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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

G.D. Morgan, Jr. Circuit Court Judge

Appellate Case No. 2023-000033

Deonda Weldon, Individually and as Personal Representative of the Estate of Earline Cooley, …….. Appellant,

v.

Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square, Dominion Senior Living, LLC, Dominion Clemson, II, LLC, Dominion Management Group, LLC, and Dominion Group, LLC …… Respondents.

RECORD ON APPEAL (VOLUME 2)

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF PICKENS	)	C.A. No.: 2021-CP-39-01127 & 2021-CP-39-01128
	)	
Deonda Weldon, Individually and as Personal Representative of the Estate of Earline Cooley,	)	
	)	**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION AND PROTECTIVE ORDER FROM DISCOVERY**
Plaintiff,	)	
	)	
v.	)	
	)	
Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square, Dominion Senior Living, LLC, Dominion Clemson, II, LLC, Dominion Management Group, LLC, and Dominion Group, LLC,	)	
	)	
Defendant(s).	)	

Defendants Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square (hereinafter "Facility"), Dominion Senior Living, LLC (hereinafter "Dominion Senior Living), Dominion Clemson, II, LLC (hereinafter "Dominion Clemson, II"), Dominion Management Group, LLC (hereinafter "Dominion Management"), and Dominion Group, LLC (hereinafter "Dominion Group) filed these motions to dismiss the Complaint and to compel Plaintiff's claims against them to arbitration which was filed pursuant to multiple subsections of Rule 12(b) of the South Carolina Rules of Civil Procedure and the Federal Arbitration Act.

This case involves wrongful death and survival action claims alleging assisted living facility negligence and corporate negligence resulting in the serious injuries and death of Earline Cooley. Earline Cooley was admitted to the Facility on or about March 8, 2019 for assisted living facility services, but due to Earline Cooley's past medical

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history, medical diagnoses, and medications, as well as other factors, Defendants knew or should have known that Earline Cooley was at high risk for falls at the time of her admission. In fact, the physician's evaluation form at the time of Earline Cooley's admission as well as the Fall Prevention Program Resident Risk Assessment form dated March 8, 2019 reflected that Earline Cooley had a history of falls and was a fall risk. The only individual care plan created by the Defendants was dated November 18, 2019, some eight months after her admission to the facility. The care plan from November reflected that Earline Cooley used a walker/cane but did not reflect any addition assistance that she may need in ambulation/transfers.

That further, during her admission, Earline Cooley suffered from at least ten (10) falls between August 2019 and March 9, 2020. Despite all of the falls as well as physical therapy notes reflecting that Earline Cooley required "moderate physical assistance" to transfer from sit to stand and notes reflecting that she had "unsteadiness on feet", "weakness", "history of falling", as well as other diagnoses, no changes were made to Earline Cooley's care plan and no interventions were implemented top prevent her from falling. As a result of the March 9, 2020 fall, Earline Cooley fractured her right hip and struck her head. She then underwent surgery and post-operatively suffered with hypoxia and thrombocytopenia as a result of the complications from surgery. As a result of her injuries, she continued to decline and never recovered until her death on May 27, 2021.

That in addition to the clinical negligence, Defendants were also negligent by having staff conduct out of scope assessments, understaffing the facility, and underfunding the facility. As a result of the underfunding, understaffing, failure to correct past deficiencies which were known to the Defendants and as a result of having

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inadequate policies and procedures, Plaintiff has alleged corporate negligence as well as the facility's clinical negligence which Plaintiff alleges was directly caused by the parent, management, and affiliated companies of the facility, all of which owned, controlled, directed, and affected resident care at the facility.

As a result of Earline Cooley's injuries and statutory beneficiary claims, Plaintiff filed Summons and Complaints against Defendants on October 13, 2021 and subsequently served the Defendants. Defendants answered the Complaints on December 21, 2021. Defendants served their First Interrogatories and First Requests for Production upon the Plaintiff on December 21, 2021.

The parties engaged in significant discovery over the subsequent months. That further, the parties had actually set depositions of witnesses to be taken. Plaintiff responded to Defendants' First Interrogatories and First Requests for Production on April 25, 2022. On June 9, 2022, Defendants filed these Motions to Dismiss and Compel Arbitration. The Affidavits of Deonda Weldon and Debra Galloway are attached hereto at Exhibits 1 and 2. In response to Defendants' motions, Plaintiff submits this Memorandum in Opposition together with the attached exhibits.

BRIEF SUMMARY OF ARGUMENTS

I. The Arbitration Agreement is unenforceable because Defendants abandoned and waived their right to seek to enforce arbitration.

II. The Arbitration Agreement is unenforceable because Debra Galloway did not possess the appropriate authority to execute the Arbitration Agreement on behalf of Earline Cooley.

III. The Arbitration Agreement is unenforceable because it is unconscionable.

IV. The Arbitration is unenforceable as to the statutory beneficiaries' claims in the wrongful death action.

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V. The Corporate Defendants, Dominion Senior Living, Dominion Clemson, II, Dominion Management Group, and Dominion Group, are not parties to the alleged Arbitration Agreement, and therefore, any alleged Arbitration Agreement is not enforceable as to those Defendants.

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).

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."). Arbitration agreements must satisfy the basic tenets and requirements of contract law. Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844, (Ct. App. 1999). Section 2 of the Federal Arbitration Act dictates that arbitration agreements are enforceable except "upon such grounds as exist at law or equity for the revocation of any contract". 9 U.S.C. §2. The courts, not arbitrators, are charged with deciding certain "gateway matters" including whether the

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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). Thus, unless there is a valid, irrevocable, and enforceable contract, the Federal Arbitration Act does not even apply.

Further, the party seeking enforcement of the agreement bears the burden to prove a valid arbitration agreement exists that is enforceable, knowing, voluntary, and intentional. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008); Hinson-Barr, Inc. v. Pinckard, 292 S.C. 267, 268, 356 S.E.2d 115, 116 (1986). "A motion to compel arbitration pursuant to the FAA is 'akin to the burden on summary judgment.'" Thomas v. Progressive Leasing, Civ. No. 17-1249, 2017 WL 4805235, at *2 (D. Md. Oct. 25, 2017)(internal quotation marks omitted) (quoting Galloway v. Santander Consumer USA, Inc., 819 F.3d 79, 85 (4th Cir. 2016)). Therefore, the burden is on the moving party to demonstrate the absence of any genuine dispute of material fact, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970), and that the movant is "entitled to judgment [compelling arbitration] as a matter of law." Burrell v. 911 Restoration Franchise Inc., 2017 WL 5517383, at *3 (D. Md. November 17, 2017) (citing Fed. R. Civ. P. 56(a)).

Further, "there is, however, no public policy – federal or state – favoring arbitration." Simmons v. Benson Hyundai, LLC, 2022 S.C. App. LEXIS 37, 22WL791174 quoting Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021). The arbitration agreement at issue in this

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particular case with Facility is not valid to begin with and Defendants cannot meet their burden of proof. Therefore, the inquiry should go no further as to the motions.

I. The Arbitration Agreement is unenforceable because Defendants abandoned and waived their right to seek to enforce arbitration.

The right to enforce an arbitration clause may be waived. Davis v. KB Home of South Carolina, Inc., 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011). Courts generally consider the following factors when determining whether a party has waived his right to compel arbitration:

1) Whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration;
2) Whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and
3) Whether the non-moving party was prejudiced by the delay in seeking arbitration. Id.

However, the United States Supreme Court recently held that the third prong, the prejudice requirement, was not appropriate in determining waiver as it created a special rule for arbitration agreements that did not apply to other agreements and motions. Morgan v. Sundance, Inc., 142 S.Ct. 482, 211 L. Ed.2d 292 (2021). As a result, the third prong, the prejudice requirement, no longer exists. As the United States Supreme Court noted in Morgan, Defendants who do not seek the relief of an arbitration agreement right away and instead engage in months of litigation, answering complaints, discussing settlement, etc. before moving to compel arbitration, may waive their right to compel arbitration. Id. As the Morgan court noted, waiver "is the intentional relinquishment or

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abandonment of a known right." *Citing* United States v. Olano, 507 U.S. 725 733 (1993)(internal quotation marks omitted). The Morgan court also noted that in determining whether waiver has occurred, the court focuses on the person who held the right to compel arbitration and not on the actions of the opposing party. Id.

The Court of Appeals in Liberty Builders, Inc. v. Horton, 336 S.C. 658, 521 S.E.2d 749 (S.C. App 1999) held that the party moving to compel arbitration waived their right after filing initial pleading and responding to discovery. Furthermore, the South Carolina Supreme Court has also recognized that nursing homes can waive arbitration rights. Dean v. Heritage Healthcare of Ridgeway, LLC, 401 S.C. 371 (2014).

