisions of the South Carolina Law pursuant to both statutory and common laws. Further, this actions brought on behalf of the Estate of the deceased, Mary Solesbee, pursuant to the laws of the State of South Carolina.

WRONGFUL DEATH ACTION

25. This actions is further brought pursuant to the Wrongful Death Provisions of the § 15-79-125 *et seq* South Carolina Code of Laws, as amended, and pursuant to the common laws of the State of South Carolina. Further, this action is brought on behalf of the statutory beneficiaries of the estate of Mary Solesbee, namely and including, her daughter, Connie Bayne and her son Allen Dover.

FIRST CAUSE OF ACTION (NEGLIGENCE AS TO NURSING HOME DEFENDANTS)

26. Plaintiff restates and re-alleges each and every paragraph previously pled above as if repeated verbatim.

27. That the Nursing Home Defendants were willful, wanton, careless, negligent, grossly negligent, and provided care below the required standard of care in the following way:

- a. In failing to properly treat, evaluate, and take diagnostic measures at the appropriate times to care for Mary Solesbee;
- b. In failing to timely obtain appropriate and necessary consultations by specialists and all other qualified physicians for the care, evaluation and treatment of Mary Solesbee;

- c. In failing to timely and properly communicate about the care, symptoms and treatment of Mary Solesbee, among treating and referring physicians and related medical and care staff;
- d. In failing, on multiple occasions, to obtain and follow labs and monitor the effect of the infection;
- e. In failing, on multiple occasions, to provide proper wound care;
- f. In failing, on multiple occasions, to have and/or implement appropriate policies and procedures applicable to Mary Solesbee's condition;
- g. In failing to provide a safe and clean environment;
- h. In failing to provide the most basic care, which does not require medical training or education, but is care that if not provided will lead to suffering and decline of health as did occur in this matter;
- i. Negligently hiring, training, and supervising the staff for the defendant's facility;
- j. In failing to provide adequate staffing, adequately paid, compensated or trained staff at facilities to care for residents, such as Mary Solesbee; and in doing so with the full knowledge of such inadequate staffing practices which placed patients, such as Mary Solesbee at risk;
- k. In failing, on multiple occasions, to provide proper comprehensive and timely assessments and evaluations outlining all factors in Mary Solesbee's case;
- l. In failing to properly design, modify, or adhere to an appropriate care plan;
- m. In failing to timely and appropriately implement and provide intervention for a patient/resident with obvious declining health;

- n. In failing to properly monitor, evaluate, understand and treat Mary Solesbee's wound and skin condition, and failing to timely notify her physicians and family about her adverse conditions;
- o. In failing to timely and properly assess and appreciate the severity of her wound and infection;
- p. In failing to have and/or implement adequate and effective policies, procedures, staff and equipment to appropriately and adequately monitor, supervise and treat Mary Solesbee;
- q. In failing to follow and comply with its own policies and procedures directed at the care and treatment of residents/patients;
- r. In failing to consult a physician and/or specialist in a timely matter;
- s. In failing to timely have Mary Solesbee transported to a hospital; or other care facilities;
- t. In failing to properly and appropriately act upon Mary Solesbee's obvious decline and advance in conditions, on numerous occasions;
- u. In failing to properly train staff and operate the management facility to the extent that resident care was adversely impacted and effected and caused injuries to Mary Solesbee;
- v. Negligently administrating and operating as well as negligently, recklessly and carelessly administering and operating the defendant nursing home;
- w. In failing to transport Mary Solesbee to the hospital;
- x. In providing contra-indicated medication to Mary Solesbee.

**SECOND CAUSE OF ACTION
(NEGLIGENCE AS TO PHYSICIAN DEFENDANTS)**

28. Plaintiff restates and re-alleges each and every paragraph above, previously pled above as if repeated verbatim.

29. The Physician Defendants were willful, wanton, careless, negligent and grossly negligent, fell below the applicable standard of care in the following:

- a. In failing to provide proper comprehensive and timely assessments and evaluations outlining all of these factors for Mary Solesbee and failing to appropriately design a plan of care;
- b. In failing to timely and properly follow any plan of care, all of which occurred on numerous occasions;
- c. In failing to timely and properly order and/or implement intervention for the patient related to the obvious risks of increasing and growing compromise of her infection;
- d. In failing to properly evaluate, record and document Mary Solesbee's health and condition;
- e. In failing to timely and properly order diagnostic procedures for Mary Solesbee, all of which occurred on numerous occasions, creating numerous events;
- f. In failing to properly oversee and coordinate the medical care at Magnolia Manor – Inman;
- g. In failing to order treatment procedures for Mary Solesbee in a timely and appropriate manner;
- h. And negligently hiring, training and supervising its employees and contractors;
- i. In failing to recognize and act upon Mary Solesbee's conditions;

- j. In failing to act as reasonably prudent physician and/or nurse practitioner would do under the same or similar circumstances;
- k. In failing to implement a care plan designed to prevent avoidable injuries and complications;
- l. In failing to have a timely and appropriate intervention and/or care plan for a resident specifically at risk for a growing infection, and in need of assistance and daily activity;
- m. In failing to respond to changes and conditions, including vital signs and skin wound appearance;
- n. In failing to address changes in weight loss;
- o. In failing to provide appropriate wound care;
- p. In failing to keep true and accurate records;
- q. In failing to provide proper antibiotic care and coverage;
- r. In failing to timely transport Mary Solesbee to a hospital or a care facility;
- s. In failing to recognize evidence of potential sepsis;
- t. In failing to recognize the significance of vital signs changes;
- u. In failing to timely and properly obtain blood cultures, wound cultures, and other needed tests;
- v. In failing to recognize the significance of weight loss;
- w. In failing to timely and properly apply appropriate dressing and treatment for the leg wound;
- x. In failing to have or require appropriate RN oversight;
- y. In failing to timely and properly document Mary Solesbee's condition;

- z. In failing to provide accurate documentation or correct inaccurate documents;
- aa. In failing to practice within the scope of care;
- bb. In failing to notify physicians of change of condition; and
- cc. In prescribing contra-indicated treatments.

**THIRD CAUSE OF ACTION
(NEGLIGENCE PER SE AS TO NURSING HOME DEFENDANTS
AND PHYSICIAN DEFENDANTS)**

30. Plaintiff restates and re-alleges each paragraph previously pled above as if were repeated verbatim.
31. The conduct of the defendants is governed by the Adult Protection Act of South Carolina Code § 43-35-5, et seq, the Bill of Rights for Residents of Long Term Care Facilities at South Carolina Code § 44-81-10, et seq, South Carolina Department of Health and Environmental Control Regulations at regulations 61-17, et seq, as well as similar protective state and federal regulations and statutes.
32. The statutes and regulations set out above are enacted for the benefit and protection of the class of the public of which Mary Solesbee was a member at all times relevant to this action. The defendants violated these Statutes and Regulations in that their failure to properly care for Mary Solesbee and other similar situated patients at their facility.
33. As a direct and proximate result of the violation of the statutes and regulations by the defendants, which constitutes negligence *per se*, Mary Solesbee suffered injuries, damages and death as stated above.

**FOURTH CAUSE OF ACTION
(NEGLIGENT REPRESENTATION TO NURSING HOME DEFENDANTS)**

34. Plaintiff restates and re-alleges each paragraph previously pled as if repeated verbatim.

35. Prior to and around the time of Mary Solesbee's admission to the Defendant's facility, and at the time of Mary Solesbee's sustained injuries at the facility, agents of the facility made untrue statements to Mary Solesbee and/or to her family and all representatives about the quality of care that Ms. Solesbee would receive at the Defendant's facility. Such statements were intended by those making them to be relied upon by Mary Solesbee, her family and all representatives and upon which they did rely.

36. The defendants represented to Mary Solesbee and to the family and all representatives that she would receive appropriate care within professional standards, that such care would be designed to properly provide the care and treatment under the conditions with which she presented, that the facility had adequate staffing and adequate funding, that Mary Solesbee would be carefully monitored, that Mary Solesbee would receive adequate nutrition, hydration, therapies, evaluation and preventive interventions, and that Mary Solesbee would be safe and secure and that problems or insufficiencies that the defendant's facility may have had in the past have been corrected.

37. That these statements were untrue, that the defendants knew that such statements were untrue and yet they intended they be relied upon by Mary Solesbee and her family and all representatives and upon them, they did rely in choosing to admit Mary Solesbee to the facility.

38. These representations were willful, wanton, careless, reckless, and negligent in that these defendants knew or should have known that they would not be able to meet these representations and did in fact fail to meet these representations.

39. That as a direct and proximate result of these defendant's misrepresentations and/or suffered injuries and damages as set forth above.

**FIFTH CAUSE OF ACTION
(CORPORATE NEGLIGENCE AS TO THE NURSING HOME DEFENDANTS)**

40. Plaintiff restates and re-alleges each and every paragraph previously pled above as if repeated verbatim.

41. That the Defendants were willful, wanton, negligent, careless, grossly negligent and intentional in their failure to provide Magnolia Manor – Inman with adequate and proper management, funding, staffing, and supplies necessary to provide the appropriate care for residents such as Mary Solesbee and to provide such care within the standard of care.

42. That these Defendants, especially those other than Magnolia Manor – Inman exercised sufficient control over Magnolia Manor – Inman and divested Magnolia Manor – Inman of the necessary monies, finances, staff, supplies to provide appropriate care to the residents within the required standard of care and the necessary care to meet federal and state regulations and statutes which applied to Magnolia Manor – Inman and were necessary for the care of Mary Solesbee.

43. That the Defendants other than Magnolia Manor – Inman did this through a complex corporate scheme whereby such funds were divested from Magnolia Manor – Inman, in which such funds were necessary for resident/patient care and were syphoned from the facility through a central cash management system, and/or self-corporate system, where the income for the facility was swept up into one or more central accounts for the

corporate defendants, whereby other money from Magnolia Manor – Inman were syphoned from the facility through exorbitant management fees, and other exorbitant charges and monies taken by the corporate defendants from Magnolia Manor – Inman. That these monies were divested from this facility with the full knowledge of such money was necessary for the resident care, but would not be available.

44. That as a direct and proximate result of the defendant's corporate acts and/or omissions, plaintiff suffered the injuries and damages set forth above, including her death.

WHEREFORE, the plaintiff prays for judgement against each and every defendant in the following particulars:

- a. For actual, punitive and special damages in the amount to be determined by the trier of facts;
- b. For the costs and disbursements of this action;
- c. For attorney's fees and costs;
- d. For such other and further relief as the court deems just and proper;
- e. Plaintiff requests a jury trial.

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s/W. Harold Christian, Jr.
W. Harold Christian, Jr.
Attorney for Plaintiff
S.C. Bar No.: 01230

Greenville, South Carolina
Date: January 3, 2019

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON
PLEAS

C.A. No.:

The Estate of Mary Solesbee, by her
Personal Representative Connie
Bayne,

Plaintiff,

**SECOND AMENDED
COMPLAINT
WRONGFUL DEATH
ACTION AND
SURVIVAL ACTION**

v.

Fundamental Clinical and Operational)
Services, LLC; Fundamental)
Administrative Services, LLC; and)
THI of South Carolina at Magnolia)
Manor - Inman, LLC d/b/a Magnolia)
Manor - Inman; Inpatient Consultants)
of North Carolina, P.C.; and Angela)
Brown, ACNP,

Defendant(s).

That the Plaintiff above-named, complaining of the Defendants herein, would
respectfully show this Court as follows:

1. That the Plaintiff, Connie Bayne, is a citizen and resident of the County of
Spartanburg, State of South Carolina. At all times relevant herein, Connie Bayne
is and was the daughter of Mary Solesbee and is the duly appointed Personal
Representative of the Estate of Mary Solesbee, who at the time of her death was a
resident of the County of Spartanburg, State of South Carolina.

2. The defendant, Magnolia Manor - Inman, LLC d/b/a Magnolia Manor – Inman (hereinafter collectively Magnolia Manor), is a business organized and existing under the laws of one of The States of The United States. At all times relevant herein, this defendant is and was a business which employs and/or contracts for the employment of physicians, nurses, therapists, and related staff to provide health care needs to patients and residents and operates nursing home facilities in the State of South Carolina. This business holds itself as being highly capable and highly skilled at providing physician services, nursing services, long-term skilled care, and rehabilitative services to the public at large and to persons such as, Mary Solesbee, deceased. Further, this defendant owns and/or leases property, advertises, maintains agents, and transacts business deriving substantial revenue in Greenville and Spartanburg County, South Carolina. Both through its individual actions and in connection with its affiliated and/or parent and/or subsidiary entities including, Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Manor – Inman, LLC. At all times relevant herein, agents, employees, servants, and apparent agents of Magnolia Manor and/or all Fundamental Clinical Operational Services LLC, Fundamental Administrative Services LLC, and THI of South Carolina at Magnolia Manor – Inman, LLC (hereinafter collectively known as Fundamental and THI respectively) acted on behalf of themselves and on behalf of Magnolia Manor.
3. Furthermore, at all times relevant herein, Fundamental, THI, and Magnolia Manor were acting in a joint enterprise to operate and manage the facility doing business as Magnolia Manor – Inman, LLC, located in Inman, South Carolina, in order to provide care and treatment to vulnerable adults including Mary Solesbee. That such facility held itself as

being qualified to provide appropriate care to persons such as Mary Solesbee and employed and/or contracted with Inpatient Consultants of North Carolina, P.C., and Angela Brown ACNP to provide nursing and/or physician and/or mid-level medical care to its residents and patients including Mary Solesbee.

4. Angela Brown, hereinafter Nurse Brown, is a licensed Nurse Practitioner residing in the County of Spartanburg, State of South Carolina and was at all time relevant herein providing care at Magnolia Manor – Inman facility, including providing medical care and services to residents and patients such as and including Mary Solesbee.
5. Further at all times relevant herein, Angela Brown was acting as an employee, agent and servant of Inpatient Consultants of North Carolina, P.C. That Inpatient Consultants of North Carolina, P.C. is a corporation incorporated under the laws of one of The States of the United States and does business in the County of Spartanburg, State of South Carolina.
6. Hereinafter, the defendants Fundamental, THI, and Magnolia Manor, shall be collectively identified and referred to as “Nursing Home Defendants”.
7. Hereinafter, defendants Angela Brown and Inpatient Consultants of North Carolina, P.C. shall be collectively identified and referred to as “Physician Defendants”.
8. As relates to the care and treatment provided to the deceased Plaintiff herein, the unfolding sequence of events flowed from multiple and different acts of negligence by the same party and by different parties creating a number of events.

FACTUAL BACKGROUND

9. On the 27th day of June, 2016, Mary Solesbee was admitted to Magnolia Manor – Inman with a left thigh wound which was abscessed. She remained there as a resident/patient until July 14th, 2016 when she was transported to a hospital.
10. At the time of her admission to Magnolia Manor – Inman, she was not properly assessed by a registered nurse.
11. It was noted that Ms. Solesbee had clear drainage from her leg wound.
12. That upon and after admission a registered nurse did not participate in and/or sign off on the plan of care for Ms. Solesbee.
13. That on many and numerous occasions, the Nursing Home Defendants violated standard of care necessary for Ms. Solesbee in that it failed to perform and/or record vital signs, creating numerous events of negligence.
14. That the Nursing Home Defendants, on many and numerous occasions, failed to provide wound treatment and to properly record the progress with accurate and complete documentation, creating numerous events of negligence.
15. That the Nursing Home Defendants allowed Ms. Solesbee to sustain a 12-pound weight loss in 8 days, without and on numerous and separate occasions failed to respond the same.
16. That the Nursing Home Defendants provided improper care for the wound by using a contra-indicated mixture of medications of her treatment for the purpose of healing.

17. That during the course of her stay, Ms. Solesbee became unstable and experienced drops of blood pressure, and the Nursing Home Defendants failed to appropriately respond and understand the reasons and therefore, failed to act appropriately.
18. That Ms. Solesbee, on more than one occasion, experienced elevations of temperature and other adverse changes which were either unrecognized and/or were not responded to.
19. That on July 14th, 2016, Ms. Solesbee was admitted to Pelham Regional Medical Center from Magnolia Manor – Inman with sepsis secondary to cellulitis and an infected leg wound. That ultimately Ms. Solesbee passed away while in the hospital on August 1st, 2016, as a direct and proximate result of the sepsis resulting from the improperly treated leg wound and infection, which the defendants had failed to timely recognize and treat on numerous occasions, as is more fully set forth above.
20. That the plaintiff would show that the standard care of reasonably prudent nursing homes, skilled nursing facilities, nurses/practitioners and other caregivers, including the Nursing Home Defendants, in the same or similar circumstances required, at a minimum the following:
 - a. Timely evaluation and assessment of Mary Solesbee, outlining all risk factors with which she presented in order to design an appropriate plan of care;
 - b. Provision of complete and comprehensive monitoring of Mary Solesbee;
 - c. Implementing a care plan designed to prevent harm and injuries;
 - d. Timely and appropriate intervention, care planning and care for a resident at risk for infection, and in need of assistance in daily activities;
 - e. Notification to physicians of changes in conditions, including vital signs and skin and wound appearance;
 - f. Addressing changes in weight loss;
 - g. Providing appropriate wound care;

- h. Keeping true and accurate records; and
- i. Timely and properly assessing Mary Solesbee's wound.

21. That the Nursing Home Defendants on numerous and repeated occasions and in numerous ways, creating numerous events herein during Ms. Solesbee's stay at Magnolia Manor – Inman, from June 27th, 2016 to July 14th, 2016, fell below the accepted standard of care for reasonably prudent nursing homes, caregivers, nurse practitioners, physicians, and care providers and were willful, wanton, negligent, careless and grossly negligent in the following ways:

- a. In failing to timely evaluate and assess Mary Solesbee, outlining all risk factors with which she presented in order to design an appropriate plan of care;
- b. In failing to provide complete and comprehensive monitoring of Mary Solesbee;
- c. In failing to implement a care plan designed to prevent harm and injuries;
- d. In failing to provide timely and appropriate intervention, care planning and care for a resident at risk for infection, and in need of assistance in daily activities;
- e. In failing to provide notification to physicians of changes in conditions, including vital signs and skin and wound appearance;
- f. In failing to address changes in weight loss;
- g. In failing to provide appropriate wound care;
- h. In failing to keep true and accurate records; and
- i. In failing to timely and properly assess Mary Solesbee's wound.

22. That the acts of the above were willful, wanton, careless, negligent and grossly negligent and involving the care and treatment of the Nursing Home Defendants, including the facilities identified herein, and Physician Defendants, were below the accepted standard

of care for reasonably prudent caregivers, facilities, nursing homes, physicians, and nurse practitioners. These breaches of the standard care include, but are not limited to: neglect, corporate negligence, and mismanagement; failure to exercise independent judgement as patient advocates; failure to ensure proper preventative measures in place to keep residents safe; failure to assess the residents; failure to properly train staff; failure to properly supervise; and failure to abide by applicable federal and state laws governing long term care facilities and skilled nursing facilities. The above deficiencies, neglect and failures, occurred on numerous occasions, and in numerous ways, creating multiple events, and caused Mary Solesbee's pain and suffering, and further caused her to become septic, require medical care, incur medical expenses, and led to and caused her death.

23. That as a direct and proximate result of the Nursing Home Defendants and Physician Defendant's acts and/or omissions. Ms. Solesbee suffered the following injuries and damages:

- a. Sepsis;
- b. Death;
- c. Trauma and wounds to her leg;
- d. Decreased levels of cognition, health and consciousness;
- e. Pain, suffering, physical and mental stress, loss of enjoyment of life, and anxiety;
- f. Injuries to her body;
- g. Loss of dignity
- h. Hospitalization
- i. Underwent medical care and procedures which otherwise she would not have to undergo

j. Medical Expenses

k. In such other and further ways as discovered in trials.

SURVIVAL ACTION

24. The plaintiff will show that this action was brought pursuant to the Survival Action Provisions of the South Carolina Law pursuant to both statutory and common laws. Further, this actions brought on behalf of the Estate of the deceased, Mary Solesbee, pursuant to the laws of the State of South Carolina.

WRONGFUL DEATH ACTION

25. This actions is further brought pursuant to the Wrongful Death Provisions of the § 15-79-125 *et seq* South Carolina Code of Laws, as amended, and pursuant to the common laws of the State of South Carolina. Further, this action is brought on behalf of the statutory beneficiaries of the estate of Mary Solesbee, namely and including, her daughter, Connie Bayne and her son Allen Dover.

FIRST CAUSE OF ACTION (NEGLIGENCE AS TO NURSING HOME DEFENDANTS)

26. Plaintiff restates and re-alleges each and every paragraph previously pled above as if repeated verbatim.

27. That the Nursing Home Defendants were willful, wanton, careless, negligent, grossly negligent, and provided care below the required standard of care in the following way:

- a. In failing to properly treat, evaluate, and take diagnostic measures at the appropriate times to care for Mary Solesbee;
- b. In failing to timely obtain appropriate and necessary consultations by specialists and all other qualified physicians for the care, evaluation and treatment of Mary Solesbee;

- c. In failing to timely and properly communicate about the care, symptoms and treatment of Mary Solesbee, among treating and referring physicians and related medical and care staff;
- d. In failing, on multiple occasions, to obtain and follow labs and monitor the effect of the infection;
- e. In failing, on multiple occasions, to provide proper wound care;
- f. In failing, on multiple occasions, to have and/or implement appropriate policies and procedures applicable to Mary Solesbee's condition;
- g. In failing to provide a safe and clean environment;
- h. In failing to provide the most basic care, which does not require medical training or education, but is care that if not provided will lead to suffering and decline of health as did occur in this matter;
- i. Negligently hiring, training, and supervising the staff for the defendant's facility;
- j. In failing to provide adequate staffing, adequately paid, compensated or trained staff at facilities to care for residents, such as Mary Solesbee; and in doing so with the full knowledge of such inadequate staffing practices which placed patients, such as Mary Solesbee at risk;
- k. In failing, on multiple occasions, to provide proper comprehensive and timely assessments and evaluations outlining all factors in Mary Solesbee's case;
- l. In failing to properly design, modify, or adhere to an appropriate care plan;
- m. In failing to timely and appropriately implement and provide intervention for a patient/resident with obvious declining health;

- n. In failing to properly monitor, evaluate, understand and treat Mary Solesbee's wound and skin condition, and failing to timely notify her physicians and family about her adverse conditions;
- o. In failing to timely and properly assess and appreciate the severity of her wound and infection;
- p. In failing to have and/or implement adequate and effective policies, procedures, staff and equipment to appropriately and adequately monitor, supervise and treat Mary Solesbee;
- q. In failing to follow and comply with its own policies and procedures directed at the care and treatment of residents/patients;
- r. In failing to consult a physician and/or specialist in a timely matter;
- s. In failing to timely have Mary Solesbee transported to a hospital; or other care facilities;
- t. In failing to properly and appropriately act upon Mary Solesbee's obvious decline and advance in conditions, on numerous occasions;
- u. In failing to properly train staff and operate the management facility to the extent that resident care was adversely impacted and effected and caused injuries to Mary Solesbee;
- v. Negligently administrating and operating as well as negligently, recklessly and carelessly administering and operating the defendant nursing home;
- w. In failing to transport Mary Solesbee to the hospital;
- x. In providing contra-indicated medication to Mary Solesbee.

**SECOND CAUSE OF ACTION
(NEGLIGENCE AS TO PHYSICIAN DEFENDANTS)**

28. Plaintiff restates and re-alleges each and every paragraph above, previously pled above as if repeated verbatim.

29. The Physician Defendants were willful, wanton, careless, negligent and grossly negligent, fell below the applicable standard of care in the following:

- a. In failing to provide proper comprehensive and timely assessments and evaluations outlining all of these factors for Mary Solesbee and failing to appropriately design a plan of care;
- b. In failing to timely and properly follow any plan of care, all of which occurred on numerous occasions;
- c. In failing to timely and properly order and/or implement intervention for the patient related to the obvious risks of increasing and growing compromise of her infection;
- d. In failing to properly evaluate, record and document Mary Solesbee's health and condition;
- e. In failing to timely and properly order diagnostic procedures for Mary Solesbee, all of which occurred on numerous occasions, creating numerous events;
- f. In failing to properly oversee and coordinate the medical care at Magnolia Manor – Inman;
- g. In failing to order treatment procedures for Mary Solesbee in a timely and appropriate manner;
- h. And negligently hiring, training and supervising its employees and contractors;
- i. In failing to recognize and act upon Mary Solesbee's conditions;

- j. In failing to act as reasonably prudent physician and/or nurse practitioner would do under the same or similar circumstances;
- k. In failing to implement a care plan designed to prevent avoidable injuries and complications;
- l. In failing to have a timely and appropriate intervention and/or care plan for a resident specifically at risk for a growing infection, and in need of assistance and daily activity;
- m. In failing to respond to changes and conditions, including vital signs and skin wound appearance;
- n. In failing to address changes in weight loss;
- o. In failing to provide appropriate wound care;
- p. In failing to keep true and accurate records;
- q. In failing to provide proper antibiotic care and coverage;
- r. In failing to timely transport Mary Solesbee to a hospital or a care facility;
- s. In failing to recognize evidence of potential sepsis;
- t. In failing to recognize the significance of vital signs changes;
- u. In failing to timely and properly obtain blood cultures, wound cultures, and other needed tests;
- v. In failing to recognize the significance of weight loss;
- w. In failing to timely and properly apply appropriate dressing and treatment for the leg wound;
- x. In failing to have or require appropriate RN oversight;
- y. In failing to timely and properly document Mary Solesbee's condition;

- z. In failing to provide accurate documentation or correct inaccurate documents;
- aa. In failing to practice within the scope of care;
- bb. In failing to notify physicians of change of condition; and
- cc. In prescribing contra-indicated treatments.

**THIRD CAUSE OF ACTION
(NEGLIGENCE PER SE AS TO NURSING HOME DEFENDANTS
AND PHYSICIAN DEFENDANTS)**

- 30. Plaintiff restates and re-alleges each paragraph previously pled above as if were repeated verbatim.
- 31. The conduct of the defendants is governed by the Adult Protection Act of South Carolina Code § 43-35-5, et seq, the Bill of Rights for Residents of Long Term Care Facilities at South Carolina Code § 44-81-10, et seq, South Carolina Department of Health and Environmental Control Regulations at regulations 61-17, et seq, as well as similar protective state and federal regulations and statutes.
- 32. The statutes and regulations set out above are enacted for the benefit and protection of the class of the public of which Mary Solesbee was a member at all times relevant to this action. The defendants violated these Statutes and Regulations in that their failure to properly care for Mary Solesbee and other similar situated patients at their facility.
- 33. As a direct and proximate result of the violation of the statues and regulations by the defendants, which constitutes negligence *per se*, Mary Solesbee suffered injuries, damages and death as stated above.

**FOURTH CAUSE OF ACTION
(NEGLIGENT REPRESENTATION TO NURSING HOME DEFENDANTS)**

34. Plaintiff restates and re-alleges each paragraph previously pled as if repeated verbatim.

35. Prior to and around the time of Mary Solesbee's admission to the Defendant's facility, and at the time of Mary Solesbee's sustained injuries at the facility, agents of the facility made untrue statements to Mary Solesbee and/or to her family and all representatives about the quality of care that Ms. Solesbee would receive at the Defendant's facility. Such statements were intended by those making them to be relied upon by Mary Solesbee, her family and all representatives and upon which they did rely.

36. The defendants represented to Mary Solesbee and to the family and all representatives that she would receive appropriate care within professional standards, that such care would be designed to properly provide the care and treatment under the conditions with which she presented, that the facility had adequate staffing and adequate funding, that Mary Solesbee would be carefully monitored, that Mary Solesbee would receive adequate nutrition, hydration, therapies, evaluation and preventive interventions, and that Mary Solesbee would be safe and secure and that problems or insufficiencies that the defendant's facility may have had in the past have been corrected.

37. That these statements were untrue, that the defendants knew that such statements were untrue and yet they intended they be relied upon by Mary Solesbee and her family and all representatives and upon them, they did rely in choosing to admit Mary Solesbee to the facility.

38. These representations were willful, wanton, careless, reckless, and negligent in that these defendants knew or should have known that they would not be able to meet these representations and did in fact fail to meet these representations.
39. That as a direct and proximate result of these defendant's misrepresentations and/or suffered injuries and damages as set forth above.

**FIFTH CAUSE OF ACTION
(CORPORATE NEGLIGENCE AS TO THE NURSING HOME DEFENDANTS)**

40. Plaintiff restates and re-alleges each and every paragraph previously pled above as if repeated verbatim.
41. That the Defendants were willful, wanton, negligent, careless, grossly negligent and intentional in their failure to provide Magnolia Manor – Inman with adequate and proper management, funding, staffing, and supplies necessary to provide the appropriate care for residents such as Mary Solesbee and to provide such care within the standard of care.
42. That these Defendants, especially those other than Magnolia Manor – Inman exercised sufficient control over Magnolia Manor – Inman and divested Magnolia Manor – Inman of the necessary monies, finances, staff, supplies to provide appropriate care to the residents within the required standard of care and the necessary care to meet federal and state regulations and statutes which applied to Magnolia Manor – Inman and were necessary for the care of Mary Solesbee.
43. That the Defendants other than Magnolia Manor – Inman did this through a complex corporate scheme whereby such funds were divested from Magnolia Manor – Inman, in which such funds were necessary for resident/patient care and were syphoned from the facility through a central cash management system, and/or self-corporate system, where the income for the facility was swept up into one or more central accounts for the

corporate defendants, whereby other money from Magnolia Manor - Inman were syphoned from the facility through exorbitant management fees, and other exorbitant charges and monies taken by the corporate defendants from Magnolia Manor - Inman. That these monies were divested from this facility with the full knowledge of such money was necessary for the resident care, but would not be available.

44. That as a direct and proximate result of the defendant's corporate acts and/or omissions, plaintiff suffered the injuries and damages set forth above, including her death.

WHEREFORE, the plaintiff prays for judgement against each and every defendant in the following particulars:

- a. For actual, punitive and special damages in the amount to be determined by the trier of facts;
- b. For the costs and disbursements of this action;
- c. For attorney's fees and costs;
- d. For such other and further relief as the court deems just and proper;
- e. Plaintiff requests a jury trial.

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Attorney for Plaintiff
S.C. Bar No.: 01230

Greenville, South Carolina
Date: February 27, 2019

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF COMMON PLEAS

3
4 CONNIE BAYNE,)
5 PLAINTIFF,) TRANSCRIPT OF RECORD
6 -vs-) 2018-CP-42-04405
7 FUNDAMENTAL CLINICAL) AUGUST 16, 2019
8 AND OPERATIONAL) SPARTANBURG, SOUTH CAROLINA
9 SERVICES, LLC., ET AL,)
10 DEFENDANTS.)

11
12 B E F O R E:

13 THE HONORABLE GRACE G. KNIE, JUDGE.
14
15

16 A P P E A R A N C E S:

17 MATTHEW W. CHRISTIAN, ESQUIRE
18 ATTORNEY FOR THE PLAINTIFF

19 RUSSELL G. HINES, ESQUIRE
20 ATTORNEY FOR THE DEFENDANT

21 MICHAEL R. WATTS
22 CIRCUIT COURT REPORTER
23
24
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1 (PROCEEDINGS, AUGUST 16, 2019)

2 THE COURT: Okay. The next matter is Connie Bayne
3 versus Fundamental Clinical and Operational Services, civil
4 action number 18-CP-42-4405.

5 Okay. This is the defendant's motion to dismiss,
6 is that correct?

7 MR. CHRISTIAN: Yes, Your Honor.

8 THE COURT: Okay.

9 MR. HINES: Your Honor, I suppose, just to
10 clarify, I'm Russ Hines here for -- well, we represent, our
11 firm does, three of the defendants.

12 THE COURT: Okay.

13 MR. HINES: The moving party here is T.H.I. in
14 South Carolina. It's Magnolia Manor and --

15 THE COURT: Yes, sir.

16 MR. HINES: And it's a motion -- it's a motion to
17 compel arbitration. I mean, I think it's drafted for the
18 words certainly includes dismiss, but I think it's just to
19 dismiss, or alternatively to stay and compel arbitration,
20 but essentially what it is, Your Honor, is a motion to
21 compel arbitration.

22 THE COURT: Okay. Thank you.

23 MR. HINES: And, Your Honor, if you will pardon
24 the interruption, I suppose my office has -- we have made a
25 couple of motions, but we represent the parties, two other

1 defendants.

2 And, by the way, I honestly can't recall if I said
3 it. My name is Russ Hines.

4 THE COURT: Yes, sir.

5 MR. HINES: And I -- you might have seen me on the
6 pleadings that you have in front of you. I'm sort of
7 subbing in today, but from Young, Clement, Rivers. We
8 represent, in addition to the Magnolia Manor, Fundamental
9 Clinical and Operational Services, LLC, and Fundamental
10 Administrative Services, LLC..

11 Those two entities are called The Fundamental have
12 more recently made motions to stay. They are not on the
13 docket for today, and I spoke with Mr. Christian prior to
14 the hearing and I told him that by no means did I intend to
15 try and ambush him with any newly filed motions. The only
16 reason I suggested to him it would be appropriate to mention
17 those to Your Honor, those motions, Your Honor, is because
18 those motions are what I'll call tag-along motions. They
19 simply say we recognize that one of the parties in this
20 litigation has made a motion to compel arbitration and we
21 asked the proceeding be stayed as to us until that's figured
22 out. And that's, you know, pretty much the sum and
23 substance of those motions. I understood Mr. Christian
24 indicated he didn't have a problem with the court addressing
25 those, but, of course, I realize the court may independently

1 have a problem.

2 And, furthermore, I don't want to speak for Mr.
3 Christian. I mentioned those only in case it would be
4 helpful to dispose of those today, because really they are
5 very much secondary to the primary motion, which is to
6 compel arbitration.

7 THE COURT: Thank you.

8 Yes, sir, your position on the -- I saw those
9 motions. Your position as to that?

10 MR. CHRISTIAN: Yes, ma'am, I don't have any
11 problem with the court hearing those today.

12 THE COURT: Okay. All right.

13 Okay, I am happy to hear from you, sir, with
14 regard to the motion to compel arbitration and as to the
15 other motions that were recently filed.

16 MR. HINES: Thank you, Your Honor.

17 May it please the court.

18 Again, Russ Hines from Young, Clement, Rivers in
19 Charleston on behalf of the defendants Magnolia Manor and
20 the two Fundamental entities.

21 The motion to compel arbitration --

22 Let me mention this, another brief housekeeping
23 matter, Your Honor. Do you have a copy of our memo in
24 support of that motion available to you? If you do not, I
25 will be happy to approach, if I may bring you one.

1 THE COURT: What -- just one moment. Let me make
2 sure, and I'm happy to have a paper copy as well.

3 (Off the record).

4 (Back on the record)

5 THE COURT: Okay. Thank you, sir, and I do have
6 it pulled up on my system.

7 MR. HINES: Thank you, Your Honor.

8 This motion --

9 Well, to give you a little bit of case background,
10 this is a wrongful death and survival action brought by Ms.
11 Solesbee as the personal representative of her mother Ms.
12 Bayne.

13 Ms. Bayne was a resident of Magnolia Manor, a
14 skilled nursing facility in Inman, from June the 27th
15 through July the 14th of 2016. And, of course, the
16 allegation is that those claims arise out of the improper
17 care and treatment that she would have been alleged to have
18 received during that stay.

19 Upon admission to the facility, or at the time of
20 it, another of the personal representative of Ms. Solesbee,
21 one of Ms. Bayne's children, another child whose name is Mr.
22 Dover, Allen Dover, he signed as representative of his
23 mother, Ms. Bayne, two different documents that are at the
24 heart of what I'm here to argue to you. One is an admission
25 agreement. The other than is an arbitration agreement. We

1 are moving to compel arbitration obviously under the
2 arbitration agreement.