In Johnson v. Heritage Healthcare of Estell, LLC, 416 S.C. 508, 788 S.E.2d 216 (2016), the South Carolina Supreme Court held that the defendant nursing home waived its right to compel arbitration after, among other things, answering the Complaint, seeking limited discovery issues, serving discovery, and waiting approximately ten (10) months to file the motion to compel arbitration after the Plaintiffs filed the Complaint. Further, in Flexon v. PHC Jasper, Inc., 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015), the South Carolina Court of Appeals recognized and affirmed the order that the party moving for arbitration waived its right to arbitration by engaging in discovery without reservation or limitation. Similar to the present case, the moving party had engaged in discovery and continued through litigation for a period of time before moving to compel arbitration. Further, multiple other South Carolina Circuit Courts have held that parties, including nursing homes, have waived their right to compel arbitration by participating in discovery and not moving for arbitration immediately after the filing of the Summons and Complaint.

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In the present case, Defendants contend that any claim against them must be resolved through arbitration. The Defendants were on notice of the claim as early as June 2020 when Plaintiff served her requests for medical records from the Facility upon the Defendants, and that request explicitly stated that the purpose of it was to "aid in the investigation of a legal claim." See Exhibit 3. Of note, with the request was included the General Durable Power of Attorney for Earline Cooley. See Affidavit of Amanda Venable at Exhibit 4. Subsequently, Plaintiff filed the Summons and Complaint against the Defendants on or about October 13, 2021. Defendants served their Answer on December 21, 2021. After the service of the Answer, Defendants attempted to engage in settlement discussions with Plaintiff which were unfruitful. On December 21, 2021, Defendants also served their First Interrogatories and First Requests for Production upon the Plaintiff. The Interrogatories, not including subparts, contained twenty-seven (27) questions/requests, all of which had no relationship to any arbitration issues whatsoever. Defendants' Requests for Production contained at least twenty-nine (29) requests, not including subparts, all of which except for one had no relationship or bearing on arbitration issues. Additionally, Defendants sent out no less than four (4) subpoenas to third parties for the production of documents on December 31, 2021, a discovery tool not otherwise available to them in arbitration. See Exhibit 5.

On March 1, 2022, Defendants responded to Plaintiff's First Interrogatories and First Requests for Production. Those responses were deficient and Plaintiff sent correspondence to defense counsel regarding same, a copy of which is attached hereto at Exhibit 6. As a result of not being able to resolve the deficiencies, Plaintiff filed a Motion to Compel with this Court on March 22, 2022. On April 25, 2022, Plaintiff provided

responses to Defendants' First Interrogatories and First Requests for Production. On May 2, 2022, the parties then began discussing dates for depositions of witnesses and depositions were in fact scheduled.

Defendants then delayed another six (6) weeks before filing a Motion to Compel Arbitration. As a result, Defendants waited nearly eight (8) months from the filing of the Summons and Complaint to file their Motion to Compel Arbitration after conducting extensive discovery and waited two (2) years from the date Plaintiff first requested records from the Defendants notifying them of a potential legal claim before filing their Motion to Compel Arbitration.

While Defendants may contend that they were unaware of the authority which Debra Galloway had to sign the Arbitration/Admissions Agreement until April 2022, this argument is without merit. First, Defendants were provided with the General Durable Power of Attorney on June 11, 2020 with Plaintiff's records request, and Defendants produced the records with the Health Care Power of Attorney on July 28, 2020. See Exhibit 7. Second, Defendants would be contending that they knowingly had Debra Galloway sign a form to admit her mother to a facility and to waive a right to a jury trial without knowing whether or not she had authority to do so. In fact, the form itself states that Debra Galloway signed as "Medical Power of Attorney." The Defendants cannot contend that they were asking Ms. Galloway to sign the form which the facility representative believed that Ms. Galloway had the requisite authority to sign, but then could only ***really*** believe it applies ***if*** a power of attorney is produced. Further, nearly all of these facilities obtain a copy of any power of attorney at the time of execution of these documents. Therefore, the Defendants should have been aware of these documents at

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the time of admission. Finally, the General Durable Power of Attorney had been filed and recorded with the Register of Deeds which was publicly available to the Defendants to locate and obtain at any point in time.

As a result, under applicable case law as well as other circuit court orders in the State of South Carolina, the Defendants have waived their right to move for arbitration. See Briody, Smith, and Cook Orders at Exhibits 8, 9, and 10. The Defendants abandoned this right from the outset as they were aware of this potential claim since June 2020, had actual possession of both the Durable power of Attorney and Health Care Power of Attorney at that time, and never filed the motion until June 9, 2022. For this reason alone, the Defendants' motion should be denied.

II. The Arbitration Agreement is unenforceable because Debra Galloway did not possess the appropriate authority to execute the Arbitration Agreement on behalf of Earline Cooley.

While it is true that Debra Galloway was named as alternate Healthcare Power of Attorney, a Healthcare Power of Attorney is insufficient to provide the authority to enter into an arbitration agreement on behalf of her mother, Earline Cooley. In fact, South Carolina courts have repeatedly held that entering into an arbitration agreement is not a "healthcare" decision, and further explicitly state that a healthcare power of attorney is not sufficient to grant such authority. Hodge v. Uni-Health Post-Acute Care of Bamberg, Opinion No. 5541 (S.C. Ct. App. March 7, 2018); Thompson v. Pruitt Corp., 416 S.C. at 56-58, 784 S.E.2d; Coleman v. Mariner Health Care, Inc., 755 S.E.2d 450, 407 S.C. 346 (S.C. 2014); Arredondo v. SNH SE Ashley River Tenant, 433 S.C. 69 (20201, 856 S.E.2d 550. In fact, in Arredondo, the court specifically held that there must be specific language indicating that the power of attorney provides the authority to arbitrate. Arredondo v.

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SNH SE Ashley River Tenant, 433 S.C. 69 (20201, 856 S.E.2d 550; also see Hodge v. Uni-Health Post-Acute Care of Bamberg, Opinion No. 5541 (S.C. Ct. App. March 7, 2018).

Because the Healthcare Power of Attorney did not provide Debra Galloway with any actual authority to sign the Arbitration Agreement on her mother's behalf, the Defendants would then have to attempt to rely upon the General Durable Power of Attorney. However, the General Durable Power of Attorney did not provide that authority to Debra Galloway at the time she signed the Arbitration Agreement.

As previously mentioned, Debra Galloway was the second alternate general durable power of attorney for her mother which empowered her only if the primary power of attorney, Deonda Weldon, and the first alternate power of attorney, Robin Elliott, were unavailable or unwilling to serve. See Durable Power of Attorney at Exhibit 11, p. 1. The Defendants knew that Debra Galloway did not have such authority because the first page of the Resident Admission Agreement, which contained the Arbitration Agreement states "Deonda Weldon" was the person designated to:

> "act as the single 'Financially Responsible Party' and/or agrees to act as the 'Resident's Representative,' accepting their respective rights and obligations as set for the in this Agreement. Community, Manager, Resident, Financially Responsible Party and/or Resident's Representative are collectively referred to herein as the 'Parties'…."

Therefore, the Facility knew that Debra Galloway was not a party to the agreement as she was not identified in the Resident Admission Agreement as a party to the agreement. Furthermore, the Resident Admission Agreement which contains the Arbitration Agreement explicitly sets forth that Deonda Weldon should have been the party to the agreement and was the financially responsible party because the Facility

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knew that she was, in fact, the primary general durable power of attorney. There is no evidence that Deonda Weldon was unwilling or unable to serve. In fact, her affidavit at Exhibit 1 explicitly states that, "Had the Defendants provided to me the Admission Agreement, I would have been designated and been responsible for reviewing and considering the execution of same." That further, Debra Galloway's affidavit attached hereto as Exhibit 2 specifically reflects that at no time had either of her sisters stated that they were unwilling or unable to serve as Earline Cooley's power of attorney.

Therefore, Debra Galloway did not possess the necessary authority to be able to enter into an arbitration agreement, waiving her mother's rights to a jury trial either in the Healthcare Power of Attorney or in the General Durable Power of Attorney. As a result, the Arbitration Agreement is unenforceable because Debra Galloway lacked the appropriate authority.

III. The Arbitration Agreement is unenforceable because it is unconscionable.

The Admission Agreement and incorporated attachments which contain the Arbitration Agreement is approximately thirty-five (35) pages long which required signatures and/or initials in multiple places by Debra Galloway.

The unconscionability is evidenced by multiple integral terms to the agreement including, but not limited to, the fact that the agreement purports to significantly limit damages with an onerous cap on compensatory and punitive damages, other liability waivers, and also due to the fact that the agreement implicitly carves out disputes that the Facility may have against residents and/or their families from the limitation on damages clauses but applies to all other claims which a resident may have against the Facility. See Admission Agreement, pp. 39-40.

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Other sections of the agreement place upon the resident unreasonable waivers and assumptions of risk. In fact, on page 35 of the agreement, a release and assumption of risk waives liability that requires the resident to assume all risk related to or arising from living in the Facility. Further, there is a release and waiver of liability clause in that same paragraph requiring the resident to hold the Facility harmless from any claims arising out of the Facility's failure to obtain or furnish services beyond that which was contractually indicated even if the Facility performed an inadequate assessment of the resident's needs to identify what services should be performed.