3 Now, it is -- it must be conceded at the outset we
4 are talking about a non-signatory that we are trying to
5 enforce the arbitration agreement against, specifically the
6 estate of Ms. Bayne. Ms. Bayne herself was not a signatory
7 to the agreement.

8 And so that gets us to how -- how do you get
9 there? This is not a case where we have a power of attorney
10 or anything, any documents that would allow us to file in
11 Ms. Bayne's estate to the arbitration agreement.

12 It's not a case obviously under the Coleman case
13 from a few years back. We can't use the Adult Health Care
14 Act, you know, the service act to get there either.

15 And what that brings us to the question of agency,
16 whether an actual or true agency or an agency by estoppel or
17 a ratification -- or, excuse me, an agency -- yeah, by
18 estoppel, and a related question is the question of merger,
19 merger specifically between the two different documents, the
20 arbitration agreement and the admission agreement.

21 Now, before I go on to make my argument, I will
22 also mention that we have a secondary position.

23 Our number one position, Your Honor, that we asked
24 that, of course, this litigation be stayed and the claims
25 against Magnolia Manor compel to arbitration.

1 If that is not something the court is inclined to
2 do, our secondary position is that we be allowed to conduct
3 discovery, specifically limited within the bounds that --
4 you know, the appropriate bounds, and this court
5 obviously -- well -- well, we would certainly be happy to
6 heed the court's discretion on what those bounds might be,
7 as long as we are asking for a reasonable opportunity to
8 conduct discovery about the facts and circumstances that
9 would surround any factual questions that bear upon the
10 issue of agency, estoppel, to include within that
11 competency, because there is a suggestion in the filings in
12 opposition to our motion about the lack of competency,
13 capacity, to contract at the time of the admission on the
14 part of Ms. Bayne.

15 I understand, for instance, that they have
16 included affidavits, both from Ms. Solesbee, and also from
17 Mr. Dover to that effect. Now, of course, those affidavits
18 speak in -- well, fairly general terms. They were very
19 short affidavits, and just so I'm not misstating, if the
20 court would indulge me.

21 This is Ms. Bayne's affidavit, but based upon her
22 observation of her mother at the time of the admission to
23 Magnolia Manor admitted that she was not competent to
24 understand her own business affairs and that she was
25 physically disabled from caring for herself. Certainly that

1 affidavit is evidence of what I just read is what Ms. Bayne
2 has said, and her brother, Mr. Dover, has said likewise.
3 Obviously, however, I'm not able to cross-examine an
4 affidavit. I'm not able to understand exactly what that
5 means. And it occurs to me that the question of capacity is
6 indeed a factual question.

7 And to the extent the court might be suggesting
8 "well, where is your affidavit? Where is your affidavit to
9 say otherwise from somebody at the facility?" I meant to
10 say, Your Honor, we have not submitted it.

11 Let me submit, respectfully, that it wouldn't make
12 any difference if we had, or should I say, rather, it would
13 be -- really I don't see how a meaningful factual
14 determination could be made, even understanding that the
15 determination will be made by the court, as opposed to -- we
16 are not talking about a jury issue, but on the basis of
17 uncross-examined affidavits from either party.

18 There is another note, for instance, or another
19 nod to the question of capacity that's provided as an
20 exhibit to plaintiff's opposing memorandum. It's called
21 resident's face sheet, and there were a few references in it
22 to, for instance, unspecified dementia without behavioral
23 disturbance, delirium due to physiological condition,
24 Alzheimer's Disease unspecified. And I will have to
25 concede, you know, in good faith those are said in that

1 document, but that's all that's said. What that means in
2 terms of her contractual capacity at the time of admission,
3 it does not say, and it would be, respectfully, Your Honor,
4 pure speculation to say that anybody could say, particularly
5 in keeping with the idea of, you know, here we are in court
6 talking about judicial determination yes or no on
7 competency.

8 What I'm guessing, Your Honor, is I don't -- I
9 understand they pushed back on this issue of competency or
10 capacity, but my response to that is to say fair enough,
11 there may be evidence that you have to support that, but we
12 are certainly not -- the record is certainly not such that
13 it would only yield that conclusion.

14 And, moreover, I guess maybe more to get to the
15 point about why we would ask for discovery is because it's
16 often argued in cases where the party is trying to seek
17 arbitration, if we just went and conducted discovery
18 ourselves, we could -- and certainly we could send out -- we
19 could take depositions. We could do all those things and,
20 of course, it would be a catch 22 if we would use the
21 machinery of litigation to try and determine, or the tools
22 of litigation, to try and get at this issue that bears on
23 our arbitration rights and in so doing open ourselves up to
24 the claim of waiver by using the tools of litigation.
25 Respectfully, Your Honor, that's an unfair situation to be

1 in. And the reason we come to you asking you as this court
2 is asking for essentially the court's blessing to do this is
3 that we will believe it's appropriate, I mean, to allow in a
4 very targeted way.

5 We are not at all suggesting that we want to waive
6 the ability to resolve this dispute to arbitration. We are
7 talking about a threshold issue of arbitrability and that is
8 issues that's appropriately decided in the court. I mean,
9 that's, in fact, the case law is to the effect that unless
10 said other way, or unless made clear in the agreement to
11 arbitrate, the threshold question of arbitrability is to be
12 decided in court. And I don't think that if we come to the
13 court and ask for that process of the court deciding the
14 threshold issue to include some limited and targeted
15 discovery, that that bends any sort of notion of justice.
16 In fact, I think it's entirely consistent with what both our
17 state and the federal law says to be the favored position
18 that arbitration occupies in the eyes of our courts, meaning
19 the favored way to resolve disputes. And so all we are
20 talking about is a full and fair opportunity to enforce what
21 we believe to be a contractual right.

22 So forgive me for sort of arguing that a little
23 bit out of turn, because that was all going towards the
24 discovery requests.

25 Let me back up to why we would ask before we would

1 even have to get there. You could refer this matter to
2 arbitration now..

3 Mr. Dover certainly -- I have to concede, too, on
4 this point. As far as any evidence of actual agency, for
5 instance, conduct on behalf of the decedent Ms. Bayne
6 herself, that I could look to to show that she had
7 manifested the kind of a sense to have Mr. Dover act on her
8 behalf and subject to her control and Mr. Dover exercised
9 that control, my hands are very much tied. Again, that goes
10 to the discovery issue in terms of trying to present that to
11 you. So I think, at least today, I can't really do much
12 with that.

13 When I go to the next level of the analysis and I
14 think what about apparent authority, it's a similar problem.
15 It's the same problem. The problem is that the ability --
16 you cannot show -- you cannot show an apparent -- excuse me,
17 an apparent agency solely by the acts of the alleged agent.
18 You know, you can't do it. Obviously the question of
19 apparent agency goes to what express or implicit conduct of
20 the alleged principal would have given the third party
21 reason to believe there was such authority, and we can't do
22 that here. We don't have the information, which we would
23 try to get through discovery, and, of course -- so, again,
24 our hands are tied.

25 But as I get down to the next level, it occurs to

1 me that we do have enough information to argue for estoppel,
2 and I think to begin that analysis we have to start with the
3 idea of a merger of the two agreements;

4 To my knowledge, there is no contention that Mr.
5 Dover did not have the ability to enter into the admission
6 agreement. The idea -- and I think you have seen it in the
7 cases - Coleman, Thompson, I guess most recently Hodge -
8 where this idea of merger between the admission agreement
9 and the arbitration agreement -- or the admission agreement
10 and a separate arbitration agreement is all in different
11 cases that also involved skilled nursing facilities, is
12 that, yes, the law is that when two agreements are executed
13 by the same party at the same time for the same purpose as
14 part of the same transaction, that it is presumed that these
15 documents shall merge and be essentially treated as one,
16 unless there is evidence to show that that is not what the
17 parties intended.

18 In all these cases, in Coleman and Hodge and
19 Thompson, of course, our appellate courts have said well,
20 there was this evidence of separateness, we are not going to
21 find merger to be there. And I don't think this is arguing
22 against precedent, Your Honor. I think what is is
23 distinguishing precedent.

24 To the extent, however, that it is arguing against
25 precedent, but, nonetheless, I will have to put forth this

1 argument. In all those cases it's a very important
2 distinction. The court in each one of those said, well, you
3 know, these two documents, there is merger clause in the
4 admission agreement that specifically references the
5 arbitration agreement; thereby, indicates the intended
6 separateness of these two agreements. They shall not merge.

7 That's not the case here. The arbitration
8 agreement had a merger clause, but it does not specifically
9 mention -- excuse me, the admission agreement has a merger
10 clause, but it does not mention the arbitration agreement by
11 name.

12 But I think more importantly is the fact that each
13 one of those cases, the arbitration agreement, unlike the
14 admission agreement, had a provision that said you can
15 revoke your agreement to the arbitration agreement within
16 thirty days. That provision was not found in the admission
17 agreements in this case.

18 Now, in our case there is no revocation found in
19 the arbitration or the admission agreement, but I think I
20 can understand where the courts are coming from in feeling
21 that there was evidence of separateness, because the idea
22 being, hey, one of these documents you can flat out undo.
23 And if the idea is that you can undo one of them, the other
24 one still stands, well, there is a separate character there
25 that's being recognized.

1 We don't have that. We don't have the ability to
2 have -- you know, how -- if they were truly merged, how
3 could you one of them all the sudden start within thirty
4 days after dropout. I think I -- I think that's the
5 distinction I could understand when our appellate courts
6 have made, but it doesn't exists here. I think that's a
7 huge factual difference.

8 Moreover, I think it's important to note -- I've
9 seen one of these cases before, Your Honor, where --

10 Judge, it should be known that this arbitration
11 agreement that we are talking about was not a condition to
12 admittance into the facility, and I have seen another
13 instance where one of my colleagues argued one of these, and
14 I was reading back over the transcript. A trial judge was
15 particularly interested in "well, how could you say they
16 merged when you tell me that this is not a condition of the
17 admission?" My answer is there's a difference between not
18 being a condition of the admission and not being in
19 conjunction with the admission. It's perfectly true that
20 Mr. Dover did not have to sign the arbitration agreement to
21 move forward with Ms. Bayne being admitted. It was
22 voluntary, but he did do it at the time, the same time, for
23 the same purpose.

24 My point is that does show a relatedness between
25 the two. In fact, when I look at the document, which is

1 Exhibit 2 to our memo in support, Your Honor, specifically
2 the arbitration agreement reads "it's further understood
3 that in the event any controversy or dispute between the
4 parties arising out of or relating to the facility's
5 admission agreement, or breach thereof, or relating in any
6 way to the resident's stay at the facility, its provisions
7 here, services to the resident," it continues on, but the
8 point is -- it continues on to provide for those parties to
9 arbitrate, but the point is, Your Honor, these things are
10 hand in glove once they are signed. This isn't just -- you
11 know, this -- there is a coordination between the two.

12 And, Your Honor, I suppose you realize what I'm
13 talking about, and I could go on until today, so -- I'm
14 sorry. Thank you for your indulgence for the time. I think
15 we have covered this ground in our writings and so part of
16 me obviously --

17 Well, I'll let Mr. Christian talk, but if you have
18 any questions for me, maybe it's the best thing for me to
19 answer them, but if --

20 It reminds me of one thing, though. I know one of
21 the things that I expect Mr. Christian is going to say, as
22 he's written in his brief, and I should say is that you
23 can't just judge -- this is non-starting -- anyway, this is
24 a wrongful death claim. At least as to the wrongful death
25 claims, these facts toward beneficiaries, they didn't agree

1 to arbitrate anything.

2 And my very quick response to that is, Your Honor,
3 that's true. However, they don't have any claims as to a
4 beneficiary. They are the beneficiary. They have a
5 beneficial interests in the claims they, themselves, cannot
6 bring. The claim must be brought by the name of the
7 personal representative of the estate of the decedent. So
8 their claims are still distinct. I mean, this is not --
9 not -- neither one of these --

10 Mr. Dover, for instance, he's a statutory
11 beneficiary. He can't go bring a claim for wrongful death.
12 He doesn't have that claim. If he were a personal
13 representative he could.

14 And his sister, who is a -- Ms. Solesbee, who is a
15 statutory beneficiary, she is bringing a claim as personal
16 representative. But, of course, that's as personal
17 representative. That's not her individually.

18 So the whole idea that this is going -- basically
19 binding claimants to a contract to which they were not party
20 and did not agree is I think misplaced from the start, Your
21 Honor, because, again, it's not -- they benefit from the
22 claim. This is like a separation of legal and equitable
23 title, I guess, that we think of in trust law.

24 Maybe one last point. I was thinking about how to
25 distinguish this. I will give you an example of it, a loss

1 of consortium claim. In South Carolina a loss of consortium
2 claim, this is not a derivative claim. It stands alone for
3 the spouse that is claiming loss of consortium. So if you
4 had a spouse that was making we'll call it the
5 under-claiming claim, or sort of the primary claim, if you
6 will, who would agree to arbitrate, but the spouse who was
7 suing for loss of consortium had not. You would not have
8 the ability to say the spouse who has not agreed to
9 arbitrate is suing for loss of consortium. No, no, you are
10 bound by this one, but it's not derivative, but in this case
11 its circumstances are different. We are talking about a
12 statutory beneficiary. And as long as we are correct that
13 the estate and the personal representative of the estate,
14 who obviously represents the estate, is bound, so are the --
15 in fact, it's not even the case that you would say that the
16 wrongful death beneficiaries are bound. It's simple that
17 their claims -- they come in essentially at the end to get
18 what is recovered, if anything. And so it's really not
19 quite, respectfully, the way to look at it legally to think
20 of it as their claim.

21 Thank you, Your Honor.

22 THE COURT: Thank you, and I will give you an
23 opportunity to reply to anything that you need to -- that
24 you feel that you need to do.

25 Okay, yes, sir. Good morning.

1 MR. CHRISTIAN: Thank you, Your Honor.

2 Matt Christian here on behalf of the plaintiff.

3 And, Your Honor --

4 THE COURT: And I do want to commend both of you
5 all on your briefs and the attachments. I feel like now I
6 have an encyclopedia of orders from every judge in the state
7 regarding this issue.

8 And I see Mr. Mullman and Mr. Poliakoff are here
9 and I'm assuming they are here as observers today.

10 MR. POLIAKOFF: Yes, Your Honor, we are not
11 directly involved in this case, but we have many cases
12 against this defendant chain on similar issues.

13 THE COURT: Which is y'all's specialty.

14 Yes, sir.

15 MR. CHRISTIAN: Thank you, Your Honor.

16 And if I might approach, I have a hard copy for
17 you.

18 THE COURT: Yes, sir.

19 MR. CHRISTIAN: It's tabbed, and it might be a
20 little more convenient.

21 And I also have to add to your encyclopedia one
22 other order that should have been already included, that we
23 have already provided to Mr. -- or that Mr. Hines has
24 already seen, and it's an order from -- that I received from
25 Judge Stilwell near the end of last year that addresses .

1 similar issues in this case regarding powers of attorney and
2 agency and estoppel, as well as wrongful death statutory
3 beneficiaries.

4 But, in any event, Your Honor, I understand that
5 they make sort of a compelling argument. I think it's just
6 unfortunate that -- at least for them, that almost all the
7 authority that they rely on is not good law. Nearly all of
8 their attachments and exhibits to their brief are -- have
9 been of overruled by our Court of Appeals and the Supreme
10 Court. They are all from 2007, 2009, 2011, 2012, which
11 predate the Coleman, the Hodge, the Thompson, the Wilson
12 decisions by our courts.

13 I had the Coleman case, I had that opportunity to
14 be involved in that case, which went all the way to -- where
15 the defendant's petition for cert to the United States
16 Supreme Court and it was denied, and it's directly on point
17 in this case, as is Hodge and Thompson as well.

18 And so just to back up, I think it's very
19 important to factually understand that Mr. Dover, who was
20 the one that signed the arbitration agreement in this case,
21 had been given a power of attorney years before this
22 admission, and that initial power of attorney said that it
23 would become ineffective, should his mother become
24 handicapped, or -- excuse me, disabled or not competent.
25 And I think she was both, but that's really totally

1 irrelevant, because just a couple months after he got that
2 power of attorney, she actually revoked that power of
3 attorney in writing and she filed that appropriately, as the
4 requirements provide. And so it was not effective, and that
5 was more than two years before this nursing home admission
6 occurred. And so, as Mr. Hines pointed out, it's clear that
7 he -- that Mr. Dover had really no authority to sign the
8 arbitration agreement on her behalf.

9 Now, he did have the authority to sign the
10 admissions agreement under the South Carolina Adult Health
11 Care Consent Act. And, of course, that was one of the
12 issues addressed in Coleman, where the Coleman court said
13 just because you have the authority to admit somebody and
14 sign such an admission agreement into a facility doesn't --
15 is totally different from having authority to sign an
16 arbitration agreement and it doesn't provide the power to
17 enter into the arbitration agreement. So we know that that
18 issue was really addressed by Coleman.

19 Coleman also addressed the estoppel issue and also
20 found that there was no merger.

21 And I would really direct the court in this case
22 to the Thompson cases and the Hodge case by our Court of
23 Appeals, which are directly on point.

24 I really am a bit surprised that we are here a
25 little bit today on this motion, because they speak to the

1 exact same issues that the defendants in this case raised.
2 And in that case, or in both those cases, the court said
3 there is no estoppel. There is no agency.

4 And what's really interesting to me is in the
5 Hodge case the patient or the resident was actually
6 competent. I believe -- which is opposite of what Ms.
7 Solesbee was in this case, because we know from the
8 diagnosis face sheet, that we have provided as an exhibit,
9 that she had dementia. She had Alzheimer's. She had
10 delirium, all of those things, which really I think are
11 uncontroverted, because that's their records. But, in any
12 event, in Hodge the resident was competent and the court
13 found there was no agency, there was no estoppel.

14 And throughout their brief they continuously refer
15 to the actions of Mr. Dover; that he signed this agreement,
16 that he signed as resident, that he represented by signing
17 that he had some authority. And what Mr. Dover did has zero
18 effect on whether there should be any estoppel or any
19 agency, because it's a holding out by the principal, or by
20 Ms. Solesbee in this case, and there is no evidence that she
21 held out or allowed Mr. Dover to be her agent, to have the
22 authority to sign the arbitration agreement.

23 And they discussed the merger issue. And I would
24 respectfully disagree with sort of their characterization of
25 how these cases would be different from Hodge and from

1 Thompson. In fact, this case has nearly all of the same
2 issues that would prevent a merger as Coleman and Hodge and
3 Thompson.

4 For example, the Thompson court said -- one of the
5 things that they said was -- distinguished that there was no
6 merger between the arbitration agreement and admission
7 agreement was that the admission agreement was required to
8 be signed for admission and the arbitration agreement was
9 not required to be signed for admission.

10 They totally admit in their brief, for example, on
11 page eleven, that the arbitration agreement was not required
12 for admission. The admissions agreement was. That's just
13 one example. We don't have to have a whole litany, but
14 there actually is a whole litany here.

15 One of the things that Coleman in some of these --
16 and Hodge referred to that there is no merger. One of the
17 factors is that they said the admissions agreement refers to
18 state law, the arbitration agreement refers to federal law.
19 Well, in this admissions agreement it says it's reliant upon
20 both state and federal law and the arbitration agreement is
21 only according to federal law.

22 They said that another -- another reason this is
23 not like Hodge and Thompson is because in those cases the
24 arbitration agreement could be discontinued or revoked.
25 Well, actually in this case it's sort of the opposite. The

1 admission agreement can be terminated with written notice,
2 but the arbitration agreement cannot be. The admission
3 agreement actually explicitly gives the instruction to both
4 the resident and facility as to how they can terminate the
5 admissions agreement, and the arbitration agreement
6 specifically says it cannot be terminated. So that's
7 further evidence that there is no merger.

8 The admissions agreement has a severability
9 provision. The admissions agreement has the provision that
10 says it supersedes all other agreements, similar language to
11 what Coleman discusses.

12 The admissions agreement is assignable by the
13 facility.

14 The admissions agreement, again, it represents
15 this is the entire agreement, which are direct issues in
16 Coleman and Hodge that there was no merger.

17 So there is so many things here that we can rely
18 upon to show that there is no merger between this admissions
19 agreement and this arbitration agreement, Your Honor.

20 And even further, the Hodge court said even if the
21 admissions agreement and arbitration agreement merge, there
22 can be no equitable estoppel, because the resident's estate
23 was not attempting to enforce the admissions agreement.
24 They weren't seeking a benefit under the admissions
25 agreement -- or excuse me, they weren't seeking a benefit

1 under the arbitration agreement.

2 And that's the exact same language that our court
3 just recently decided, I believe came out just recently in
4 the Wilson v. Willis case by the South Carolina Supreme
5 Court. And it should be -- and that dealt directly with
6 estoppel and an arbitration agreement. And one of the
7 things that the South Carolina Supreme Court said in that
8 case is "equitable estoppel is ultimately a theory designed
9 to prevent injustice and it should be used sparingly."

10 Further stating that "equitable estoppel should be
11 used sparingly to compel arbitration," and noting "it is
12 more properly used as a shield to prevent injustice rather
13 than a sword to compel arbitration and that it should be
14 used with restraint and only in exceptional circumstances."

15 You know, judge, as I already indicated, I believe
16 Hodge and Thompson and Coleman are directly on point. They
17 are really asking the court here today to ignore our Supreme
18 Court and Court of Appeals argument.

19 It's kind of interesting, too, because even in
20 Hodge there was actually even a power of attorney that was
21 valid in that case. It just turned out that it didn't
22 specifically grant the authority to arbitrate. So this is a
23 totally different situation, because there is no power of
24 attorney, so there can't even be any type of thought that he
25 had any authority.

1 Their own admissions agreement contemplates that
2 there are situations where residents do not have -- or
3 resident's relatives do not have powers of attorney. The
4 admissions agreement talks about the process for that and
5 how they should get a guardian or a conservator. And so
6 this is a sophisticated facility that has dealt with these
7 issues on many occasions before and they understood the
8 difference between somebody who has authority and doesn't.

9 And if it's their contention that Ms. Solesbee was
10 competent, they could have had her sign this agreement when
11 she came over to the facility. Her son signed this
12 agreement when she was at the hospital, totally un -- she
13 was totally unaware that this thing had been signed. They
14 could have had her sign it when she came to the facility, if
15 she was indeed competent, just as the court in Hodge noted,
16 and they didn't do that.

17 And the last couple things I would address, Your
18 Honor, is the wrongful death issue. We have attached a
19 number of orders from other courts where they have held that
20 the wrongful death statutory beneficiary claim is
21 independent and that those claims cannot be bound by the
22 arbitration agreement when they are not signatories.

23 Just in the last two weeks I also received two
24 additional orders from Judge Miller in nursing home cases
25 addressing the arbitration issue and denying arbitration as

1 to the wrongful death statutory beneficiaries.

2 And we cited a number of cases in our brief that
3 discuss how the wrongful death claims are independent
4 claims. We --

5 Also one of the things I would note is in their
6 brief they cite the Dean case for the proposition that
7 allegedly our Supreme Court said that the wrongful death
8 claim is automatically wrapped up in the arbitration
9 agreement, and I don't believe that's true at all.

10 What the Dean court said in a footnote was that
11 arbitration -- or excuse me, "the wrongful death claims
12 cannot be excluded from arbitration just because they are a
13 wrongful death claim, but they can be excluded if there is a
14 state law contractual defense." And there is a -- what we
15 are supposed to do with arbitration agreements is treat them
16 like any other contract. And there is a state law
17 contractual defense as to why the wrongful death claim in
18 this situation should not be bound, and that's because the
19 statutory beneficiaries were not parties to the agreement
20 and did not sign and no one who signed signed on their
21 behalf on had authority to sign on their behalf.

22 Now, had the statutory beneficiary signed and
23 waived their right to arbitration, that might be a different
24 issue, but under a state law contractual defense they cannot
25 be bound.

1 And one other -- and then one other issue that
2 they raised in their brief is that they say that the
3 majority rule in the country is that wrongful death claims
4 are bound. I believe that's totally incorrect. I think
5 they cited six or seven jurisdictions, which obviously
6 isn't a majority, but we had a case down in front of Judge
7 Gergel where he was going to certify this issue to the South
8 Carolina Supreme Court and he had actually pulled every
9 decision from across the country and noted that there was no
10 clear decision across the country or majority view on this
11 issue.

12 And then, finally, Your Honor, their issue with
13 discovery.

14 First of all, there is nothing in our Rules of
15 Civil Procedure that prevent them from seeking discovery at
16 any point in time. The rules allow it, and they could have
17 served discovery at any point in time up to this hearing.

18 In fact, they knew that they have the burden to
19 prove that this is a valid and enforceable arbitration
20 agreement. It was their duty to come to the hearing today
21 with the evidence they needed to prove that. At no point --
22 they filed the motion to compel arbitration, so they could
23 have done discovery. They are allowed to do that by the
24 rule, but what they want to do is they want to say, judge,
25 will you give us an advisory opinion that if we go and do

1 discovery, that we won't have waived our rights to
2 arbitration, and that's not the purpose of the court. Our
3 courts are clear that the courts can't give advisory
4 opinion, and that's what they are seeking. They are seeking
5 an advisory opinion that if they do that, they won't have
6 waived their right to compel arbitration.

7 And -- and it's interesting, because my partner,
8 who actually is -- Harold Christian, who is actually the one
9 who was lead on this case, this was his file, he's
10 unfortunately suffering in Austria and Switzerland today, he
11 acted sort of against my counsel. Of course, I guess that's
12 what happens when it's your dad. He can do what he wants to
13 do, but -- and I said "I don't think we need discovery in
14 this case," but he sent discovery to them as to the
15 arbitration issue anyway.

16 Their response was "we have got a motion to compel
17 arbitration and we are objecting to producing any responses
18 to your discovery as to arbitration." They had that
19 opportunity. They told us we couldn't even ask for it, and
20 now all they want to do is delay it and then somehow or
21 another come back and say "we can't argue what we argued
22 here today."

23 And the last thing I would note about that is that
24 the Hodge case, this was an issue brought up in Hodge at the
25 hearing where the Circuit Court denied the arbitration

1 motion. They said "well, judge, you need to let us go back
2 and do discovery on these issues."

3 And the judge said "no, it's not necessary. It's
4 not going to be helpful," and the Court of Appeals actually
5 agreed.

6 And the reason it wouldn't have been helpful in
7 that case is the same reason it wouldn't be helpful and not
8 necessary today is because the only issue that's relevant is
9 what was the intent and the actions of the principal, and
10 she is -- she is deceased and there is zero that the
11 principal did anything to allow her son to hold himself out
12 to be her agent or have any authority.

13 So we can talk all day about her competency, and I
14 think that's sort of a relevant point, but it is in no way
15 necessary to make this decision today. In fact, it wouldn't
16 bear any light or shed any assistance in the court making
17 the decision today whether she was competent or not, because
18 in Hodge, as we know, she was competent in that case as well
19 and the court said there is no need for discovery there.

20 So I apologize for taking so long, Your Honor.
21 It's just that I felt like it was necessary to address all
22 the issues that they have raised and I will be happy to
23 answer any questions the court may have.

24 THE COURT: Thank you.

25 Anything in reply, sir?

1 MR. HINES: Yes, Your Honor.

2 This might be a bit of a hodge-podge because I was
3 jotting down some notes, so if you will forgive me --

4 THE COURT: Take your time.

5 MR. HINES: -- I'll try to hit them very quickly.

6 Let me start with the discovery issue first.

7 I understood Mr. Christian to say that the rules
8 allow for us to conduct discovery. I don't deny that one
9 bit, but, of course, that's the -- to state that is at least
10 not completely --

11 Well, let me say it like this. Our problem is
12 that the rules don't allow it. Our problem is if we engage
13 in it.

14 I suspect, and I'm not asking counsel this
15 question directly, but I suspect if we had done what he
16 agreed the rules allow us to do, we could expect a waiver
17 argument at some point in time.

18 So, you know, I think it's more disingenuous, it
19 might have been used earlier to one of my arguments, I think
20 that word is perhaps more appropriate in respect to the
21 argument that sure, the rules allow you to do it. And, of
22 course, if you do it, then you are just shooting your -- any
23 rights that you might claim to have to arbitrate in the
24 foot. That doesn't seem to me to be a system that is very
25 geared to administration of justice and I don't think it is

1 the system.

2 Also to be clear, Your Honor, we are not arguing
3 for an advisory opinion. We are arguing for a binding
4 determination of this court that you may do this. And if
5 you do this, it will not be a waiver. That's what we want.
6 We don't want just a, you know, some sort of a -- you
7 know -- well, we don't want an advisory opinion. We want --
8 we want leave.

9 And a couple other things, Your Honor, on the
10 issue of Hodge in that case where, you know, and its
11 discovery issues.

12 There was some -- I guess I would have to call
13 them, you know, unequivocal declarations from Mr. Christian
14 interspersed in his argument. It's clear that Mr. Dover had
15 no authority. She was in -- Mrs. Bayne was -- didn't have
16 the capacity. There is no evidence of this, there is no
17 evidence of that. We left -- I mean, if that is to carry
18 the day, Your Honor, I suppose we just have to take his word
19 for it. And this is not any reflection by any means on Mr.
20 Christian's word himself. I'm just talking in general
21 sentence, that I do not believe, Your Honor -- I mean,
22 essentially if that carries today, then this will never fly,
23 because it would take nothing more than the scant affidavits
24 that we have here that say "no, you got it all wrong," and
25 we will have to say, "well, I guess we got it all wrong, we

1 can't ask any questions."

2 So, Your Honor, I think that's really -- if that
3 is to be the standard, I think it is one that is fairly
4 obvious sets the stage for some unjust result,
5 having essentially one party having the ability, one side.
6 And, again, this is zero, absolutely zero reflection on Mr.
7 Christian himself. I'm talking about is general standard.
8 Just, you know, tell us what the deal is. Essentially --
9 because that -- in that case you have a wrongful death
10 situation.

11 And I thought I had agreed to this in my original
12 argument, that without question what matters is the -- is
13 what the principal, the alleged principal, Ms. Bayne
14 herself, her conduct, and that does not mean --

15 I think I did say it like this, that as long as
16 you cannot show apparent agency solely by the conduct or
17 words or actions of the alleged agent, but that is
18 circumstantial evidence that would be relevant to additional
19 evidence.

20 And, of course, I understand that Ms. Bayne is no
21 longer with us and cannot be deposed herself, but other
22 people can -- to include, of course, Ms. Solesbee and Mr.
23 Dover, absolutely have testimony that bears on this, on the
24 question of her capacity. And, in fact, that in our records
25 there are notions that absolutely says the words appear

1 Alzheimer's, delirium. That is not the standard for
2 capacity. I mean, does she know what she's doing? There is
3 plenty of case law about this, about the idea of did the
4 person -- you know, is the person capable of knowing what
5 they are signing and the consequences of it, and that
6 document -- were the court to find that that document alone
7 and the unchecked affidavits of Ms. Bayne's children could
8 prove to us the issue of capacity, well, that's -- again,
9 it's a situation where it's -- the law I suppose would have
10 to be from our perspective, well, you know, it's over before
11 it starts. There is nothing you can do, as long as they
12 file an affidavit that says otherwise. And this piece of
13 paper certainly could -- I mean the face sheet, it would be
14 truly speculative to say that that means she didn't have
15 capacity at the time these contracts were entered into.

16 And I also thought there was some notion about
17 equity. We argue about estoppel, that not being used or
18 being used with great restraints when it came to arbitration
19 clause. I think that's also the problem. And I don't -- I
20 know that was from other -- you know, in the Wilson case.
21 It was more recent saying this is arguing against precedent
22 and I'll note that, but I don't know that it is, because I
23 don't know that this is an issue that was addressed in that
24 case, but my point is, as Mr. Christian mentioned,
25 agreements to arbitrate are supposed to stand on equal

1 footing with any other contract and the idea that they would
2 be a particular standard of -- a stricter standard with
3 respect to the application of equity to the enforcement of
4 arbitration agreements as opposed to others would be
5 offensive to the requirement of equal footing to these
6 contracts. To the extent that that is what he's arguing, I
7 submit to Your Honor that that cannot be. It would violate
8 the FAA, would violate the requirements.

9 Similarly, he indicated that the South Carolina
10 statutory claim for wrongful death created a state law
11 contractual defense. Respectfully, I don't believe it does.
12 It certainly doesn't create a general one. The state law
13 defenses have to be applicable with any contract.

14 By its definition if that statutory matter is
15 applied specifically and it's exclusively in wrongful death,
16 then clearly it's not something that is placing on equal
17 footing arbitration agreements with -- well, claims for
18 wrongful death, rather. With -- it wouldn't be applicable in
19 any other -- it would be too targeted to arbitration.

20 And I guess in that regard, for instance, he
21 mentioned, well, how could it be wrongful death, the
22 beneficiaries didn't sign the agreement. If that's the
23 standard, you will never have -- essentially it eliminates
24 wrongful death arbitration, because the idea that you will
25 have wrongful death beneficiaries signing an arbitration

1 agreement, considering how many accidents happen on
2 highways, interstate highways, you know, it's a -- as a
3 practical matter that is to -- if that were the rule, it
4 would swallow -- you know, it does contradict Dean. Dean
5 indicates that just because it's wrongful death claim
6 doesn't mean you can't arbitrate. Well, if the rule is you
7 have to have signed arbitration agreements from every
8 arbitration statutory beneficiary for wrongful death, you
9 know, that will effectively end that, except for in very
10 exceptional cases where for some reason every beneficiary
11 hasn't also signed it in arbitration.

12 Gosh, Your Honor, thank you for your indulgence.
13 I have spoken quite a bit. We have got our materials.

14 And I would -- oh, I would mention Exhibit 3 I
15 think in our filing is a much more recent order, August 13th
16 last year, Spartanburg County.

17 THE COURT: Henderson?

18 MR. HINDS: Judge Henderson, correct. Thank you.
19 That would --

20 THE COURT: Yes, I have seen it. Thank you.

21 You all are so knowledgeable on this subject and I
22 commend you both, and I know y'all have put so much work
23 into your positions and I do appreciate it.

24 I'm going to ask you each to do one thing for me,
25 and I don't think it will be difficult for you, because you

1 have already written your brief. If you would convert them
2 into a proposed order for me and send them to me in word
3 format, or send them to Ms. -- this is Ms. Gasser, Megan
4 Gasser, and she's the new Elizabeth as of this last week,
5 last Wednesday. She is doing a great job, my new law clerk.
6 If you all could forward that to her e-mail, that would be
7 very helpful for me, within five days? Would that be?

8 MR. CHRISTIAN: Yes, ma'am, we can do that.

9 MR. HINES: Thank you.

10 THE COURT: All right. Thank you.

11 MR. CHRISTIAN: Thank you so much.

12 THE COURT: All right. Thank you all. Nice to
13 see you all.

14 MR. CHRISTIAN: Nice to see you too.

15 THE COURT: So this is under advisement.

16 (END OF REQUESTED TRANSCRIPT OF RECORD)
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CERTIFICATE

I, the undersigned, Michael R. Watts, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Spartanburg County, South Carolina, on the 16th day of August, 2019.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

November 25, 2019

Michael R. Watts
Circuit Court Reporter

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
THE ESTATE OF MARY SOLESBEE,	)	CASE NO. 2018-CP-42-04405
BY HER PERSONAL	)	
REPRESENTATIVE CONNIE BAYNE,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	DEFENDANT THI OF SOUTH
	)	CAROLINA AT MAGNOLIA MANOR-
FUNDAMENTAL CLINICAL AND	)	INMAN, LLC'S MOTION TO DISMISS
OPERATIONAL SERVICES, LLC;	)	PLAINTIFF'S COMPLAINT, COMPEL
FUNDAMENTAL ADMINISTRATIVE	)	ARBITRATION AND STAY STATE
SERVICES, LLC; AND THI OF SOUTH	)	COURT PROCEEDINGS
CAROLINA AT MAGNOLIA MANOR-	)	
INMAN; D/B/A MAGNOLIA MANOR-	)	
INMAN; IPC HEALTHCARE, INC;	)	
AND ANGELA BROWN, ACNP,	)	
	)	
DEFENDANTS.	)	
	)	

TO: W. HAROLD CHRISTIAN, JR., ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, THI of South Carolina at Magnolia Manor-Inman, 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, Negligent Misrepresentation, Corporate Negligence, 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.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

YOUNG CLEMENT RIVERS, LLP

By: s/D. Jay Davis, Jr.
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*Attorneys for the Defendant THI of South Carolina
at Magnolia Manor-Inman, LLC*

Charleston, South Carolina

Dated: February 22, 2019

PLEASE READ CAREFULLY
FACILITY - RESIDENT/REPRESENTATIVE
ARBITRATION AGREEMENT

This Agreement is made between Mamella Mary Inman ("Facility"), its agents, employees and servants, and Mary Selesoff ("Resident") or John Selesoff ("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.