That further, the agreement requires the resident to waive all liability against the Facility for injuries caused by another resident, presumably even if the other resident was known to the Facility to be a danger and was not appropriate for the assisted living facility. Admission Agreement, p. 35. Furthermore, the agreement purports to require the resident to agree that falls will occur and cannot be prevented. Admission Agreement, p. 45.

A waiver of liability exists with regards to any injuries resulting from a resident performing activities independently without requesting or waiting on staff despite the fact that the Facility is aware that many of these residents suffer with dementia and memory loss and are unable to remember or know to request help. Admission Agreement, p. 44. Additional waivers of liability purport to exist at page 44 where the agreement states that the resident agrees that if the resident chooses to not request assistance or supervision in attempting certain daily activities, then there is no liability despite the fact that many of these residents, including Earline Cooley, suffer from dementia and are unaware of the need to request such assistance. The Facility further requires the families to sign a waiver

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releasing the Facility for medication errors and negligence unless they agree to use the Facility's pharmacy/medication system. Admission Agreement, p. 59.

Most importantly, in addition to the above-referenced unreasonable waivers and releases, the agreement prevents any non-economic damages above $250,000.00, prevents punitive damages, and limits economic damages to actual economic loss offset by any collateral source payments. Admission Agreement, pp. 39-40. All of these damages are otherwise allowed under state law and are not capped. As a result, the agreement limits and restricts otherwise available statutory and common law damages.

Additionally, the limitations on damages provisions essentially do not apply to the Facility in claims against the resident. In no circumstance would the Facility have a claim against the resident for non-economic damages. Further, the Facility in no circumstance would have the issue of collateral source payments to be offset in a damages assessment. The agreement also allows the Facility to not arbitrate any claims less than $15,000.00 which would include most claims the Facility would have for unpaid rent. As a result, the Facility implicitly carves out all of the limitations on damages clauses for any claims it may have against the resident and/or their family. Admission Agreement, pp. 39-40.

The arbitrator may award economic and non-economic damages, but shall have no authority to award punitive damages to any Party. Each side shall bear an equal share of the arbitrator's fees and the costs of the arbitration.

15. LIMITATIONS OF LIABILITY PROVISION.

The parties to this Agreement understand that the purpose of this "Limitation of Liability Provision" is to limit, in advance, each party's liability in relation to this Agreement. Liability for any claim brought by a party of this Agreement against the other party, including but not limited to a claim by the Community for unpaid charges, or a claim by the Resident, Resident's Representative or by the Resident's estate, arising out of the care or treatment received by the Resident at the Establishment, including without limitation, claims for medical negligence or violation(s) of South Carolina Statutes, arising from simple or gross negligence, shall be limited as follows:

(1) Net economic damages shall be awardable, including, but not limited to, past and future medical expenses, offset by any collateral source payments.

(2) Non-economic damages shall be limited to a maximum of $250,000.

(3) Interest on unpaid fees shall not be awarded.

(4) Punitive damages shall not be awarded.

Under South Carolina law, unconscionability is "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007) (quoting Carolina Care Plan, Inc. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). The "absence of meaningful choice" element "speaks to the fundamental fairness of the bargaining process." Simpson, 3873 S.C. at 25, 664 S.E.2d at 669. The key factors on this element include (1) the nature of the injuries suffered by the plaintiff; (2) whether the plaintiff is a substantial business concern; (3) the relative disparity in the parties' bargaining power; (4) the parties' relative sophistication; (5) whether there is an element of surprise in the inclusion of the challenged clause; and (6) the conspicuousness of the arbitration clause. Id. (citing Carlson v. Gen. Motors Corp., 883

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F.2d 287, 293 (4th Cir. 1989)).

Identifying a document as an adhesion contract is a useful starting point for analyzing these substantive factors. Simpson, 373 S.C. at 27, 644 S.E.2d at 669. The evidence shows the Admission and Arbitration Agreement is an adhesion contract. An adhesion contract has two defining characteristics: (1) it is presented in a standardized form; and (2) it is presented by a party with greater bargaining power to a party with lesser power on a "take-it-or-leave-it" basis—i.e. without that party's ability to negotiate terms. Simpson, 373 S.C. at 27, 644 S.E.2d at 670 (citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001)). The Arbitration Agreement bears all the markers of a standard form contract. On its face, it is evident the Arbitration Agreement was not only for the Facility's use but also for other facilities bearing the "Dominion Senior Living" brand. The Company's name is printed on the first page of the Admission Agreement. Both the Admission Agreement and the Arbitration Agreement (which is purportedly incorporated into the Admission Agreement) are standard forms, unchangeable by Plaintiff. The evidence further shows this form contract was effectively non-negotiable. As Debra Galloway explained, the Arbitration Agreement was part of a stack of documents presented to her near the time of Earline Cooley's admission. The employee who signed the Arbitration Agreement in the Facility's name provided no indication to Debra Galloway that she was entitled to change the Arbitration Agreement's terms.

The Simpson factors also show the fundamental unfairness of the bargaining process. The first factor favors the Plaintiff because Earline Cooley's injuries were personal and substantial. Defendants' negligence and neglect led to serious injuries with a

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femur/hip fracture, urinary tract infection, hypoxia, head injury, and ultimately, her premature death. See Complaint. The other factors also favor Plaintiff. Debra Galloway was not a substantial business concern. She was acting only as Earline Cooley's daughter with the aim of obtaining the assisted living facility services care Earline Cooley urgently needed. In contrast, Defendants are sophisticated business entities evidenced in many ways including the complex organization structure they have built to manage the Facility's operations as well as the fact that they have multiple facilities generating extensive revenue from many residents. The disparity in bargaining power is considerable. Defendants operate long-term care facilities in multiple states with likely revenue totaling millions of dollars. See Exhibit 12. Dominion Senior Living Web Page Communities. Earline Cooley, on the other hand, was an elderly woman in poor health in need of daily care.

Finally, the key language of some of the unconscionable provisions were not conspicuous relative to any of the other admission paperwork the Facility presented to Debra Galloway. Further, many of these provisions were buried in attachments and significantly lengthy agreements and documents. See Exhibit 13. As a result, many of these onerous provisions and limitations would not have been immediately apparent to an unsophisticated person. i.e. Simpson, 373 S.C. at 27-28, 644 S.E.2d at 670 (finding arbitration provision "inconspicuous in light of its consequences" including the deprivation of statutory remedies). The fact that this agreement was presented on a take-it-or-leave-it basis at a stressful time while Debra Galloway was trying to locate a long-term care facility for Earline Cooley's safety and well-being, the fact that Debra Galloway had no option but to sign these documents in order to gain admission for her

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mother and the fact that these documents are form documents provided by the Facility further demonstrates the fact that this is a contract of adhesion.

Additionally, as already addressed hereinabove, the Arbitration Agreement contains oppressive terms. The mandatory waiver of liability provisions which are purported to be included by virtue of the Admission Agreement attempting to incorporate the Arbitration Agreement serves to provide significant limitations and one-sided oppressive terms in and of that provision itself. However, when that provision is combined with the waivers in the Admission Agreement and the limitations on damages contained within the Admission and Arbitration Agreement, the unfairness and oppressive one-sided terms of this agreement are magnified to such a degree that no reasonable person would have agreed to same. In fact, there is no doubt that given these oppressive terms, that this is the very same reason which the Defendants implicitly chose to avail themselves to not be bound by the limitation on damages for any claim or action where they may sue the resident or resident's family.

Recent South Carolina Court of Appeals decisions further touch on and support the argument of unconscionability in this particular case. In Huskins v. Mungo Homes, LLC, 2022 S.C. App. LEXIS 61 (Ct. App. 2022), the South Carolina Court of Appeals determined that a provision within an arbitration agreement purporting to restrict the statute of limitations period for a homebuyer's recourse against the home builder was unconscionable. The Court noted that there was a lack of meaningful choice, lack of bargaining power, the purchasers were not represented by counsel nor were a substantial concern to the home builder. Furthermore, the Court noted that, "Even though this provision purports to apply equally to both parties, as a practical matter, it would

disproportionately affect the homebuyer's ability to bring a claim. Further, it is not geared towards achieving an unbiased decision by a neutral decision-maker." Id. at 17.

Moreover, the South Carolina Supreme Court in Smith v. D.R. Horton, Inc., 417 S.C. 42, 790 S.E.2d 1 (2016), held that limitations on damages claims rendered the arbitration agreement unconscionable and unenforceable. The Court further noted that the home purchaser did not have a substantially stronger bargaining position than an average homebuyer nor were they represented by counsel. The Court further noted that the home purchaser was a single client to a corporation that constructs homes in twenty-seven (27) states, and as a result, they were not a substantial business concern of the home builder that comprised a large portion of the home builder's clientele. As a result, the Supreme Court found that the home purchaser lacked a meaningful choice in their ability to negotiate the arbitration clause. As in the present case, Debra Galloway was not represented by counsel, was not a substantial business concern to the Defendants who are a large long-term care company operating in multiple states across the country, and Debra Galloway was no more in a substantial bargaining position than the average family member admitting a loved one to a long-term care facility. That further, in the same respect, the limitations on damages and claims in the present case are one-sided, oppressive, unconscionable, and therefore, unenforceable. Multiple other South Carolina state courts have found arbitration agreement provisions in long-term care cases to be unenforceable due to one-sided, oppressive terms. See Putman, Whitfield, and Coleman Orders attached Exhibits 14, 15, and 16.