<u>Alle E. [Signature]</u>	<u>6/27/16</u>	
Resident/Representative Signature	Date	Printed Name of Resident/Representative
<u>Robby [Signature]</u>	<u>6/27/16</u>	
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 SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT.
	)	
THE ESTATE OF MARY SOLESBEE,	)	CASE NO. 2018-CP-42-04405
BY HER PERSONAL	)	
REPRESENTATIVE CONNIE BAYNE,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
FUNDAMENTAL CLINICAL AND	)	FUNDAMENTAL CLINICAL AND
OPERATIONAL SERVICES, LLC;	)	OPERATIONAL SERVICES, LLC'S
FUNDAMENTAL ADMINISTRATIVE	)	MOTION TO STAY
SERVICES, LLC; AND THI OF SOUTH	)	
CAROLINA AT MAGNOLIA MANOR-	)	
INMAN; D/B/A MAGNOLIA MANOR-	)	
INMAN; IPC HEALTHCARE, INC;	)	
AND ANGELA BROWN, ACNP,	)	
	)	
DEFENDANTS.	)	
	)	

TO: HAROLD CHRISTIAN, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that Defendant Fundamental Clinical and Operational Services, LLC, hereinafter referred to as "this Defendant", 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 staying this action.

Defendant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman ("Facility Defendant") has filed a Motion in this case to compel Plaintiff's claims to arbitration pursuant to a valid and enforceable arbitration agreement entered into between those parties.

This Defendant respectfully requests this Honorable Court specifically stay any requirement to file any further responsive pleadings as well as any requirement to respond to any

motions or discovery filed or served by Plaintiff until such time as this Court has made a final decision on the validity of the arbitration agreement and the appellate process, if any, has been exhausted and the arbitration proceedings, if any, are completed in their entirety.

This Motion and Petition will be supported by the pleadings filed in this case, the Motion filed by Facility Defendant and all supporting exhibits, 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.

Russell G. Hines

Gaillard T. Dotterer, III

P.O. Box 993, Charleston, SC 29402

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Attorneys for the Defendant Fundamental

Administrative Services, LLC

Charleston, South Carolina

Dated: August 9, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
THE ESTATE OF MARY SOLESBEE,	)	CASE NO. 2018-CP-42-04405
BY HER PERSONAL	)	
REPRESENTATIVE CONNIE BAYNE,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICES, LLC;	)	FUNDAMENTAL ADMINISTRATIVE
FUNDAMENTAL ADMINISTRATIVE	)	SERVICES, LLC'S MOTION TO STAY
SERVICES, LLC; AND THI OF SOUTH	)	
CAROLINA AT MAGNOLIA MANOR-	)	
INMAN; D/B/A MAGNOLIA MANOR-	)	
INMAN; IPC HEALTHCARE, INC;	)	
AND ANGELA BROWN, ACNP,	)	
	)	
DEFENDANTS.	)	
	)	

TO: HAROLD CHRISTIAN, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that Defendant Fundamental Administrative Services, LLC, hereinafter referred to as "this Defendant", 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 staying this action.

Defendant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman ("Facility Defendant") has filed a Motion in this case to compel Plaintiff's claims to arbitration pursuant to a valid and enforceable Arbitration Agreement entered into between those parties.

This Defendant respectfully requests this Honorable Court specifically stay any requirement to file any further responsive pleadings as well as any requirement to respond to any

motions or discovery filed or served by Plaintiff until such time as this Court has made a final decision on the validity of the arbitration agreement and the appellate process, if any, has been exhausted and the arbitration proceedings, if any, are completed in their entirety.

This Motion and Petition will be supported by the pleadings filed in this case, the Motion filed by Facility Defendant and all supporting exhibits, 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

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Russell G. Hines

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Attorneys for the Defendant Fundamental

Administrative Services, LLC

Charleston, South Carolina

Dated: August 9, 2019

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

C.A. No.: 2018-CP-42-04405

The Estate of Mary Solesbee, by her
Personal Representative Connie
Bayne,

Plaintiff,

v.

Fundamental Clinical and
Operational Services, LLC;
Fundamental Administrative
Services, LLC; and THI of South
Carolina at Magnolia Manor –
Inman, LLC d/b/a Magnolia Manor
– Inman; Inpatient Consultants of
North Carolina, P.C.; and Angela
Brown, ACNP,

Defendant(s).

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANT
THI OF SOUTH CAROLINA AT
MAGNOLIA MANOR – INMAN, LLC
D/B/A MAGNOLIA MANOR'S
MOTION TO DISMISS AND
COMPEL ARBITRATION**

These are wrongful death and survival action cases involving nursing home negligence and corporate negligence resulting in the death of Mary Solesbee (hereinafter "Decedent"). Connie Bayne (hereinafter "Daughter") was Decedent's Daughter and serves as the Personal Representative of the Decedent's estate. Decedent was admitted to THI of South Carolina at Magnolia Manor – Inman, d/b/a Magnolia Manor (hereinafter "Magnolia Manor"), a skilled nursing facility owned, controlled, and operated by Fundamental Clinical and Operational Services, LLC and Fundamental Administrative Services, LLC. Other Defendants in this action include Inpatient Consultants of North Carolina, P.C.; and Angela Brown, ACNP, which were involved with Decedent's care prior to her admission

to Magnolia Manor. Decedent was admitted for short-term rehabilitation after being treated at Pelham Regional Medical Center for a spider bite.

Mary Solesbee was a seventy-one (71) year old lady who lived by herself and was fully capable of taking care of herself including her activities of daily living. In fact, she had traveled to Myrtle Beach by herself in the summer of 2016, when she was staying at a recreational vehicle center and was bitten by a spider. She drove herself home. A few days after getting home, the wound on her leg from the spider bite was so serious that she went to the Emergency Department at Pelham Regional Medical Center on June 12, 2016. As a result of the evaluation there, she was admitted to the hospital and diagnosed with sepsis. She remained in the hospital until June 27, 2016. At discharge the sepsis had resolved, and the leg wound was healing.

She was discharged from the hospital to Magnolia Manor for rehabilitation, including continuing physical therapy, occupational therapy, and wound care. Unfortunately, instead of providing attention to the leg wound, she did not receive proper care and treatment, the leg wound worsened while she was there. The facility, as well as the medical group failed to recognize her worsening condition. As a result, the leg wound worsened, became seriously infected, and the facility allowed her to once again become septic. As a result, on July 14, 2016 she was transported to the Pelham Medical Center where the leg wound was described as "left thigh wound, bloody drainage with a foul odor". She was admitted to Pelham Regional Medical Center and had become seriously septic. On July 16, 2016, she was transported to Spartanburg Regional Medical Center where she began treating with an infectious disease specialist. Unfortunately, because the inappropriate care in delay of getting treatment, she passed on August 1, 2016 from sepsis.

The Decedent's Daughter, in her individual capacity and as Personal Representative of Decedent's Estate, filed and served two Notices of Intent to File Suit against the Defendants alleging inadequate care resulting in the Decedent's death. The parties engaged in a mandatory pre-suit mediation which was unsuccessful. The Daughter as Personal Representative then filed the Complaints for Wrongful Death and Survival Action and timely served same on the Defendants.

The Daughter contends that there was not only Clinical Malpractice but that there was also Corporate Negligence as a result of the intentional understaffing and underfunding the facility. The underfunding of their facilities caused by the management and/or affiliated companies of Magnolia Manor, all of which owned, controlled, directed, and managed the facility and directly affected the resident care at the facility.

On February 22, 2019, Defendants filed this Motion to Dismiss and Compel Arbitration.

In response to Defendant's Motion to Dismiss and Compel Arbitration, Plaintiff has also filed with this Memorandum, the Affidavit of the Daughter Connie Bayne, a copy of which is attached hereto as Exhibit A, as well as other supporting documents.

ARGUMENT

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See 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 (S.C. 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 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, 644 S.E.2d 663, 667 (S.C. 2007) (internal citation omitted). 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). Defendants cannot meet the burden.

Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007) (“General contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause.”). The courts, not arbitrators, are charged with deciding certain “gateway matters” including whether the parties have a valid arbitration agreement or whether the arbitration clause applies to a certain type of controversy. New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 629, 667 S.E.2d 1, 5 (Ct. App. 2008). The arbitration agreement at issue in this particular case is not valid to begin with because there existed no authority for anyone to sign the Arbitration Agreement on behalf of Decedent and was not signed by the Decedent. Therefore, the inquiry should go no further. However, even if the Court finds that the parties had a valid arbitration agreement, the agreement applies only to the Survival Action and only to the “facility” Defendant.

I. Decedent’s Son Had No Authority to Sign the Arbitration Agreement for Decedent

The Son, Allen Dover, who signed all admitting documents, lacked the authority to execute any Arbitration Agreement on Decedent’s behalf. The legal consequences of an agent’s actions can only be attributed to the principal when the agent has actual or apparent

authority. Charleston Registry v. Young Clement, 598 S.E.2d 717, 359 S.C. 635, 642 (Cl. App. 2004). In the present case, neither actual nor apparent authority exists for the Son.

As will be discussed below, a limited general agreement Power of Attorney was executed on September 2, 2014 by Mary Solesbee giving her Son Power of Attorney for certain limited acts, and alternatively giving Power of Attorney to Connie Bayne. While that Power of Attorney was limited in scope and ended when Mary Solesbee became disabled, it had already been revoked, and revocation filed on September 12, 2014.

This was almost two years before the alleged Arbitration Agreement was signed by her Son. This Arbitration Agreement was signed when her Son was presented with a group of admission documents. It is clear that her Son did not, nor anyone else, have the authority to bind Mary Solesbee such that this inquiry should end. However, the issues which may be raised by the Defendants is their effort to deny the parties of a jury trial which will be discussed below.

A. No Actual Agency/Authority

At the time of Mary Solesbee's admission to Magnolia Manor, her Son was required to sign a "package" of admission documents. Among those documents was what was purported to be a "Facility/Resident/Representative Arbitration Agreement". That agreement, together with other documents, was and required for the admission. The Decedent, Mary Solesbe did not sign the Arbitration Agreement. Allen Dover had no authority to execute the Arbitration Agreement, therefore, it is not binding for Mary Solesbee, nor her Estate, nor her Statutory Beneficiaries.

On October 4, 2013, Mary Solesbee had given a "General (but restrictive) Power of Attorney" to her Son, a copy of which is attached as Exhibit B. That Power of

Attorney was revoked ten (10) days later, which will be discussed below. This Power of Attorney was filed with the Cherokee County Register of Deeds on September 2, 2014. However, not only was this a Power of Attorney which did not grant powers to enter into Arbitration, it also by its own wording, ceased to exist if and when Mary Solesbee became disabled or incapacitated, which was clearly the case here. Well beyond that, the Power of Attorney itself was revoked by a Revocation of General Durable Power of Attorney on September 12, 2014 and filed with the Register of Deeds for Cherokee County on that same date, a copy which is attached hereto as Exhibit C. Therefore, at the time of execution of the Arbitration Agreement on June 27, 2016, Allen Dover nor anyone else had the authority to act on behalf of Mary Solesbee to enter into any Arbitration Agreement.

None of these aforementioned powers specifically delineated to the Son on behalf of Decedent, subsequently cancelled, would authorize her or grant her the authority to enter into an arbitration agreement for Decedent. The Court in Hodge v. UniHealth Post-Acute Care of Bamberg, Opinion No. 5541 (S.C. Ct. App. March 7, 2018) discussed a Maryland case, Dickerson v. Longoria, 95 A.2d 721, 743, 414 Md. 419 (2010), and specifically noted that “ ‘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.’ ” *Id.* As further noted by the South Carolina Court of Appeals in Hodge, the Dickerson Court, and The Supreme Court of Nebraska which was quoted in Hodge, “...a son who had authority to sign health care documents on behalf of his mother did not have authority to sign an arbitration agreement

on her behalf.” Hodge citing Dickerson and Koricic v. Beverly Enterprises-Nebraska, Inc., 773 N.W.2d 145, 149-52 (Neb. 2009).

The Court in Hodge distinguished powers of attorney such as in the present case from those where the durable power of attorney provides the “catch all” provisions and other statements which empowered the attorney-in-fact to “do anything” regarding decedent’s estate and granting general powers. Hodge v. UniHealth Post-Acute Care of Bamberg, Opinion No. 5541 (S.C. Ct. App. March 7, 2018). In the present case, no such provisions exist. Therefore, as the Hodge Court noted, “Even when such a health care power of attorney was present, courts have concluded that the spouse lacked authority to sign the arbitration agreement because a health care power of attorney granted for medical decisions does not confer authority to sign an arbitration agreement waiving legal rights.” Id. More importantly, the Hodge court relied upon the Court of Appeals’ decision in Thompson v. Pruitt Corp., 784 S.E.2d, 679, 416 S.C. 43, 55 (Ct. App. 2016), *cert. denied*, S.C. Sup. Ct. Order dated Dec. 2, 2016, where the Thompson court determined “**“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.”**” Hodge quoting Thompson at 55, 784 S.E. 2d at 686, emphasis added.

Therefore, the Power of Attorney granted to the Son by Decedent which only includes the authority to make financial or health care decisions for Decedent in no way provided any actual authority for the Son to sign an arbitration agreement. Simply stated as noted by the Hodge and Thompson courts, this Power of Attorney only conveys the authority to handle finances or make health care decisions, does not contain the “catch all”

language of many general powers of attorney, and does not encompass the executing of an agreement to resolve legal claims by arbitration and waiving a jury trial. Hodge v. UniHealth Post-Acute Care of Bamberg, Opinion No. 5541 (S.C. Ct. App. March 7, 2018); Thompson v. Pruitt Corp., 784 S.E.2d, 679, 416 S.C. 43 (Ct. App. 2016), *cert. denied*, S.C. Sup. Ct. Order dated Dec. 2, 2016. Therefore, no actual authority existed for the Son to sign the Arbitration Agreement.

B. No Apparent Agency/Authority

Without actual agency, Defendants must argue the Son had apparent authority/agency to enter into the Arbitration Agreement on behalf of Decedent. Apparent authority is based on “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). Apparent authority exists when the principal is bound by the acts of its agent after the principal has placed the agent in such a position that a person of ordinary prudence, reasonably familiar with business, usages and custom, is led to believe the agent has certain authority and in turn, deals with the agent based on the assumption. Muller v. Myrtle Beach Golf and Yacht Club, 303 S.C. 137, 399 S.E.2d 430 (Ct. App. 1990), *rev’d on other grounds*.

South Carolina law requires that to prove apparent authority, the Defendants 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.

In the present case, there is no evidence Decedent represented to Defendants that the Son had the authority to enter into the arbitration agreement on her behalf. In fact, the evidence is to the opposite. Decedent was not present when the Son signed the Arbitration Agreement as she was still in the hospital. Decedent was never aware that the Son had signed the Arbitration Agreement. Decedent never authorized the Son to sign such contracts or agreements. Further, at the time of admission, Decedent was confused from the effects of her medical condition and medications. Further, on admission, Magnolia Manor included dementia and delirium in her diagnosis, see Exhibit D. The South Carolina Court of Appeals noted in Hodge the importance of the facility's ability to obtain a signature from the resident during the admission to the arbitration agreement and the failure to do so.

The Son made no representation that he had any authority to bind his mother. Moreover, as noted in Hodge, when the Arbitration Agreement is separate from the Admissions Agreement, as in the present case, the facility cannot show that it changed its position for the worse as required to prove apparent agency. Therefore, Defendants cannot argue that any apparent authority/agency existed for the Son to sign the Arbitration Agreement on Decedent's behalf.

II. Wrongful Death - The Arbitration Agreement is Unenforceable Against the Decedent's Wrongful Death Statutory Beneficiaries.

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. Bennett v. Spartanburg Railway Gas and Electric Co., 97 S.C. 27, 81 S.E. 189 (1914). The alleged Arbitration Agreement by its own terms is an agreement between Mary Solesbee (Resident) and Magnolia Manor (Facility). While at some point during Decedent's admission to the facility, she might have had the authority to bind herself and her claims to arbitration but was never given the chance. However, even if Decedent had agreed to arbitration, she did not have the legal authority to bind her statutory beneficiaries who are not a party to the Arbitration Agreement. The signatories to the agreement are Son on behalf of Decedent and Magnolia Manor – Inman. The scope of the agreement does not include the statutory beneficiaries' claims. Other South Carolina courts have agreed that arbitration agreements do not reach the wrongful death beneficiaries' claims in these circumstances. See Exhibit F and G, Coleman and Young Orders.

While Defendants would like to contend that the agreement covers statutory beneficiaries' claims, which it does not, the problem with this contention is that Decedent/Son had no authority to waive the statutory beneficiaries' claims. While dealing with a separate arbitration issue in a nursing home case and finding the arbitration agreement to be unenforceable, the Court of Appeals in Hodge recognized the separateness of the statutory beneficiaries/estate's claims from those of the patient/resident. In discussing the Maryland court's case of Dickerson, the Court noted that the nursing home

was attempting “to use equitable estoppel against [the patient’s] estate based on actions that [daughter] took *in her individual capacity*. The fact that [daughter] is *now the Personal Representative for [the patient’s] [e]state* is of no moment; we will not hold this circumstance against [the patient’s] [e]state. Simply put, [the patient’s] [e]state is the plaintiff in this case, and Respondent has alleged no conduct on the part of [the patient’s] [e]state, or by [daughter] in *her capacity as Personal Representative* of [the patient’s] [e]state....” Hodge quoting Dickerson v. Longoria, 995 A.2d. 721, 743 (Md. 2010). As recognized in this discussion, actions taken by Daughter in her *individual capacity* will not be held against the estate and as the Court noted, the estate may well have other beneficiaries or creditors.

Further confirming the separateness of each statutory beneficiary’s claim from that of the survival action, a Federal District Court in South Carolina has analyzed this issue under the South Carolina Non-Economic Awards Act of 2005. Diane Boyle as Personal Representative of the Estate of John Francis Boyle v. United States of America, United States District Court for the District of South Carolina, Beaufort Division (2009). In Boyle, the Court concluded that the wrongful death beneficiaries’ claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. See Exhibit H, Boyle Order. Further, at least one other South Carolina court judge has come to the same conclusion. See Order at Exhibit I. These analyses confirm that the wrongful death claimants have separate and distinct claims apart from that of the survival action. As such, the Son and Decedent were incapable of waiving the statutory beneficiaries’ right to a trial by jury.

Many other states have come to this same conclusion, Daniels v. Sunrise Senior Living, Inc., 212 Cal.App 4th 674, 151 Cal.Rptr.3d 273 (Cal.App.4 Dist, 2013) (Wrongful Death claims not bound to arbitration), Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009) (Wrongful Death claimants not bound by arbitration agreement.) The only signatures to the Arbitration Agreement were the Son for Decedent (Resident) and Magnolia Manor – Inman (Facility). (See Arbitration Agreement attached hereto as Exhibit E).

Therefore, the only parties executing this Agreement were the Son purportedly on behalf of Decedent and Magnolia Manor. Magnolia Manor would contend that this agreement is binding on the non-signatory statutory beneficiaries simply because the Arbitration Agreement says so.

However, as the Supreme Court of Kentucky said regarding binding non-signatory wrongful death beneficiaries in Ping v. Beverly Enterprises, Inc.:

[A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third-party are appropriately subjected to the contract's arbitration provisions, at least where the tort and contract are significantly intertwined. See, In re Weekley Homes, L.P., 180 S.W. 3d 127 (Tex. 2005) (negligent repair claim by homeowner's daughter against contractor was subject to repair contract's arbitration clause because daughter, although a non-party, was direct and principal beneficiary under the contract). It is something else entirely, however, to say that incidental beneficiaries of a contract—individuals or entities with no substantive

rights under the contract and no direct benefits-may have their tort claims against the parties swept up into the contract's arbitration provisions merely by being mentioned in the contract as potential claimants. This is what Beverly purports to do. Arbitration is a matter of contract, however; it is something the contracting parties, or their proxies, must agree to. It is not something that one party may simply impose upon another. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed.2d 491 (2002) (“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit”, Citation and internal quotation marks omitted.) Since Beverly's theory would allow just that, i.e., would allow one party merely by referring to someone else in an arbitration clause to thereby bind that other person to arbitration as a “third party beneficiary” of the arbitration agreement, we reject it out of hand.

Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581, 599-600 (KY 2012).

Likewise, Magnolia Manor's mentioning of “successors, assigns, heirs, personal representatives, guardians or any other persons deriving their claims through or on behalf of Resident”, as being bound by the Arbitration Agreement does not make it so. It is no more than an *ipse elixir* which Defendants expect this Court to embrace. The law simply does not permit a party to cut off the rights of a non-signatory to an agreement who receives no benefit thereunder.

The wrongful death claims are separate claims apart from the Decedent's claims. According to South Carolina's Wrongful Death Act:

“Whenever the death of a person shall be caused by the wrongful act, negligent or the fault of another and the act, negligent or the fault is such as would, if death had not ensued, had entitled party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued shall be liable to an action for damages.”

South Carolina Code Annotated §15-51-10 (1977)

The wrongful death beneficiaries are as follows:

“Every such action shall be for the benefit of the wife, or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none, for the benefit of the heirs or the person whose death shall have been so caused.”

South Carolina Code Annotated §15-51-20 (Supp. 2001)

The general element of damages recoverable are pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of the use and comfort of the Decedent, society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries. Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d. 713, 714 S.C. (Ct. App. 1989).

The wrongful death claim is a separate claim than the claims a decedent might bring on his own behalf under the survival statute. In Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914), the Supreme Court held that wrongful death and survival actions are different claims for different injuries. The Court stated “necessarily, therefore, there must be separate verdicts and separate judgments, there should be separate actions.” Id. at 31. See also Strickland v. Southern Ry Co., 111 S.C. 248, 97 S.E. 695 (1918) (Supreme Court Affirmed Appeal from Circuit Court’s ruling noting that survival claims are independent of wrongful death claims), Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539 (1928) (discussing the difference between survival and wrongful death claims as being independent of each other).

It is true that our Supreme Court reaffirmed that a claim under the Wrongful Death Act lies in the decedent’s estate only when the decedent possessed the right of recovery at

his death. Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 699 S.E. 2d 143 (2010). This rule, however, does not dictate the conclusion that a wrongful death claim is wholly derivative of the decedent's claim. Instead, the rule provides that if the defendant has a defense that would completely bar the decedent's claim had the decedent survived, then the wrongful death beneficiaries may not bring a claim under the statute. For instance, in Stokes, the statute of limitations had run on the decedent's claim, and the wrongful death beneficiaries were accordingly totally barred from pursuing their claims under the statute. The Supreme Court cited the following from United States District Court case of Quattlebaum v. Carey Canada, Inc., 685 F. Supp. 939 (D.S.C. 1988): "anything that would have *defeated the decedent's recovery* had he survived the accident, (such as contributory negligence, a valid release, or similar acts on his part." (Emphasis added). The Court held Quattlebaum was correctly decided and adheres to the principle that that a decedent's estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived." Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 143, 146, 699 S.E.2d (S.C. 2010) at 146.

Magnolia Manor has never asserted that the claims here are completely barred or that Decedent's recovery has been "defeated" by operation of law, such as by the running of the statute of limitations or the execution of a release. Instead, what Magnolia Manor asserts is that Decedent may not bring a claim in court but must pursue his remedies in arbitration. Thus, neither Stokes nor the wrongful death statute operate to cut off the statutory beneficiaries' rights, even if the claims had been subject to arbitration. See also Carter v. SSC Odin Operating Co., LLC, 2012 IL 113204, ¶57, 976 N.E.2d 344, 359 (IL 2012) (noting the defendants overstated the significance of the derivative nature of a

wrongful death action, and stating “Although a wrongful-death action is dependent upon the decedent’s entitlement to maintain an action for his or her injury, had death not ensued, neither the Wrongful Death Act nor this court’s case law suggests that this limitation on the cause of action provides a basis for dispensing with basic principles of contract law in deciding who is bound by an arbitration agreement”).

The Pennsylvania Superior Court recently in Pisano v. Extended Homes, Inc., operating under the fictitious name Belaire Health 84 Rehabilitation Center, 2013 PA Super 232, 77 A.3d 651, 662 (PA 2013) affirmed the trial court decision that the nursing home arbitration agreement did not apply to the statutory beneficiaries’ wrongful death claim. The Court noted the wrongful death and survival actions are not derivative of each other but are flowing from the same underlining tortious conduct. Like the South Carolina statute, Pennsylvania’s wrongful death statute provides that the right of action exists only for the benefit of the spouse, children, parents, or parents of the deceased. Id. at 656. The Pennsylvania Court further held that since the wrongful death claim is independent of the survival action and because the wrongful death statute does not characterize the wrongful death claim as that of a third-party beneficiary, that the trial court properly refused to compel arbitration to the non-signatory wrongful death beneficiaries who were not parties to the arbitration agreement.

Likewise, in Bybee v. Abdulla, M.D., 189 P.3d 40, 2008 UT 35 (Utah, 2008), the Supreme Court of Utah held that an agreement to arbitrate that was signed by the decedent cannot extend to the statutory beneficiaries of a wrongful death claim. The Utah Supreme Court noted that certain defenses from the decedent’s personal injury action may be raised against the heirs of a wrongful death action such as comparative negligence and statutes of

limitations as key common characteristics. However, as the Supreme Court of Utah noted, both of these defenses go to the viability of the underlying personal injury action. The Court further stated that “by contract, an agreement to bind heirs to arbitrate disputes does not implicate the viability of underlying claims.” Id. at 47, citing Horwich v. Superior Court, 21 Cal. 4th 272, 87 Cal. Rptr. 2d 222, 980 P. 2d 927, 935 (1999). The Utah Supreme Court went on to note that “we have never intended to suggest, however, that because Decedent is the master of his claim, he may by contract expose his unwilling heirs to any imaginable defense.” Bybee v. Abdulla, M.D. at 46. The Utah Supreme Court further held that the defenses against the decedent’s claim which are less likely to be found enforceable against the heirs’ claims in a wrongful death action “are contract provisions that purport to affect the rights of heirs that do not affect the existence of the decedent’s personal injury claim during his lifetime. The arbitration agreement...falls squarely within this category and is, therefore, unenforceable against the heir.” Id. at 47.

The Court of Appeals in Washington in Woodall v. Avalon Care Center-Federal Way, LLC, 155 Wn. App. 919, 231 P. 3d 1252 (Wash. App. Div. 1 2010) held that “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit.” Id. quoting Satomi Owners Association v. Satomi, LLC, 167 Wash. 2d 781, 225 P.3d 213 (2009). The Washington Court of Appeals further noted that the wrongful death claims asserted in that case were not on behalf of the estate just as South Carolina’s wrongful death claims are not on behalf of the estate. The Washington Court of Appeals further discussed the Supreme Court of Ohio’s ruling in Peters v. Columbus Steel Casting Co., 115 Ohio St.3d 134, 873 N.E.2d 1258 (2007), wherein the Supreme Court of Ohio held that the wrongful death claim of a

spouse who was Administrator of her husband's estate was not subject to the Decedent's arbitration agreement. The Washington Court of Appeals in discussing Peters, stated "In sum, the decedent's agreement was an agreement 'to arbitrate his claims against the company,' and thus the provision in the agreement binding the decedent's heirs applied to a survival action. But the decedent could not 'restrict his beneficiaries to arbitration of their wrongful death claims because he held no right to those claims.'" Woodall v. Avalon Care Center - Federal Way, LLC at 929. In the Washington Court of Appeals' analysis, the Court concluded that the wrongful death beneficiaries could not be bound to the arbitration agreement which they did not sign.

Any claims of estoppel in an effort to enforce the arbitration is wholly without merit.

While dealing with a separate arbitration issue in a nursing home case and finding the arbitration agreement to be unenforceable, the Court of Appeals in Hodge v. Uni-Health Post-Acute Care of Bamberg, Opinion No. 5541 (S.C. Ct. App. March 7, 2018), recognized the separateness of the statutory beneficiaries/estate's claims from those of the patient/resident. In discussing the Maryland court's case of Dickerson, the Court noted that the nursing home was attempting "to use equitable estoppel against [the patient's] estate based on actions that [daughter] took *in her individual capacity*. The fact that [daughter] is *now the Personal Representative for [the patient's] [e]state* is of no moment; we will not hold this circumstance against [the patient's] [e]state. Simply put, [the patient's] [e]state is the plaintiff in this case, and Respondent has alleged no conduct on the part of [the patient's] [e]state, or by [daughter] in *her capacity as Personal Representative* of [the patient's] [e]state..." Hodge quoting Dickerson v. Longoria, 995

A.2d. 721, 743 (Md. 2010). As recognized in this discussion, actions taken by the Son in her *individual capacity* will not be held against the estate and as the Court noted, the estate may well have other beneficiaries or creditors.

Defendants further incorrectly assert other cases hold that the statutory beneficiaries are bound as third party beneficiaries. Defendants' Memorandum, p. 5. The Defendants rely on Pearson v. Hilton Head Hosp., 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012). In Pearson, the Plaintiff who sought to avoid the arbitration agreement had filed suit for a breach of the very contract that contained the arbitration clause. In the present case, no claim for breach of contract has been made whatsoever. Further, the Plaintiff in Pearson personally received direct benefits from the contract. Here, the statutory beneficiaries personally received zero benefit from any contract.

The statutory beneficiaries' claim is much more akin to the claims of the non-signatory Plaintiffs in Wilson v. Willis, No. 27879, 2019 S.C. LEXIS 27, where the South Carolina Supreme Court held the non-signatories could not be bound by the arbitration agreement. Much like the non-signatories in Wilson, the statutory beneficiaries in the instant case are not attempting to exploit or receive a direct benefit from the agreement and were not even aware of the existence of the arbitration provision. Defendants confuse the benefit Decedent received from admission and attempt to argue the statutory beneficiaries received a benefit personally from the admission. That argument is without merit.

As the Wilson Court notes, "Equitable estoppel is ultimately a theory designed to prevent injustice, and it should be used sparingly. See Hirsch v. Amper Fin. Servs., LLC, 71 A.3d 849, 852 (N.J. 2013)(observing equitable estoppel should be used sparingly to compel arbitration and noting 'it is more properly viewed as a shield to prevent injustice

rather than a sword to compel arbitration’); 28 Am.Jr.2d Estoppel and Waiver §29 (2011)(stating equitable estoppel should be used with restraint and only in exceptional circumstances).”

Because the statutory beneficiaries have separate and independent claims and were not covered by the scope of this agreement or parties to this agreement, the Arbitration Agreement drafted by Magnolia Manor cannot reach the claims of the wrongful death statutory beneficiaries.

CONCLUSION

In conclusion, because there existed no Power of Attorney, or any other authority, granting Allen Dover, or anyone else, actual authority to sign the Arbitration Agreement on behalf of Decedent there existed no Arbitration Agreement. Further, there is no evidence that Decedent represented to Defendants that Daughter had any authority to sign the Arbitration Agreement, and as a result there was no apparent authority/agency for Son to sign the Arbitration Agreement on behalf of Decedent. Finally, even if there were some type of authority for Son to execute the Arbitration Agreement on behalf of Decedent, the Arbitration Agreement cannot reach the claims of the wrongful death statutory beneficiaries, and therefore, the wrongful death claim cannot be bound to arbitration. Therefore, the Defendants’ Motion to Dismiss and Compel Arbitration should be denied.

Respectfully submitted,

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Attorney for Plaintiff

Greenville, South Carolina
Date: August 12, 2019

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

The Estate of Mary Solesbee by her
Personal Representative Connie
Bayne,

Plaintiff,

v.

Fundamental Clinical and Operational
Services, LLC; Fundamental
Administrative Services, LLC; and
THI of South Carolina at Magnolia
Manor — Inman, LLC d/b/a Magnolia

Manor — Inman; Inpatient Consultants
of North Carolina, P.C.; and Angela
Brown, ACNP,

Defendant(s).

IN THE COURT OF COMMON PLEAS

C.A. No.: 2018-CP-42-04405

AFFIDAVIT



The undersigned, after first being duly sworn and deposed, states as follows:

1. That she is the Personal Representative of the Estate of Mary Solesbee, and is Mary Solesbee's daughter;
2. That at the time that her mother, Mary Solesbee, was admitted to Magnolia Manor — Inman that she was not present for the execution of any documents, including any alleged Arbitration Agreement. Further, that at no time has she ratified any such alleged Arbitration Agreement.
3. That as a Statutory Beneficiary of her mother that she hereby asserts her right to a jury trial.

4. That based upon her observation of her mother, that at the time of her admission to Magnolia Manor – Inman, that she was not competent to understand her own business affair and that she was physically disabled from caring for herself.

Connie Bayne
Connie Bayne

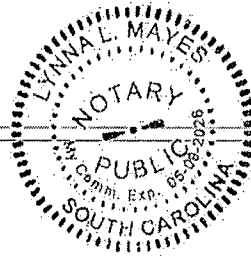
SWORN to and subscribed before me this

14th day of March, 2019

Lyndia R. Mayes

NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: May 9, 2026



General Power of Attorney

Notice: This is an important document. Before signing this document, you should know these important facts. By signing this document, you are not giving up any powers or rights to control your finances and property yourself. In addition to your own powers and rights, you may be giving another person, your attorney-in-fact, broad powers to handle your finances and property. This general power of attorney may give the person whom you designate (your "attorney-in-fact") broad powers to handle your finances and property, which may include powers to encumber, sell or otherwise dispose of any real or personal property without advance notice to you or approval by you. **THE POWERS WILL NOT EXIST AFTER YOU BECOME DISABLED OR INCAPACITATED.** This document does not authorize anyone to make medical or other health care decisions for you. If you own complex or special assets such as a business, or if there is anything about this form that you do not understand, you should ask a lawyer to explain this form to you before you sign it. If you wish to change your general power of attorney, you must complete a new document and revoke this one. You may revoke this document at any time by destroying it, by directing another person to destroy it in your presence or by signing a written and dated statement expressing your intent to revoke this document. If you revoke this document, you should notify your attorney-in-fact and any other person to whom you have given a copy of the form. You also should notify all parties having custody of your assets. These parties have no responsibility to you unless you actually notify them of the revocation. If your attorney-in-fact is your spouse and your marriage is annulled, or you are divorced after signing this document, this document is invalid. Since some 3rd parties or some transactions may not permit use of this document, it is advisable to check in advance, if possible, for any special requirements that may be imposed. You should sign this form only if the attorney-in-fact you name is reliable, trustworthy and competent to manage your affairs. This form must be signed by the Principal (the person appointing the attorney-in-fact), witnessed by two persons other than the notary public, and acknowledged by a notary public.