South Carolina law does not favor arbitration of disputes. Simmons v. Benson Hyundai, LLC, 2022 S.C. App. LEXIS 37, 22WL791174 quoting Palmetto Constr. Grp.,

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LLC v. Restoration Specialists, LLC, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021). Severability is frequently not proper for an unconscionable provision in an arbitration clause. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 34, 644 S.E.2d 663, 673 (2007). The parties' intent is the primary factor in determining whether the offending provision is severable. Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002). If the offending provision "pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts," then severance looks more like rewriting the contract than effectuating the parties' intent. Simpson, 373 S.C. at 34, 673 S.E.2d at 673 (quoting Booker v. Robert Half Int'l Inc., 413 F.3d 77, 84-85 (D.C. Cir. 2005)); see also Alexander v. Anthony Intern., LP, 341 F.3d 256, 271 (3rd Cir. 2003)(concluding court "cannot give effect to an agreement to arbitrate afflicted by so much fundamental and pervasive unfairness"). Recognizing South Carolina's policy about arbitration, the Simpson court refused to sever an arbitration agreement's offending provisions and instead invalidated the entire agreement because it contained multiple unconscionable provisions that denied statutory rights and violated established public policy. 373 S.C. at 35, 644 S.E.2d at 674 n. 9.

The previous sections of this Memorandum discuss several items within the Agreement's arbitration and limitation of liability provisions that are unconscionable and inconsistent with South Carolina public policy. The Agreement contains a severability provision but Simpson shows that severability clauses are ineffective if unconscionable provisions permeate the overall arbitration provision. This case is similar to Simpson and the Court should refuse to enforce the entire arbitration, limitation on damages, and waiver provisions rather than attempting to excise the multiple unconscionable items

within the provision. Like Simpson, the Arbitration Agreement contains multiple unconscionable items throughout the agreement including the damages cap. Like Simpson, the Agreement's unconscionable provisions are inconsistent with the state's clear public policy related to long-term care. Therefore, the Arbitration Agreement should be invalidated in full.

Additionally, the unconscionable sections are not severable under Smith v. D.R. Horton, Inc., 417 S.C. 42, 790 S.E.2d 1 (2016). In Smith, the South Carolina Supreme Court, in addressing the lack of the option of severability of the unconscionable provisions, noted that the arbitration agreement and the contract as a whole contained "numerous cross references to one another, intertwining the sub-paragraphs so as to constitute a single provision." In the very same manner, the entirety of these contracts is so intertwined and cross-referenced that it would be impossible to sever the unconscionable provisions alone.

For example, the arbitration provision on page 39 contains unconscionable provisions discussed above. Further, multiple other unconscionable provisions discussed hereinabove exist throughout the Admission Agreement. Waivers of liability and assumption of risk provisions are on page 35 under the section "Assisted Living." More limitation on damages are in the "Limitations of Liability Provision" on page 40. Additional waivers or assumption of risk provisions are included under "Risk Management Process" on page 44, and also under an exhibit titled "Medication Administration Waiver" at page 59.

Additionally, the South Carolina Supreme Court recently affirmed the trial court's ruling that an arbitration agreement was unconscionable and inseverable despite a

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severability clause in the contract. Damico v. Lennar Carolinas, Inc., 2022 S.C.LEXIS 107, 2022 WL 4231032. The Court noted the unconscionable provisions of the agreement and further declined to sever the unconscionable terms from the remainder of the agreement for two reasons. First, doing so would require the Court to "blue pencil the agreement regarding a material term of the contract, a result strongly disfavored in contract disputes. Second, as a matter of policy, we find severing terms from an unconscionable contract of adhesion (in this case an arbitration provision) discourages fair, arm's length transactions." Id. The Court also noted the importance of the fact that it was a contract of adhesion in refusing to sever the unconscionable provisions from the agreement. The Court also noted the public policy considerations in protecting the public from such agreements and that allowing such agreements to stand simply by allowing the Court to sever out those portions would promote sophisticated parties to intentionally insert unconscionable terms that often go unchallenged throughout their contracts, hoping that the courts would step in and rescue the party from their gross overreaches. Id. Similarly, in the present case, a contract of adhesion exists with multiple unconscionable terms intertwined throughout the contract which would apply to the arbitration agreement and would, in essence, both promote the Defendants to continue unconscionable provisions in their agreements and would require the Court to "blue pencil" the agreement.

As a result, there is no doubt that the multiple cross-references and intertwining of the unconscionable provisions and Arbitration Agreement into the contract as a whole make these provisions inseverable and unenforceable. The Court would have to essentially rewrite the entire agreements to sever out the unconscionable provisions.

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IV. The Arbitration Agreement is unenforceable as to the statutory beneficiaries' claims in the wrongful death 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). The alleged Arbitration Agreement with Facility by its own terms is an agreement between "Dominion Clemson, LLC doing business as Dominion Senior Living of Clemson ('Community') located at 100 Pershing Ave., Clemson, SC 29631 (the 'Establishment'), Lindsey Daugherty ('Manager') and Earline Cooley ('Resident')." (Admission Agreement at Exhibit 13, page 28). Therefore, any purported agreement to arbitrate any claims was clearly (by the terms of the contract which was drafted by the Defendants) only on behalf of the Facility and the Responsible Party for Earline Cooley.[1]

However, even if Debra Galloway had agreed to arbitration, she did not have the legal authority to bind the statutory beneficiaries who are not parties to the Arbitration Agreement. The signatories to the agreement are Debra Galloway as Resident's Representative and Executive Director on behalf of Facility. No other parties are parties to this agreement. 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 Exhibits 14, 16, 17, 18, 19, 20, 21, 22, and 23, Putman, Coleman, Young, Royston, Boozer, Joyner, Testerman, Wilson, and Clinkscales Orders.

[1] It should be noted that the Responsible Party named and identified on the first page of the Agreement is not the signatory to the Agreement for Earline Cooley.

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However, while Defendants would like to contend that the agreement covers the statutory beneficiaries' claims, which they do not, the problem with this contention is that Debra Galloway had no authority to waive the statutory beneficiaries' claims.

Defendants may erroneously contend that the South Carolina Supreme Court has held that arbitration agreements are binding as to the wrongful death claims. Defendants may rely on Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014) for this proposition. To the contrary, in a footnote, the Dean Court indicated that a court may not refuse to compel arbitration "simply because a wrongful death claim is involved". However, the Supreme Court has been clear that a court may find a wrongful death claim not covered by an arbitration agreement - not because it is a wrongful death claim, but because of state law contract defenses such as a person(s) not being a party or signatory to the contract. In the present case, the statutory beneficiaries clearly are not parties/signatories to the contract. This is the exact type of basis courts have upheld invalidating an arbitration agreement.

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 [Son] took *in her individual capacity*. The fact that [Son] 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]

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[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 [Son] 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 Debra Galloway 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 may further incorrectly assert other cases hold that the statutory beneficiaries are bound as third-party beneficiaries. The Defendants may 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 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. Plaintiff's claim arises in tort, not based on a contract. Weaver v. Brookdale Senior Living, Inc., 431 S.C. 223, 847 S.E.2d 268 (Ct. App. 2020).

Defendants insist that Earline Cooley had the power to waive the right to a jury trial on a claim that did not exist when the Arbitration Agreement was presented but never belonged to her and covered injuries suffered exclusively by other people. Wilson v. Willis, 926 S.C. 326, 827 S.E.2d 167 (2019), provides the specific times when a contract may be enforced against a non-party and the Defendants would have the burden of proving each of the elements of one of those instances where such a contract may be

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enforced against a non-party. Defendants cannot prove these elements existed with regards to this specific case.

The statutory beneficiaries' claim is much more akin to the claims of the non-signatory Plaintiffs in Wilson v. Willis, 926 S.C. 326, 827 S.E.2d 167 (2019), 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 Earline Cooley 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)."

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).

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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 24, Boyle Order. Further, at least one other South Carolina court judge has come to the same conclusion. See Wilson v. Amisub Order at Exhibit 25. These analyses confirm that the wrongful death claimants have separate and distinct claims apart from that of the survival action. As such, Debra Galloway or Earline Cooley 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 agreement with Facility were Debra Galloway as "Resident's Representative" and Lindsey Daugherty, Executive Director, for "Dominion Clemson, LLC dba Dominion Senior Living at Patrick Square". Therefore, the only parties executing this Agreement were Debra Galloway purportedly on behalf of Earline Cooley and an employee as an agent for Facility.

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

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> general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third-party are appropriately subjected 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 Son against contractor was subject to repair contract's arbitration clause because Son, 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 contact-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 be 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, l54 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).

Defendants are left to argue the wrongful death claim actually belongs to Earline Cooley's estate rather than the statutorily designated beneficiaries. However, this argument incorrectly lumps together the wrongful death claims and the survival of tort claims Earline Cooley had against Defendants at the time of her death. The differences with these claims begin with the statutes themselves.

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The wrongful death claims are separate claims apart from the Earline Cooley'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 Earline Cooley, 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). Damages are paid to these beneficiaries because a wrongful death claim is directed at their losses suffered as a result of Earline Cooley's absence. Scott v. Porter, 340 S.C. 158, 168, 530 S.E.2d 389, 394 (Ct. App. 2000)(citing F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts 610 (2d ed 1997). In contrast, the legislature positions the survival statute in a completely different code chapter. The wrongful death claim is a distinct claim

warranting its own designation (Chapter 51). The survival statute is classified within an existing chapter (Chapter 5) identifying the proper "parties" for pursuing legal claims.

The wrongful death claim is a separate claim from 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).

In Grainger v. Greenville S&A Railway Co., the South Carolina Supreme Court traced the divergent tracks that wrongful death and survival claims have taken over their development. Grainger v. Greenville S&A Railway Co., 101 S.C. 399, 85 S.E. 968 (915). In that case, the trial court had dismissed the survival action because the decedent's administrator (equivalent to the modern "Personal Representative") had previously recovered on a wrongful death claim. Id. at 968. When the legislature recognized this abnormality, it responded by creating the predecessor to the modern survival statute. Id. citing 1912 Code §3693. Grainger held this legislative history conclusively established wrongful death and survival actions are distinct and independent. Id. The claims are distinct because "the beneficiaries, the cause of action, the measure of damages, are all different." Grainger 85 S.E. at 969. Our courts have

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further held that judgement in a wrongful death claim does not have preclusive effect on survival claims. 229 S.C. at 611-12 93 S.E.2d at 914. Further, the law is clear that in wrongful death claims, the personal representative "functions under two separate and distinct trusteeships". Id. In other words, while it is the personal representative's name in the caption for the wrongful death claim, "it is clear…the real parties to the action were the beneficiaries." Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539, 541 (1928).

Further, as early as 1907, our Supreme Court recognized a wrongful death action is not the survival of an action which the deceased had in his lifetime but is a "new cause of action". Osteen v. Southern Ry., Carolina Division, 76 S.C. 368, 57 S.E. 196, 200 (1907). Claussen held a wrongful death claim is "not a continuation" of any claim the decedent had before her death. 145 S.E. at 540. A wrongful death claim is "independent" of claims the decedent had during her life and "wholly different" than any other claim available at her death. Wellman v. Bethea, 243 F. 222 (E.D.S.C. 1917). Our court continues to recognize the distinctiveness of the two actions and that the wrongful death statute created a new cause of action that did not exist at common law and only accrues at the decedent's death as the wrongful death claim is subject to its own statute of limitations. Weaver v. Lentz, 348 S.C. 672, 678, 561 S.E.2d 360, 363 (Ct. App. 2002).

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

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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. l988): "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.

Facility has never asserted that the claims here are completely barred or that Earline Cooley'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 Facility asserts is that Earline Cooley may not bring a claim in court but must pursue her 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

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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"). Additionally, the legal provisions holding that an individual may prevent a wrongful death claim by ignoring or settling a personal injury suit during his life do not mean the individual may control the manner in which the wrongful death claim will be resolved should she *choose to leave it intact*.

The Pennsylvania Superior Court 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 and in this case, would include the waiver of jury trial as well.

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

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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

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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.

Because the statutory beneficiaries have separate and independent claims and were not covered by the scope of this agreement nor were parties to this agreement, the Arbitration Agreement drafted by Facility cannot reach the claims of the wrongful death statutory beneficiaries. Many other South Carolina courts agree as well. See Putman, Coleman, Young, Boozer, Joyner, Testerman, Wilson, and Clinkscales Orders at Exhibits 14, 16, 17, 19, 20, 21, 22, and 23.

V. The Corporate Defendants, Dominion Senior Living, Dominion Clemson, II, Dominion Management Group, and Dominion Group, are not parties to the alleged Arbitration Agreement, and therefore, any alleged Arbitration Agreement is not enforceable as to those Defendants.

As previously noted hereinabove, the Arbitration Agreement is incorporated within the Resident Admission Agreement. See Admission Agreement at Exhibit 13. The Admission Agreement states that the agreement is "made by and between Dominion

Clemson, LLC doing business as Dominion Senior Living of Clemson ('Community'), Lindsey Daugherty ('Manager') and Earline Cooley ('Resident')." See Exhibit 13, page 28. The parties to the agreement do not include Facility Co-Defendants Dominion Senior Living, Dominion Clemson, II, Dominion Management Group, and Dominion Group (hereinafter collectively "Corporate Defendants"). That further, the only signatories to the Arbitration Agreement are Debra Galloway as Resident's Representative and the Executive Director of the Facility. See Exhibit 13, p. 47. As a result, Corporate Defendants are not parties to the Agreement or included therein.

South Carolina law is very clear in that Facility's Co-Defendants are not third-party beneficiaries to either of these contracts. South Carolina courts have held that third-party non-signatories should only be included in arbitration agreements in exceptionally limited circumstances. Wilson v. Willis, 926 S.C. 326, 827 S.E.2d 167 (2019). Further, "South Carolina contract law carries a presumption that an individual who is not a party to a contract lacks privity to enforce it". Trancik v. USAA Insurance Company, 354 S.C. 549, 553, 581 S.E.2d 858, 861 (Ct. App. 2003). "It is to be observed that the presumption is that the parties contract for their own benefit and not for that of others not parties to the contract." Ancrum v. Camden Water, Light and Ice Company, 82 S.C. 284, 295, 64 S.E. 151, 155 (1909). The rule of contract interpretation is to ascertain and give legal effect to the intentions of the parties as determined by the contract language. Schulmeyer v. State Farm Fire and Casualty Company, 353 S.C. 492, 495, 579 S.E.2d 132, 134 (2003). Generally, courts do not have the authority to alter a contract by construction or make new contracts for the parties and words cannot be read into a contract which give an intent not expressed within the contract. Gilstrap v.

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Culpepper, 283 S.C. 83, 86, 320 S.E.2d 445, 447 (1984). Only if a contract is made for the benefit of the third person and the contracting parties intended to create a direct, rather than incidental or consequential benefit to the third person, can the third person make a claim based on the contract. Windsor Green Owners Association v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004). The Agreement in no way references the benefits or rights of such third parties and does not even contemplate their interests. As a result, these third parties should not be able to compel arbitration.

CONCLUSION

The Arbitration Agreement is unenforceable because:

1) The Defendants waived their right to compel arbitration;
2) Earline Cooley's signatory did not possess adequate authority to execute the agreement; and
3) The agreement is unconscionable.

Further, if for some reason the Court found the agreement enforceable, then it should not apply to either the statutory beneficiaries' wrongful death claim nor include the Corporate Defendants. As a result, Defendants' motions should be denied.

[SIGNATURE ON NEXT PAGE]

Respectfully submitted,

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

s/Matthew W. Christian
Matthew W. Christian
S.C. Bar No.: 70516
Attorney for Plaintiff

Greenville, South Carolina
Date: October 18, 2022

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF PICKENS	)	C.A. No.: 2021-CP-39-01127 & 2021-CP-39-01128
	)	
Deonda Weldon, Individually and as Personal Representative of the Estate of Earline Cooley,	)	
Plaintiff,	)	**AFFIDAVIT OF DEONDA WELDON**
v.	)	
Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square, Dominion Senior Living, LLC, Dominion Clemson, II, LLC, Dominion Management Group, LLC, and Dominion Group, LLC,	)	
Defendant(s).	)	

PERSONALLY appeared before me, the undersigned, who being duly sworn, hereby states and attests that the following is true and correct under penalties of perjury:

1. I was the principal and primary Durable Power of Attorney for my mother, Earline Cooley at the time of her admission to Dominion Senior Living at Patrick Square.

2. That had the Defendants presented or provided to me the Admission Agreement, I would have been designated and been responsible for reviewing and considering the execution of same.

3. That further, had this been presented to me and had I been aware of a potential Arbitration Agreement, I would not have agreed to an Arbitration Agreement or any limitations on damages.

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1

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4. That further, my sister, Robin Elliott was designated as the alternate Power of Attorney for my mother, and there was no reason that she was unwilling or unable to review the Admission Agreement for execution.

5. That further, at the time of my mother's death, my mother was not married and her only three children were myself, Debra Galloway, and Robin Elliott.

6. That further, had I been aware that Debra Galloway was signing an Admission Agreement which contained a limitation on damages and an Arbitration Agreement, I would have advised her not to sign same.

7. Finally, had I been aware that my sister was signing the Admission Agreement containing an Arbitration provision with limitation on damages, I would have advised her not to execute same.

8. At the time of my mother's admission to Dominion Senior Living at Patrick Square, she was not competent or legally capable of understanding the Admission Agreement, Arbitration Agreement, or that Debra Galloway was signing the documents on her behalf.