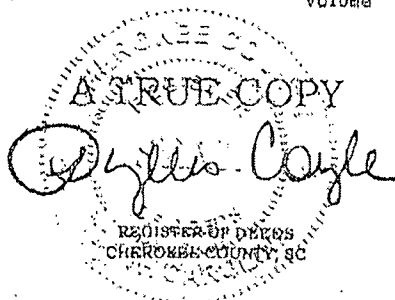
PLAINTIFFS
EXHIBIT
B
tabbies

I, Mary N. Salesbee, of REDACTED,
Blacksburg, SC, as principal, to grant a general power of
attorney to, do hereby appoint: Calvin S. Dover of and
Conrad L. Wayne, of REDACTED,
Blacksburg, SC

my attorney-in-fact to act in my name, place and stead in any way which I myself could do, if I were personally present, with respect to the following matters to the extent that I am permitted by law to act through an agent. The powers chosen below shall have the full force and effect given to them by their full enumeration as laid out in the text of the Power of Attorney Act of the laws of the State of South Carolina:

- ☒ (a) real estate transactions;
- ☒ (b) goods and services transactions;
- ☒ (c) bond, share and commodity transactions;
- ☒ (d) banking transactions;
- ☒ (e) business operating transactions;
- ☒ (f) insurance transactions;
- ☒ (g) estate transactions;
- ☒ (h) claims and litigation;
- ☒ (i) personal relationships and affairs;
- ☐ (j) benefits from military service;

201400003800
Filed for Record in
CHEROKEE COUNTY, SC
PHYLLIS COYLE, REGISTER OF DEEDS
09-02-2014 At 09:22 am.
FWR OF ATTY 15.00
Volume 71 Page 344 - 347



General POA Pg.1 (01-13)

- ☒ (k) records, reports and statements;
☒ (l) retirement benefit transactions;
☒ (m) making gifts to my spouse, children and more remote descendants; and parents;
☒ (n) tax matters;
☒ (o) all other matters;
☒ (p) full and unqualified authority to my attorney-in-fact to delegate any or all of the foregoing powers to any person or persons whom my attorney-in-fact shall select;
☒ (q) unlimited power and authority to act in all of the above situations (a) through (p)

If the attorney-in-fact named above is unable or unwilling to serve, I appoint Carmie S. Bayne of REDACTED Blacksky, S.C. REDACTED OR and Allan S. Down REDACTED Wellford, S.C. REDACTED to be my attorney-in-fact for all purposes hereunder.

To induce any third party to rely upon this power of attorney, I agree that any third party receiving a signed copy or facsimile of this power of attorney may rely upon such copy, and that revocation or termination of this power of attorney shall be ineffective as to such third party until actual notice or knowledge of such revocation or termination shall have been received by such third party. I, for myself and for my heirs, executors, legal representatives and assigns, agree to indemnify and hold harmless any such third party from any and all claims that may arise against such third party by reason of such third party having relied on the provisions of this power of attorney. This power of attorney shall not be effective in the event of my future disability or incapacity. This power of attorney may be revoked by me at any time and is automatically revoked upon my death. My attorney-in-fact shall not be compensated for his or her services nor shall my attorney-in-fact be liable to me, my estate, heirs, successors, or assigns for acting or refraining from acting under this document, except for willful misconduct or gross negligence.

Dated: Oct 4 2013

Signature and Declaration of Principal

I, Mary N. Solesbee, the principal, sign my name to this power of attorney this Oct 4 day of Oct 2013 and, being first duly sworn, do declare to the undersigned authority that I sign and execute this instrument as my power of attorney and that I sign it willingly, or willingly direct another to sign for me, that I execute it as my free and voluntary act for the purposes expressed in the power of attorney and that I am eighteen years of age or older, of sound mind and under no constraint or undue influence.

Mary N. Solesbee
Signature of Principal

Witness Attestation

I, Christina Allen, the first witness, and I, Rennie Zucker, the second witness, sign my names to the foregoing power of attorney being first duly sworn and do declare to the undersigned authority that the principal signs and executes this instrument as his/her power of attorney and that he/she signs it willingly, or willingly directs another to sign for him/her, and that I, in the presence and hearing of the principal, sign this power of attorney as witness to the principal's signing and that to the best of my knowledge the principal

is eighteen years of age or older, of sound mind and under no constraint or undue influence.

Christina Allen
Signature of First Witness

Bennie Zucker
Signature of Second Witness

Notary Acknowledgment

State of South Carolina County of Cherokee
Subscribed, sworn to and acknowledged before me by Mary G. Solecki, the Principal,
and subscribed and sworn to before me by Christina Allen and
Bennie Zucker, the witnesses, this 4th day of October, 2013.

Patricia W. Mullins
Notary Signature

Notary Public,

In and for the County of Cherokee.

State of SC

My commission expires: April 18, 2017

Seal

Acknowledgment and Acceptance of Appointment as Attorney-in-Fact

I, Connie S. Bayne Allen & Doris have read the attached power of attorney and am the person identified as the attorney-in-fact for the principal. I hereby acknowledge that I accept my appointment as Attorney-in-Fact and that when I act as agent I shall exercise the powers for the benefit of the principal; I shall keep the assets of the principal separate from my assets; I shall exercise reasonable caution and prudence; and I shall keep a full and accurate record of all actions, receipts and disbursements on behalf of the principal.

Connie S. Bayne
Signature of Attorney-in-Fact
Allen & Doris

Oct 4, 2013
Date

Acknowledgment and Acceptance of Appointment as Successor Attorney-in-Fact

I, Connie S. Bayne Allen & Doris have read the attached power of attorney and am the person identified as the successor attorney-in-fact for the principal. I hereby acknowledge that I accept my appointment as Successor Attorney-in-Fact and that, in the absence of a specific provision to the contrary in the power of attorney, when I act as agent I shall exercise the powers for the benefit of the principal; I shall keep the assets of the principal separate from my assets; I shall exercise reasonable caution and prudence; and I shall keep a full and accurate record of all actions, receipts and disbursements on behalf of the principal.

Connie S. Bayne
Signature of Successor Attorney-in-Fact
Allen & Doris

Oct 4, 2013
Date

ROA 135

Instrument
201400003974Volume Page
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STATE OF SOUTH CAROLINA)

ATTESTATION

COUNTY OF CHEROKEE)

The foregoing Revocation was this 12th day of September, 2014, signed, sealed, published and declared by the Principal as the Principal's act and deed, in the presence of us who at the Principal's request and in the Principal's presence and in the presence of each other, have hereunto subscribed our names as witnesses hereto.

Emelynd Mullis of Gaffney, South Carolina
Emelynd Mullis of Gaffney, South Carolina

* * * * *

STATE OF SOUTH CAROLINA)

PROBATE

COUNTY OF CHEROKEE)

Personally appeared deponent and made oath that deponent saw the within named Principal sign, seal and as the Principal's act and deed deliver the within Revocation and that deponent, with the other witness whose name is subscribed above, witnessed the execution thereof.

Emelynd Mullis

SWORN to and subscribed
 before me this 12th day
 of September, 2014.

Emelynd Mullis (SEAL)
 Notary Public for South Carolina
 My Commission Expires: May 3, 2021

Magnolia Manor Inman



Resident Face Sheet: MARY N SOLESBEE (Full Code)

Unit:	STATION 1	Preferred Name:	
Room/Bed:		Attending:	CHRISTOPHER PATTERSON - (864) 560-3860
Status:	Discharged		
Admit Date:	06/27/2016 11:57 AM (current)	Last Qualifying Hospital Stay:	06/12/2016 - 06/27/2016
Admitted From:	Pelham Medical Center, 29651 - SC (current)	Referral Source:	
Discharged:	07/14/2016 03:07 PM	Discharged To:	Pelham Medical Center, 29651 - SC
Primary Discharge Diagnosis:		Discharge Reason:	
		Condition on Discharge:	
Primary Payer:	Medicare A	Birth Date:	REDACTED
SSN:	REDACTED	Age:	71
Medicare A #:		Sex:	F
Medicare B #:		Marital Status:	Widowed
Medical #:		Mother's Maiden Name:	
MR#:	301585-01	Religion:	Unknown
Pharmacy:	OMNICARE PHARMACY	Prev Occupation:	
Race:	White, not of Hispanic origin		
Language:	ENGLISH	Address:	REDACTED
Is Responsible for Self:	No		WELLFORD, SC
		County:	SPARTANBURG
Service Connected Disability %:	No 0.00%	Military Svc:	
VA Claims Number:		Veteran Elig (10-5588):	No
Service Number:		Last Branch of Service:	
		Last Branch of Service Dates:	-

Insurance Information:

Insurance	Group Name	Group	Member ID #	Payer Address	Payer Phone
Other Coinsurance - Mutual of Omaha			48837988		

Advanced Directives:

Directive	Copy On File	Notes
Full Code		

Allergies:	Morphine Sulfate (MS)
Diagnoses:	A41.9 Sepsis, unspecified organism(Primary), R27.9 Unspecified lack of coordination(Admission), R48.8 Other symbolic dysfunctions, R13.10 Dysphagia, unspecified, R26.2 Difficulty in walking, not elsewhere classified, T63.331S Toxic effect of venom of brown recluse spider, accidental (unintentional), sequela, B18.2 Chronic viral hepatitis C, E11.8 Type 2 diabetes mellitus with unspecified complications, E83.42 Hypomagnesemia, F03.90 Unspecified dementia without behavioral disturbance, F05 Delirium due to known physiological condition, F34.1 Dysthymic disorder, G30.9 Alzheimer's disease, unspecified, H04.123 Dry eye syndrome of bilateral lacrimal glands, K74.60 Unspecified cirrhosis of liver, L03.314 Cellulitis of groin, M62.81 Muscle weakness (generalized)

MatrixCare Report

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG)

C.A. No.: 2018-CP-42-04405

The Estate of Mary Solesbee by her
Personal Representative Connie
Bayne,

Plaintiff,

v.

Fundamental Clinical and Operational
Services, LLC; Fundamental
Administrative Services, LLC; and
THI of South Carolina at Magnolia
Manor – Inman, LLC d/b/a Magnolia
Manor – Inman; Inpatient Consultants
of North Carolina, P.C.; and Angela
Brown, ACNP,

Defendant(s).

AFFIDAVIT



The undersigned, after first being duly sworn and deposed, states as follows:

1. That he is the son of Mary Solesbee (deceased).
2. That at the time that his mother, Mary Solesbee, was admitted to Magnolia Manor – Inman that he was asked to sign a group of documents so that his mother could be admitted from the hospital to this particular nursing home. Included amongst the documents that he was asked to sign, he now knows, was an "Arbitration Agreement".
3. That at no time did he represent to the nursing home, Magnolia Manor – Inman, that he held any particular authority to be able to enter into the Arbitration Agreement which was presented to him, and did not represent that he could at that time be the Power of Attorney for his mother. Furthermore, the agreement was not explained to

him and he signed all of the documents in a hurried fashion so that his mother could be transported and admitted to the facility for care.

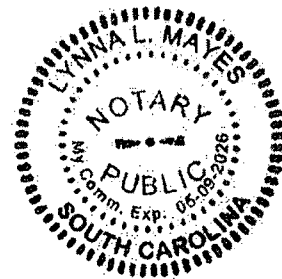
4. That as a Statutory Beneficiary of his mother's Estate that he hereby asserts his right to a jury trial in this matter.
5. That based upon his observation of his mother, that at the time of her admission to Magnolia Manor – Inman, that she was not competent to understand her own business affair and that she was physically disabled from caring for herself at that time.

Allen E. Dover
Allen Dover

SWORN to and subscribed before me this

7th day of August, 2019

Lynna L. Mayes
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: May 9, 2026



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
THE ESTATE OF MARY SOLESBEE,	)	CASE NO. 2018-CP-42-04405
BY HER PERSONAL	)	
REPRESENTATIVE CONNIE BAYNE,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICES, LLC;	)	
FUNDAMENTAL ADMINISTRATIVE	)	
SERVICES, LLC; AND THI OF SOUTH	)	
CAROLINA AT MAGNOLIA MANOR-	)	
INMAN; D/B/A MAGNOLIA MANOR-	)	
INMAN; IPC HEALTHCARE, INC;	)	
AND ANGELA BROWN, ACNP,	)	
	)	
DEFENDANTS.	)	
	)	

**DEFENDANT THI OF SOUTH
CAROLINA AT MAGNOLIA MANOR-
INMAN, LLC D/B/A MAGNOLIA
MANOR-INMAN'S MEMORANDUM IN
SUPPORT OF MOTION TO COMPEL
ARBITRATION AND STAY STATE
COURT PROCEEDINGS**

TO: W. HAROLD CHRISTIAN, JR., ATTORNEY FOR THE PLAINTIFF:

COMES NOW the Defendant, THI of South Carolina at Columbia, LLC (hereinafter "Facility Defendant", or "Defendant") and submits the following Memorandum in Support of their Motion to Dismiss 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. Plaintiff has asserted claims against Defendant arising out of Plaintiff's decedent's residency at this Defendant's skilled nursing facility (hereinafter the "Facility" or "Magnolia Manor"). However, the Facility Defendant and Plaintiff's decedent entered into an Arbitration Agreement prior to her admission at the Facility which 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

Plaintiff's decedent, Ms. Mary Solesbee was admitted to this Defendant's Facility on June 27, 2016 for skilled nursing care following her transfer from Pelham Regional Medical Center. Ms. Solesbee was admitted with the assistance and aid of her son, Allen Dover. Upon admission, Ms. Solesbee Brown was 71 years old and was admitted for care related to venomous spider bite she received earlier that summer. Prior to her admission, Ms. Solesbee entered into a number of contracts with Magnolia Manor. The contracts were each signed by the Allen Dover, as representative of Ms. Solesbee, and were signed by Libby Byers, as a representative for the Facility on June 27, 2016. 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. Solesbee was admitted to the Facility and received skilled nursing care and treatment. During her stay at the Facility, Ms. Solesbee accepted the benefits of the contracts entered into on his behalf by her representative, Mr. Dover. Such benefits included, but are not limited to, Ms. Solesbee's admission to the Facility and her receipt of the skilled nursing care provided therein.

Contrary to Plaintiff's assertions, Mr. Dover explicitly represented that he was authorized to admit Ms. Solesbee 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 his authority to bind his mother to certain agreements, is truthful and correct.

The Arbitration Agreement at issue defines Magnolia Manor as the “Facility,” Ms. Solesbee as the “Resident,” and Mr. Dover as his mother’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 Mr. Dover’s authority to sign on behalf of his 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 Mr. Dover as “Representative” and Libby Byers as the authorized representative for the Facility. Because the acts complained of by the Plaintiff fall within the scope of the Arbitration Agreement, the Court should dismiss the Plaintiff’s action, or stay these proceedings, and compel this matter to arbitration.

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

Mr. Dover represented himself to staff and admissions personnel at Magnolia Manor as his mother's representative, with the authority to sign documents on her behalf and bind Ms.

Solesbee, the Plaintiff, and the Facility pursuant to those documents.¹ It was clearly Mr. Dover's intention to bind Ms. Solesbee, the Plaintiff and any other beneficiaries as "persons deriving their claims through or on behalf of Resident" according to the terms of the Arbitration Agreement. Moreover, Ms. Solesbee evinced no intentions or directions to the contrary. The terms of the Arbitration Agreement clearly apply to the instant dispute.

Notably, this Court faced facts similar to the ones at the bar in *Macie Price v. THI of South Carolina at Magnolia Manor Inman, 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 and wife of a skilled nursing home resident of this Facility 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. Although here, Mr. Dover is not the Plaintiff, the result is inapposite. He, like the wife in *Price* clearly intended to bind his mother to the Arbitration Agreement as well as the Plaintiff, as a person deriving her claim on behalf of Ms. Solesbee.

B. Mr. Dover Possessed the Apparent and Inherent Authority to Bind Mr. Solesbee under the Arbitration Agreement, and should be Estopped from Denying the Validity of the Arbitration Agreement

¹ "It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assignees, personal representatives, guardians, or **any persons deriving their claims through or on behalf of Resident.**" (emphasis added).

a. Agency Relationship

Despite Plaintiff's argument to the contrary, Mr. Dover possessed clear authority to bind his mother to the Arbitration Agreement. A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "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).

In *Carraway v. Beverly Enters. Ala., Inc.*, 978 So. 2d 27 (Ala. 2007), the facts are substantially 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, Mr. Dover held himself out as an agent for his mother without any indication to the contrary when he executed various admission documents on her behalf, including the Arbitration Agreement. He executed these documents in his capacity as “representative.” It was the Facility's reasonable and justified belief that Mr. Dover was his mother's authorized representative and that he had the authority to execute the documents on her behalf.

Moreover, by allowing Mr. Dover to procure her admission to the Facility and thereafter by accepting the benefits of the contracts entered into in connection with that admission, Ms. Solesbee represented that Mr. Dover 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 Mr. Dover to sign the admissions paperwork, including the documents providing for Ms. Solesbee’s stay and the skilled nursing care provided at the Facility, Ms. Solesbee cloaked her son with the authority to execute those documents. Further, Ms. Solesbee did not repudiate or invalidate her son’s actions, and instead, she accepted the benefits of the contracts with the Facility by remaining at the Facility and receiving skilled nursing care and services.

Even if as Plaintiff urges, Mr. Dover lacked apparent authority to enter into the terms of the Arbitration Agreement, he 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. Stoller & 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 Mr. Dover was authorized to admit his mother to Magnolia Manor. Plaintiff argues Mr. Dover lacked the authority to bind his mother to the Arbitration Agreement and the specific terms therein, however, such actions merely accompanied and were incidental to his authority to admit his mother as a resident at the Facility. Magnolia Manor should not be disadvantaged for acting in accordance with the express representations of Mr. Dover regarding his 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. Similarly, 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. Like here, the husband signed the documents as his wife’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 *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 contracts, 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 Plaintiff to effectively admit that Mr. Dover was their mother's authorized agent as to the Admission Agreement, but not the Arbitration Agreement. In the case at bar, Magnolia Manor had no knowledge or reason to believe that Mr. Dover was not his mother's authorized agent for purposes of executing the Arbitration Agreement and other admissions paperwork. Contrary to Plaintiff's assertions, Magnolia Manor relied on the representations of Mr. Dover in admitting his 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 the Facility only for the instant lawsuit to seemingly ignore the binding agreement. Accordingly, Plaintiff should be estopped denying the validity of the Arbitration Agreement.

c. Plaintiff has not Proved that Ms. Solesbee Lacked the Capacity to Consent to the Arbitration Agreement or Confer Agency Authority upon Mr. Dover.