Date: 8/19/22

Deonda Weldon

Deonda Weldon

SWORN to and subscribed before me this

19th day of August, 2022

Amanda Venable

NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: 1-25-27

AMANDA VENABLE
NOTARY PUBLIC
STATE OF SOUTH CAROLINA
My Commission Expires
January 25, 2027

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF PICKENS	)	C.A. No.: 2021-CP-39-01127 & 2021-CP-39-01128
	)	
Deonda Weldon, Individually and as Personal Representative of the Estate of Earline Cooley,	)	
	)	**AFFIDAVIT OF DEBRA GALLOWAY**
Plaintiff,	)	
	)	
v.	)	
	)	
Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square, Dominion Senior Living, LLC, Dominion Clemson, II, LLC, Dominion Management Group, LLC, and Dominion Group, LLC,	)	
	)	
Defendant(s).	)	

PERSONALLY appeared before me, the undersigned, who being duly sworn, hereby states and attests that the following is true and correct under penalties of perjury:

1. That I was listed as the second alternate Power of Attorney for my mother only if my sister, Deonda Weldon, was unable to serve, and then subsequently, my other sister was unwilling or unable to serve.

2. That at the time of my mother's admission to Dominion Senior Living at Patrick Square, the Defendants could have provided the Admission Agreement, which I have now learned contained an Arbitration Agreement and a limitation on damages, to either one of my other sisters for execution.

3. That despite the General Durable Power of Attorney not granting me the authority to be my mother's Power of Attorney unless both of my sisters were unwilling and unable to serve, the Defendants requested that I execute the Admission Agreement.

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PLAINTIFF'S EXHIBIT
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4. That at the time of the execution of the Admission Agreement, I was unaware that there was an arbitration clause or a limitation on damages contained therein.

5. That further, the Admission Agreement and process was hurriedly provided to me to sign in a rush process with very little to no time to review the contents in the agreements.

6. That at the time of the execution of the Admission Agreement, no one explained the contents of the Arbitration Agreement or limitation on damages to me.

7. That had I been aware of the impact of the Arbitration Agreement and limitation on damages, I would have refused to sign the agreements.

8. That at the time I signed the document which I now know to be an Arbitration Agreement, at the request of the facility representative, I provided a copy of the applicable Durable Power of Attorney.

9. That further, this was an extremely emotional time for my family, and we were under significant stress and duress in trying to obtain placement in an assisted living facility for my mother with very few options.

10. That at no time prior to the execution of the Admission Agreement did either one of my sisters state that they were unwilling or unable to serve as my mother's Power of Attorney.

11. That further, the agreements were presented to me on a take it or leave it basis wherein I was led to believe that I had to sign the agreement for my mother to be admitted to the facility.

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12. That my mother would have been unaware due to her advanced age, mental state, and the fact that no one explained to her that I was signing an Arbitration Agreement and limitation on damages on her behalf.

Date: August 19, 2022

Debra Galloway
Debra Galloway

SWORN to and subscribed before me this
19th day of August, 2022
Amanda Venable
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 1/25/27

AMANDA VENABLE
NOTARY PUBLIC
STATE OF SOUTH CAROLINA
My Commission Expires January 25, 2027

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CHRISTIAN & CHRISTIAN

ATTORNEYS AT LAW

Joshua D. Christian | W. Harold Christian, Jr. | Matthew W. Christian

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1007 E. Washington St
Greenville, SC 29601
PO Box 332 | Greenville, SC 29602
Phone: 864-232-7363
Fax: 864-370-3731
cclawfirm.com

June 11, 2020

Dominion Senior Living at Patrick Square
100 Pershing Avenue
Clemson, SC 29631

Re: Patient: Earline Cooley
DOB: [redacted]

Dear Sir/Madam:

Please find enclosed a HIPAA compliant medical authorization for the release of the medical records for Earline Cooley. If you should have any questions, please do not hesitate to contact us.

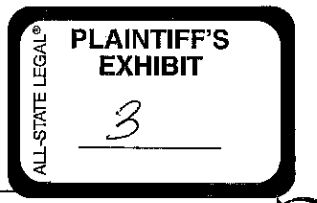
With kindest regards, I am

Sincerely,

CHRISTIAN & CHRISTIAN, LLC

Amanda Weatherford
Paralegal

/aw
enclosures



AUTHORIZATION FOR RELEASE OF MEDICAL INFORMATION
(HIPAA Compliant)

TO: Name & Address of Covered Entity authorized to release information:

Provider Name: Dominion Senior Living at Patrick Square

Address 100 Pershing Avenue

City, State, Zip Clemson, SC 29631

Patient/Client Information

Name: Earline S. Cooley

Address 304 East 2nd Avenue

City, State, Zip Easley, SC 29640

Date of Birth [redacted] Social Security No.: [redacted]

I authorize and request the below facility and the physician(s) who attended the above named individual while under the care of said medical provider to furnish medical information to:

Attn: Matthew Christian
CHRISTIAN & CHRISTIAN
Attorneys at Law
Post Office Box 332
Greenville, South Carolina 29602

Phone: 864.232.7363
Facsimile: 864.370.3731

Purpose of Disclosure: To aid in the investigation of a legal claim.

****IF THE COST FOR MEDICAL RECORDS EXCEEDS $50.00, PLEASE CONTACT OUR OFFICE BEFORE SENDING.****

Description Of Information To Be Disclosed: (including but not limited to)

[x] Entire Record

[ ] Other

Dates of Service: From All to All

Date of Expiration: 6/11/2022 or until final settlement or judgment is reached.

x I authorize release of information related to STDs, AIDS (Acquired Immunodeficiency Syndrome) or HIV (Human Immunodeficiency Virus) infection, psychiatric care and/or psychological assessment, and treatment for alcohol and/or drug abuse.

Rights of the Patient

I understand that my treatment will not be conditioned on signing this authorization and that I have the right to refuse to sign this authorization. *I understand that information disclosed as a result of this authorization may be subject to redisclosure by the recipient and may no longer be protected by federal or state law.* I understand I have the right to revoke this authorization by sending a written notice to both parties, and that a revocation is not effective if the information has already been sued or disclosed but will be effective going forward. I understand that I have the right to inspect or copy the protected health information as described in this document as provided in CFR 164.524. In 164.508(c)(2)(ii) The covered entity may not prevent my ability to receive treatment, payment, enrollment or eligibility for benefits on whether the individual signs the Authorization when the prohibition on conditioning of Authorizations applies; or the consequences to the individual of refusing to sign the Authorization when the covered entity can prevent the ability to receive treatment, enrollment in the health plan, or eligibility for benefits on failure to obtain such Authorization. If I have questions about disclosure of my health information, I can contact the medical provider. I agree that a copy of this may be provided and used as an original. I have received a copy of the Notice of Privacy Practices.

June 11, 2020
Date

Signature of Patient or Personal Representative

Matthew W. Christian

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DATE AUG - 1 2014
CERTIFIED TO BE A TRUE AND CORRECT COPY
OF DOCUMENT ON FILE IN THIS OFFICE
Timothy L. Hamby
REGISTER OF DEEDS, GREENVILLE COUNTY

BOOK 2185 PAGE 732

FILED
GREENVILLE, SC
2006 JAN 19 P 3:42
REGISTER OF DEEDS

DURABLE POWER OF ATTORNEY OF EARLINE S. COOLEY

Introductory Provision. I, **EARLINE S. COOLEY**, as principal (the "Principal") have this day appointed **DEONDA MICHELLE COOLEY WELDON** to serve as my agent ("Agent") and to exercise the powers and discretions set forth below. If **DEONDA MICHELLE COOLEY WELDON** shall be unable or unwilling or unavailable to serve or to continue to serve, then I appoint **PHYLLIS ROBIN COOLEY ELLIOTT** as substitute or successor Agent to serve with the same powers and discretions as set forth below. If **PHYLLIS ROBIN COOLEY ELLIOTT** shall be unable or unwilling or unavailable to serve or to continue to serve, then I appoint **DEBRA ALISON COOLEY GALLOWAY** as substitute or successor Agent to serve with the same powers and discretions as set forth below.

Statement of Intent to Create Durable Power of Attorney Under State Statute. By this instrument I intend to create a Durable Power of Attorney under South Carolina law.

THIS POWER OF ATTORNEY SHALL NOT BE AFFECTED BY ANY PHYSICAL DISABILITY OR MENTAL INCOMPETENCE WHICH RENDERS ME INCAPABLE OF MANAGING MY OWN ESTATE.

Revocation of Prior Powers of Attorney. I hereby revoke all powers of attorney, general and/or limited, heretofore created by me as principal and terminate all agency relationships created thereunder, including those of all successor Agents named therein, if any.

Delegation of All Powers Lawful to Delegate. I herewith delegate to my Agent each and every power that I may lawfully delegate, subject only to those limitations specifically set forth in this instrument, giving and granting unto my Agent full power and authority to do and perform all and every act, deed, matter, and things whatsoever in and about my estate, property, and affairs as fully and effectually to all intents and purposes as I might or could do in my own proper person if personally present, the specially enumerated powers herein being in aid and exemplification of the full and complete and general power herein granted and not in limitation or definition thereof, and I hereby ratify all that my Agent shall lawfully do or cause to be done by virtue of these presents.

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ARTICLE I

ASSET POWERS

Introduction. My Agent is authorized in my Agent's sole and absolute discretion from time to time and at any time, with respect to any and all of my property and interests in property, real, personal, intangible and mixed, as follows:

(1) **Power to Sell**. To sell any and every kind of property that I may own now or in the future, real, personal, intangible and/or mixed, including without being limited to contingent and expectant interests, marital rights and any rights of survivorship incident to joint tenancy or tenancy by the entirety, on such terms and conditions and security as my Agent shall deem appropriate and to grant options with respect to sales thereof, to make such disposition of the proceeds of such sale or sales, including expending such proceeds for my benefit, as my Agent shall deem appropriate.

(2) **Power to Buy**. To buy every kind of property, real, personal, intangible and/or mixed, on such terms and conditions as my Agent shall deem appropriate; to obtain options with respect to such purchases; to arrange for appropriate disposition, use, safekeeping and/or insuring of any such property.

(3) **Power to Invest**. To invest and reinvest all or any part of my property in any property or interests, including undivided interests, in property, real, personal, intangible and/or mixed, wherever located, including without being limited to securities of all kinds, stocks of corporations regardless of class, interests in limited partnerships, real estate or any interest in real estate whether or not productive at the time of investment, commodities contracts of all kinds, interests in trusts, investment trusts, whether of the open and/or closed fund types, and participation in common, collective or pooled trust funds or annuity contracts without being limited by any statute or rule of law concerning investments by fiduciaries; to sell, including short sales, and terminate any investments whether made by me or my Agent; to establish, utilize and terminate savings and money market accounts with financial institutions of all kinds; to establish, utilize and terminate accounts with securities brokers and in such accounts, to make short sales and to buy on margin and, for such purposes, my Agent may pledge any securities so held or purchased with such brokers as security for loans and advances made to the account.; to establish, utilize and terminate agency accounts with corporate fiduciaries; to employ, compensate and terminate the services of financial and investment advisors and consultants.

(4) **Power to Manage Real Property**. With respect to real property, including but not limited to any real property I may hereafter acquire or receive and my personal residence, my Agent is authorized to lease, sublease, release; to eject and remove tenants or other persons from, and recover possession of by all lawful means; to accept real property as a gift or as security for a loan; to collect, sue for, receive and receipt for rents and profits and to conserve, invest or utilize any and all of such rents, profits and receipts for the purposes described in this paragraph; to do any act of

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management and conservation, to pay, compromise, or to contest tax assessments and to apply for refunds in connection therewith; to employ laborers; to subdivide, develop, dedicate to public use without consideration, and/or dedicate easements over; to maintain, protect, repair, preserve, insure, build on, demolish, alter or improve all or any part thereof; to obtain or vacate plats and adjust boundaries; to adjust differences in valuation on exchange or partition by giving or receiving consideration; to release or partially release real property from a lien; to sell and to buy real property.

(5) **Power to Manage Personal Property**. With respect to personal property; to lease, sublease, and release; to recover possession of by all lawful means; to collect, sue for, receive and receipt for rents and profits therefrom; to maintain, protect, repair, preserve, insure, alter or improve all or any part thereof; to sell and to buy the same or other personal property

(6) **Power to Exercise Rights in Securities**. To exercise all rights with respect to corporate securities which I now own or may hereafter acquire, including the right to sell, grant security interests in and to buy the same or different securities; to establish, utilize and terminate brokerage accounts, including margin accounts; to make such payments as my Agent deems necessary, appropriate, incidental or convenient to the owning and holding of such securities; to receive, retain, expend for my benefit, invest and reinvest or make such disposition of as my Agent shall deem appropriate all additional securities, cash or property, including the proceeds from the sales of my securities, to which I may be or become entitled by reason of my ownership of any securities; to vote at all meetings of security holders, regular or special.

(7) **Power to Demand and Receive**. To demand, arbitrate, settle, sue for, collect, receive, deposit, expend for my benefit, reinvest or make such other appropriate disposition of as my Agent deems appropriate, all cash, rights to the payment of cash, property, real, personal, intangible and/or mixed, debts, dues rights, accounts, legacies, bequests, devises, dividends, annuities, rights and/or benefits to which I am now or may in the future become entitled, regardless of the identity of the individual or public or private entity involved, including but not limited to benefits payable to or for my benefit by any governmental agency or body, such as Supplemental Social Security (SSI), Medicaid, Medicare, and Social Security Disability Insurance (SSDI) and for the purposes of receiving Social Security benefits, my Agent is herewith appointed my "Representative Payee"; to utilize all lawful means and methods to recover such assets and/or rights, qualify me for such benefits and claim such benefits on my behalf, and to compromise claims and grant discharges in regard to the matters described herein; to utilize all lawful means and methods to recover such assets and/or rights, qualify me for such benefits and claim such benefits on my behalf. The authority herein granted shall include but not be limited to converting my assets into assets that do not disqualify me from receiving such benefits or divesting me of such assets. In any divestment actions or asset conversions, I direct that my Agent, to the extent reasonably possible, avoid disrupting the dispositive provisions of any estate plan of mine known to my Agent whether or not such estate plan is embodied in a will, a trust, non-probate property, or otherwise. If it is necessary to disrupt such plan, then my Agent is directed to use my

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Agent's best efforts to restore such plan as and when the opportunity to do so is available to my Agent. If a transfer of cash by my Agent is made to a pecuniary legatee under my will, my Agent shall ensure that such transfer is deemed a satisfaction of such legacy, pro tanto.

(8) **Power to Exercise Elective Share Rights.** To elect to take against any will and conveyances of my deceased spouse and/or any other person, if appropriate; to retain any property which I have the right to elect to retain; to file petitions pertaining to the election, including petitions to extend the time for electing and petitions for orders, decrees and judgments; and to take all other actions that my Agent deems appropriate in order to effectuate the election; provided, however, that if any such actions by my Agent require the approval of any court, my Agent is authorized to seek such approval.

(9) **Power with Respect to Employment Benefits.** To create and contribute to an employee benefit plan, including a plan for a self-employed individual, for my benefit; to elect retirement on my behalf; to select any payment option under any IRA or employee benefit plan in which I am a participant, including plans for self-employed individuals, or to change options I have selected; to make voluntary contributions to such plans; to make "roll-overs" of plan benefits into other retirement plans; to apply for and receive payments and benefits; to waive rights given to nonemployee spouses under state or federal law.

(10) **Power with Respect to Bank Accounts.** To establish accounts of all kinds, including checking and savings, for me with financial institutions of any kinds, including but not limited to banks and thrift institutions; to modify, terminate, make deposits to and write checks on or make withdrawals from and grant security interests in all accounts in my name or with respect to which I am an authorized signatory, except accounts held by me in a fiduciary capacity, whether or not any such account was established by me or for me by my Agent, to negotiate, endorse or transfer any checks or other instruments with respect to any such accounts; to contract for any services rendered by any bank or financial institution, and to execute, on my behalf as principal, agency or power of attorney forms furnished by any bank with respect to accounts with such bank, appointing as my Agent or any other person or persons.

(12) **Power with Respect to Safe-Deposit Boxes.** To contract with any institution for the maintenance of a safe-deposit box in my name; to have access to all safe-deposit boxes in my name or with respect to which I am an authorized signatory, whether or not the contract for such safe-deposit box was executed by me, either alone or jointly with others, or by my Agent in my name; to add to and remove from the contents of any such safe deposit box and to terminate any and all contracts for such boxes. In addition, I do hereby authorize and direct my Agent as Attorney-in-Fact under this durable power of attorney, to have access at any time or times to any safe deposit box rented by me, wherever located, in order to remove the original durable power of attorney; and any institution in which any such safe deposit box may be located is not required to make any inquiry, and shall not incur any liability to me or my estate as a

result of permitting the acting Agent under this durable power of attorney to exercise this power. This power is exercisable without: (i) any contact with or notice to me, my spouse, and/or any interested persons to my estate; (ii) any prior court order or authorization; (iii) any knowledge of or any prior determination as to my mental or physical capacity or incapacity; (iv) any knowledge as to my whereabouts regardless whether my whereabouts are known or unknown; or (v) any inquiry.

(13) **Power with Respect to Legal and Other Actions**. To institute, supervise, prosecute, defend, intervene in, abandon, compromise, arbitrate, settle, dismiss, and appeal from any and all legal, equitable, judicial or administrative hearings, actions, suits, proceedings, attachments, arrests or distresses, involving me in any way, including but not limited to claims by or against me arising out of property damages or personal injuries suffered by or caused by me or under such circumstances that the loss resulting therefrom will or may be imposed on me and otherwise engage in litigation involving me, my property or any interest of mine, including any property or interest or person for which or whom I have or may have any responsibility.