To the extent Plaintiff argues Ms. Solesbee did not have the capacity to authorize Mr. Dover to execute the Arbitration Agreement, such an argument should be dismissed. Plaintiff plainly has not shown that Ms. Solesbee lacked the requisite capacity to confer authority on her to execute Arbitration Agreement. In order for a principal to create an agency relationship, the principal must have the mental capacity to contract. *In re Thames*, 344 S.C. 564, 570, 544 S.E.2d 854, 856 (Ct. App. 2001). South Carolina Courts hold that the party alleging incompetence bears the burden of proving incapacity at the time of the transaction by a preponderance of the evidence. *Id.*, 344 S.C. at 572, 544 S.E.2d at 858. “Mere infirmity of mind or body, not amounting to an incapacity to understand the nature and consequence of the act done” is insufficient to show incapacity. *In re Nightingale's Estate*, 182 S.C. 527, 189 S.E. 890, 896 (1937).

Plaintiff has not proven Ms. Solesbee lacked the requisite mental capacity sufficient to contract when Mr. Dover executed the Arbitration Agreement. Plaintiff simply cites to Ms. Solesbee’s Resident Face Sheet which references “Unspecified dementia without behavioral disturbance, and Delirium due to known physiological condition.” Further, Plaintiff and Mr. Dover’s Affidavits contain conclusory averments of Ms. Solesbee’s alleged incompetence but wholly lack any factual description of Ms. Solesbee’s mental condition on the day the Arbitration Agreement was signed. Such statements on their own are wholly insufficient to show that Ms. Solesbee in fact lacked the ability to understand the nature and consequence of allowing her son to execute necessary admissions documents, including the Arbitration Agreement enabling her admission to the Facility. Plaintiff has not established by a preponderance of the

evidence that Ms. Solesbee was incapacitated when her son signed the admissions documents and therefore any argument premised on her incapacity should be disregarded.

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 Mr. Dover on behalf of Ms. Solesbee. 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 Mr. Dover together on behalf of his mother in the days leading up to his admission to the Facility.

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 similar 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 similar 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. Solesbee, by and through the acts of her representative, Mr. Dover, and the Facility, both contemplated that the terms of the agreement to admit Ms. Solesbee were contained in the Admissions Agreement and Arbitration Agreement. Mr. Dover executed the

Arbitration Agreement in connection with the Admissions Agreement; the Arbitration Agreement and the Admissions Agreement both covered the same subject matter and transaction (Ms. Solesbee's residency at the Facility); the Arbitration Agreement and Admissions Agreement were executed by 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. 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 & Anlaeen 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).²

² 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).

In the present case, Ms. Solesbee 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 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 non-signatory receives the benefits of the contract, which Ms. Solesbee 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.

c. Thompson and Hodge are Distinguishable

Plaintiff relies on *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 769 (Ct. App. 2016) in support of her position that Mr. Dover lacked the authority to bind his mother to the Arbitration Agreement. In particular, she relies on *Hodge* for the proposition that the Arbitration Agreement and Admissions Agreement are separate stand-alone agreements and Mr. Dover did not possess the authority to enter into the Arbitration Agreement. Reliance on those

cases is misplaced because the Arbitration Agreement here is distinguishable and should not be considered separate for purposes of merger.

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, 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.* Similarly, the arbitration agreement in *Thompson* also stated it could be revoked in 30 days. *Thompson*, 416 S.C. at 53, 784 S.E.2d at 685. Unlike the arbitration agreements in *Hodge*, and *Thompson*, the Arbitration Agreement and Admission Agreement in the case at bar should not be considered “separate” for purposes of denying merger because the Arbitration Agreement in this case does not state that it can be revoked after it has been signed.

Instead, in the present case, the agreements “were executed by the same parties; for the same purposes, and in the course of the same transaction” and, therefore, the documents merged.” *Coleman v. Marnier Health Care, Inc.*, 407 S.C. at 355, 755 S.E.2d at 455 (citing *Klutts, supra*, 268 S.C. at 88, 232 S.E.2d at 24). Specifically, the Admission and Arbitration Agreements were signed by Mr. Dover, on his mother’s behalf, and by the Facility prior to Ms. Solesbee’s admission. The documents were signed at the same time and by the exact same people: Mr. Dover as representative for his mother and by Libby Byers, as representative for the Facility. Moreover, the documents were signed for the same purpose and transaction of establishing Ms. Solesbee’s residency at the skilled nursing facility. While the Admission

Agreement in this case does contain an “Entire Agreement” clause, unlike the admission agreements in *Hodge* and *Thompson*, the provision in this case does not separately reference the Arbitration Agreement (in fact, it doesn’t refer to it at all). Accordingly, there is no language in either the Admission or Arbitration Agreement akin to the language in *Hodge* or *Thompson* to indicate the parties desired the documents be considered as separate contracts. As such, *Thompson* and *Hodge* are not controlling Plaintiff’s claims should be compelled to arbitration pursuant to the contract.

D. The Arbitration Agreement applies to Plaintiff’s Wrongful Death Claim

Plaintiff also argues that her wrongful death claim is not subject to the Arbitration Agreement. Plaintiff’s argument must be rejected. As Plaintiff would have it, her wrongful death claim asserted on behalf of the estate’s beneficiaries are not arbitrable because Ms. Solesbee lacked the authority to bind her statutory beneficiaries to arbitration. To the contrary however, courts in South Carolina have found that like here, where a decedent’s representative 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. *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 759 S.E.2d 727 (2014). Courts in South Carolina interpreting *Dean* have found that statutory beneficiaries are subject to arbitration to the same extent as the decedent. *THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. CIV.A. 7:13-2929-BHH, 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”)(citing *Dean*, 759 S.E.2d at 737 n. 3.)

Similarly, in *McCutcheon, supra*, the court by granting the defendant's motion to compel arbitration, implicitly held that the plaintiff's wrongful death claims were subject to arbitration. No. 2:11-CV-02861, 2011 WL 6318575, at *6 (D.S.C. Dec. 15, 2011). In *McCutcheon*, the plaintiff, decedent's husband, signed an arbitration agreement as the decedent's "'Durable Power of Attorney for Health Care' / 'Legal Guardian' / 'Responsible Party, '" upon the decedent's admission to a nursing home. *Id.* at *1. Subsequently, the plaintiff brought several claims, including one for wrongful death, for a dispute arising out of the nursing home's care of the decedent. The nursing home filed a motion to dismiss and to compel arbitration. *Id.* Ultimately, the court found that the arbitration agreement at issue was valid and applicable to the plaintiff's claims. *Id.* at *6. Thus, by subjecting the plaintiff's wrongful death claim to binding arbitration, the court implicitly held that wrongful death claims brought by a plaintiff in a representative capacity on behalf of a decedent, are subject to binding arbitration.

Similarly, In *Boland v. Unihealth Post Acute Care- Columbia*, the Honorable Allison Renee Lee granted a defendant's motion to compel arbitration against the personal representative of a nursing home decedent's estate, thus subjecting the plaintiff's wrongful death claim to binding arbitration. *Boland v Unihealth Post Acute Care - Columbia, LLC*, No. 2010CP25489, 2010 WL 9932512 (S.C.Com.Pl. Jan. 12, 2010). Boland involved a plaintiff who signed an arbitration agreement in connection with his mother's admission to a skilled nursing facility. *Id.* There, the plaintiff had a power of attorney. After the plaintiff's mother died, the plaintiff brought an action against the nursing home alleging wrongful death and survival claims. *Id.* The Defendant filed a motion to dismiss and compel arbitration. *Id.* The Court granted the Defendant's motion to dismiss the action and compel arbitration. *Id.*

The Arbitration Agreement here clearly encompasses wrongful death claims, which are purely derivative in nature. Indeed, The South Carolina Probate code itself tells us that such claims must be considered derivative. S.C. Code §62-3-703; *See also Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 349, 699 S.E.2d 143, 146 (2010)(citing *Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939, 941 (D.S.C. 1988)(recognizing that wrongful death claims are derivative claims and are conditioned upon a decedent's ability, "if he had lived, to bring an action at the time of his death"). The majority of states concur with this approach including New Mexico, Mississippi, Florida, Texas, Michigan, Colorado, Pennsylvania, and Alabama³. To be sure, statutory beneficiaries have no right to a claim but through the standing of the decedent. *Spradlin*, 532 F. App'x 813, 816–18. It

³ *THI of New Mexico at Hobbs Center, LLC v. Spradlin*, 532 Fed. Appx. 813 (10th Cir. 2013) *Trinity Mission of Clinton, LLC v. Barber*, 988 So.2d 910, 919 (Miss.Ct.App.2007); *see also, Laizure v. Avante at Leesburg, Inc.*, 109 So.3d 752, 761–62 (Fla.2013) ("[T]he nature of a wrongful death cause of action in Florida is derivative in the context of determining whether a decedent's estate and heirs are bound by the decedent's agreement to arbitrate. The estate and heirs stand in the shoes of the decedent for purposes of whether the defendant is liable and are bound by the decedent's actions and contracts with respect to defenses and releases."); *In re Labatt Food Serv., LP*, 279 S.W.3d 640, 646 (Tex.2009) ("[R]egardless of the fact that [decedent's] beneficiaries are seeking compensation for their own personal loss, they still stand in [decedent's] legal shoes and are bound by his agreement."); *Ballard v. Sw. Detroit Hosp.*, 119 Mich.App. 814, 327 N.W.2d 370, 371–72 (1982) ("[A]lthough the Michigan wrongful death act provides for additional damages benefitting the decedent's next of kin for loss of society and companionship, it does not create a separate cause of action independent of the underlying rights of the decedent. Rather, the cause of action is expressly made derivative of the decedent's rights."); *Allen v. Pacheco*, 71 P.3d 375, 379 (Colo.2003); *Peltz v. Sears, Roebuck & Co.* 367 *Labatt Food Serv., LP*, 279 S.W.3d 640, 646 (Tex.2009) ("[R]egardless of the fact that [decedent's] beneficiaries are seeking compensation for their own personal loss, they still stand in [decedent's] legal shoes and are bound by his agreement."); *Ballard v. Sw. Detroit Hosp.*, 119 Mich.App. 814, 327 N.W.2d 370, 371–72 (1982) ("[A]lthough the Michigan wrongful death act provides for additional damages benefitting the decedent's next of kin for loss of society and companionship, it does not create a separate cause of action independent of the underlying rights of the decedent. Rather, the cause of action is expressly made derivative of the decedent's rights."); *Allen v. Pacheco*, 71 P.3d 375, 379 (Colo.2003); *Peltz v. Sears, Roebuck & Co.* 367 F.Supp.2d 711, 718 (E.D.Pa.2005); *Briarcliff Nursing Home, Inc. v. Turcotte* 894 So.2d 661, 665 (Ala. 2004).

necessarily follows that if a decedent's rights to a claim are effected by a contract, such as a binding arbitration agreement, the beneficiaries' rights are also effected, as they stand in the legal shoes of the decedent. *See In re Labatt Food Serv., L.P.*, at 645 (Tex. 2009). A contrary holding would violate the FAA and the Supreme Court's holding in *Kindred, supra* that Arbitration Agreements must be put on equal footing with other contracts. Because Ms. Solesbee would have been bound by the arbitration agreement immediately prior to her death, the Plaintiff and the estate's wrongful death beneficiaries are also bound. *See THI of S.C. at Columbia, LLC v. Wiggins*, No. CA 3:11-888-CMC, 2011 WL 4089435, at *5 (D.S.C. Sept. 13, 2011) ("a personal representative of a decedent domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as his decedent had immediately prior to death"). Moreover, the Arbitration Agreement plainly states "*It is the intention of the parties to this Agreement to bind not only themselves, but also, their, successors, assigns, heir, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.*" Mr. Dover signed the agreement on Ms. Solesbee's behalf and, as such, the Arbitration Agreement must be found binding on the wrongful death claim.

Defendant also submits that *Long v. Silver*, 248 F.3d 309 (4th Cir.2001) supports the arbitrability of the wrongful death claims in the instant matter because the statutory beneficiaries claims are "so closely intertwined" with those relating to the survival action, Plaintiff should be estopped from refusing to submit those claims to arbitration. *See also, Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir.1993) (holding that because claims against the non-signatory were "intimately founded in and intertwined with" a contract containing an arbitration clause, signatory was estopped from refusing to arbitrate those claims (internal quotation marks omitted)).

E. Should the Court decide to Deny this Defendant's Motion, the Parties 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 Ms. Solesbee's competency, her agency relationship with Mr. Dover, and the circumstances surrounding the admissions process. In a case involving similar issues, the Honorable Perry Gravely allowed the parties to conduct additional discovery on the issue of a mother's authority to execute an Arbitration Agreement on her son's behalf 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 the parties to take the depositions of the mother, the son, the admissions coordinator for the skilled nursing facility, and the case manager for the hospital the son was transferred from. After considering the testimony of those individuals, the court found there was evidence to support a finding of apparent agency. The case at the bar involves Mr. Dover's authority to execute the Arbitration Agreement and the circumstances surrounding its execution. As in *Boyd*, if the Court determines the record is insufficient to properly rule on the issues 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 either dismissing or 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. 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.

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Manor-Inman

Charleston, South Carolina

Dated: August 14, 2019

ADMISSION AGREEMENT - SOUTH CAROLINA

RESIDENT NAME:

Mary Salesbee

RESIDENT NUMBER:

DATE OF ADMISSION:

6/27/16

THIS ADMISSION AGREEMENT ("Agreement") as above dated is by and among Magnolia Manor Inn ("Facility"), Mary Salesbee ("Resident") and/or Allen Dover ("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.

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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, 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, 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

Printed Name of Resident

Resident Social Security Number

Witness Signature Date

Printed Name of Witness

OR

Alle E. Fure 6/27/14
Signature of Representative, if any Date

Printed Name of Representative

Witness Signature Date

Printed Name of Witness

Representative Social Security No. (Voluntary Info.)

Ally Papp
Signature of Facility Official

Printed Name of Facility Official & Title

Date

Original: Business File • Photocopy: Resident/Representative

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

Appeal from Spartanburg County
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2018-CP-42-04405

The Estate of Mary Solesbee, by her personal
representative, Connie Bayne,

Respondent,

v.

Fundamental Clinical and Operational Services, LLC;
Fundamental Administrative Services, LLC; THI of
South Carolina at Magnolia Manor-Inman, LLC d/b/a
Magnolia Manor-Inman; Inpatient Consultants of North
Carolina, P.C.; and Angela Brown, ACNP,

Defendants,

Of whom Fundamental Clinical and Operational
Services, LLC; Fundamental Administrative Services,
LLC; and THI of South Carolina at Magnolia Manor-
Inman, LLC d/b/a Magnolia Manor-Inman are

Appellants.

NOTICE OF APPEAL

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
Gaillard T. Dotterer, III (SC Bar No. 103620)
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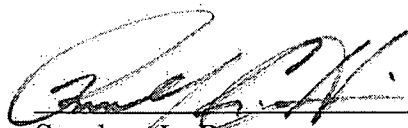
Attorneys for Appellants

Defendants, Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman (collectively, "Appellants"), hereby appeal the following order of the Honorable Grace Gilchrist Knie, Circuit Court Judge:

- **Order filed September 11, 2019** (denying Appellants' motions to compel arbitration and stay, a copy of which is attached hereto and incorporated herein by reference).

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 

Stephen L. Brown (SC Bar No. 66468)

D. Jay Davis, Jr. (SC Bar No. 12084)

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Attorneys for Appellants

Charleston, South Carolina

Dated: 10/11/19

Other Counsel of Record:

W. Harold Christian, Jr.

Matthew W. Christian

CHRISTIAN & DAVIS, LLC

1007 E. Washington Street

Greenville, South Carolina 29601

P.O. Box 332 (29602)

(864) 232-7363

Attorneys for Respondent

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

Appeal from Spartanburg County
Court of Common Pleas
Grace Gilchrist Knie, Circuit Court Judge

Case No. 2018-CP-42-04405

The Estate of Mary Solesbee, by her personal
representative, Connie Bayne, Respondent,

v.

Fundamental Clinical and Operational Services, LLC;
Fundamental Administrative Services, LLC; THI of
South Carolina at Magnolia Manor-Inman, LLC d/b/a
Magnolia Manor-Inman; Inpatient Consultants of North
Carolina, P.C.; and Angela Brown, ACNP, Defendants,

Of whom Fundamental Clinical and Operational
Services, LLC; Fundamental Administrative Services,
LLC; and THI of South Carolina at Magnolia Manor-
Inman, LLC d/b/a Magnolia Manor-Inman are Appellants.

PROOF OF SERVICE

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
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Attorneys for Appellants

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Appellants, hereby certify that the foregoing **NOTICE OF APPEAL** was served on all other parties to this matter by depositing a copy of the same in the U.S. Mail on October 11, 2019, properly posted for delivery to the following addressees:

W. Harold Christian, Jr., Esquire
Matthew W. Christian, Esquire
Christian & Davis, LLC
P.O. Box 332
Greenville, SC 29602
Attorneys for Respondent

I further certify that a copy of this **NOTICE OF APPEAL** is this day, October 11, 2019, being E-Filed with the lower court (which will also, i.e., in addition to service by mail, effect service of this notice electronically on counsel of record for all parties to this matter).

Respectfully submitted,
YOUNG CLEMENT RIVERS, LLP

By: 

Russell G. Hines (SC Bar No. 72100)

Attorneys for Appellants

Charleston, South Carolina

Dated: 10/11/19

Certificate of Counsel

The undersigned counsel for Appellants 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.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: _____

Stephen L. Brown (SC Bar No. 66468)

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Attorneys for Appellants

Charleston, South Carolina

Dated: 7/20/20

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