(14) **Power to Disclaim, Renounce, Release, or Abandon Property Interests**. To renounce and disclaim any property or interest in property or powers to which for any reason and by any means I may become entitled, whether by gift, testate or intestate succession; to release or abandon any property or interest in property or powers which I may now or hereafter own, including any interests in or rights over trusts, including the right to alter, amend, revoke or terminate, and to exercise any right to claim an elective share in any estate or under any will. In exercising such discretion, my Agent shall consider any reduction in estate or inheritance taxes that may be due on my death, and the effect of such renunciation or disclaimer on persons interested in my estate and persons who would receive the renounced or disclaimed property; provided, however, that my Agent shall make no disclaimer that is expressly prohibited by other provisions of this instrument.

(15) **Power with Respect to Insurance**. To purchase, maintain, surrender, collect, or cancel (a) life insurance or annuities of any kind on my life or the life of any one in whom I have an insurable interest, (b) liability insurance protecting me and my estate against third party claims, (c) hospital insurance, medical insurance, Medicare supplement insurance, custodial care insurance, and disability income insurance for me or any of my dependents, and (d) casualty insurance insuring assets of mine against loss or damage due to fire, theft or other commonly insured risk; to pay all insurance premiums, to select any options under such policies; to increase coverage under any such policy, to borrow against any such policy, to pursue all insurance claims on my behalf, to adjust insurance losses, and the foregoing powers shall apply to private and public plans, including but not limited to Medicare, Medicaid, SSI and Worker's Compensation.

(16) **Power with Respect to Taxes**. To represent me in all tax matters; to prepare, sign, and file federal, state, and/or local income, gift and other tax returns of all kinds, including, where appropriate, joint returns, FICA returns, payroll tax returns,

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claims for refunds, requests for extensions of time to file returns and/or pay taxes, extensions and waivers of applicable periods of limitation, protests and petitions to administrative agencies or courts, including the tax court, regarding tax matters, and any and all other tax related documents, including but not limited to consents and agreements under Section 2032A of the Internal Revenue Code or any successor section thereto and consents to split gifts, closing agreements and any power of attorney form required by the Internal Revenue Service and/or any state and/or local taxing authority with respect to any tax year; to pay taxes due, collect and make such disposition of refunds as my Agent shall deem appropriate, post bonds, receive confidential information and contest deficiencies determined by the Internal Revenue Service and/or any state and/or local taxing authority; to exercise any elections I may have under federal, state or local tax law; to allocate any generation-skipping tax exemption to which I am entitled, and generally to represent me or obtain professional representation for me in all tax matters and proceedings of all kinds and for all periods before all officers of the Internal Revenue Service and state and local authorities and in any and all courts; to engage, compensate and discharge attorneys, accountants and other tax and financial advisers and consultants to represent and/or assist me in connection with any and all tax matters involving or in any way related to me or any property in which I have or may have an interest or responsibility; and on my behalf to execute IRS Form 2848 and appoint my Agent or any suitable person selected by my Agent as my representative before the Internal Revenue Service.

(17) **Power to Make Gifts**. Having adopted and implemented a plan of making gifts to my children and others in the past, my Agent is specifically empowered to make gifts to herself and other of my children and my issue in order to take maximum advantage of any provisions of state and/or federal tax laws which allows for the making of gifts without any resulting gift tax. This Power of Attorney shall enable my Agent to take full advantage of these laws including the utilization of the annual exclusion and the exemption equivalent at her discretion. Provided however, my children are to treated equally in the making of these gifts so that no one child will receive more than another. This equality provision shall not apply to my issue other than children. Furthermore this power to make gifts includes the power to create trusts for the benefit of a donee into which a gift authorized hereunder may be placed and administered if my Agent in her/his discretion deems it advisable for the benefit of a donee. No person, firm or business relying upon this Power of Attorney shall have any duty to see to the application of the proceeds or items of value.

ARTICLE II

INCIDENTAL POWERS

Introduction. In connection with the exercise of the powers and discretions herein described, my Agent is fully authorized and empowered to perform any acts and things and to execute and deliver any documents, instruments, affidavits, certificates, and papers necessary or appropriate, to such exercise or exercises, including without limitation the following:

(1) **Resort to Courts**. To seek on my behalf and at my expense:

(a) a declaratory judgment from any court of competent jurisdiction interpreting the validity of this instrument and any of the acts authorized by this instrument, but such declaratory judgment shall not be necessary in order for my Agent to perform any act authorized by this instrument.

(b) a mandatory injunction requiring compliance with my Agent's instructions by any person, organization, corporation, or other entity obligated to comply with instructions given by me.

(c) actual and punitive damages and the recoverable costs, fees and expenses of such litigation, against any person, organization, corporation or other entity obligated to comply with instructions given by me who negligently or willfully fails or refuses to follow such instructions.

(2) **Hire and Fire - All Personnel**. To employ, compensate and discharge such domestic, health care and professional personnel including lawyers, accountants, doctors, nurses, brokers, financial consultants, advisors, consultants, companions, servants and employees as my Agent deems appropriate.

(3) **Sign Documents and Incur Costs in Implementing the Agent's Instructions**. To sign, execute, endorse, seal, acknowledge, deliver and file or record instruments and documents, including but not limited to contracts, agreements and conveyances of real and personal property, instruments granting and perfecting security instruments and obligations, orders for the payment of money, receipts, releases, waivers, elections, vouchers, consents, satisfactions and certificates. In addition, any Agent of mine who has the authority to incur costs on my behalf may render the bills for such costs to any Agent of mine who has been granted the authority to pay such costs or to any trustee of any revocable living trust of mine, or guardian, committee or conservator who has authority to pay such costs I request that costs be paid promptly. Any recipient thereof (i.e. my Agent with authority to pay or my trustee) shall promptly pay such costs.

(4) **Payment of Medical Expenses**. My Agent is directed to pay, or cause to be paid, all bills incurred and presented by any agent representing me under a Durable Power of Attorney for Health Care.

(5) **Borrow, Spend, Liquidate, Secure**. To expend my funds and to liquidate my property or to borrow money to produce such funds and to secure any such borrowings with security interests in any property, real, personal, or intangible that I may now or hereafter own.

(6) **Power to Do Miscellaneous Acts**. To open, read, respond to and redirect my mail; to represent me before the U.S. Postal Service in all matters relating to mail service; to establish, cancel, continue or initiate my membership in organizations and associations of all kinds, to take and give or deny custody of all of my important

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documents, including but not limited to my will, codicils, trust agreements, deeds, leases, life insurance policies, contracts and securities and, bearing in mind the confidential nature of such documents, to disclose or refuse to disclose such documents; to obtain and release or deny information or records of all kinds relating to me, to any interest of mine or to any person for whom I am responsible; to house or provide for housing, support and maintenance of any animals or other living creatures that I may own and to contract for and pay the expenses of their proper veterinary care and treatment; and if the care and maintenance of such animals or other living creatures shall become unreasonably expensive or burdensome in my Agent's opinion, to irrevocably transfer such animals to some person or persons willing to care for and maintain them.

ARTICLE III

THIRD PARTY RELIANCE

Introduction. For the purpose of inducing all persons, organizations, corporations and entities including but not limited to any physician, hospital, nursing home, health care provider, bank, broker, custodian, insurer, lender, transfer agent, taxing authority, governmental agency, or other party (all of whom will be referred to in this Article as a "Person") to act in accordance with the instructions of my Agent as authorized in this instrument, I hereby represent, warrant and agree that:

(1) **Third Party Liability for Revocation and Amendments**. If this instrument is revoked or amended for any reason, I, my estate, and my personal representative will hold any person, organization, corporation or entity, hereinafter referred to in the aggregate as "Person", harmless from any loss suffered, or liability incurred by such Person in acting in accordance with the instructions of my Agent acting under this instrument prior to the receipt by such Person of actual written notice of any such revocation or amendment.

(2) **Agent Has Power to Act Alone**. The powers conferred on my Agent by this instrument may be exercised by my Agent alone and my Agent's signature or act under the authority granted in this instrument may be accepted by persons as fully authorized by me and with the same force and effect as if I were personally present, competent, and acting on my own behalf. Consequently, all acts lawfully done by my Agent hereunder are done with my consent and shall have the same validity and effect as if I were personally present and personally exercised the powers myself, and shall inure to the benefit of and bind me and my estate and my personal representative.

(3) **No Liability to Third Parties for Reliance on Agent**. No Person who relies in good faith on the authority of my Agent under this instrument shall incur any liability to me, my estate or my personal representative. In addition, no Person who acts in reliance on any representations my Agent may make as to (a) the fact that my Agent's powers are then in effect, (b) the scope of my Agent's authority granted under this instrument, (c) my competency at the time this instrument is executed, (d) the fact that this instrument has not been revoked or amended, or (e) the fact that my Agent

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continues to serve as my Agent shall incur any liability to me, my estate or my personal representative for permitting my Agent to exercise any such authority, nor shall any Person who deals with my Agent be responsible to determine or insure the proper application of funds or property by my Agent. Any party dealing with any Person named as Agent (including any Person named as an Alternate Agent hereunder) may rely on as conclusively correct an affidavit or certificate of such Agent that (i) my Agent's powers are then in effect, (ii) the action my Agent desires to take is within the scope of my Agent's authority granted under this instrument, (iii) I was competent at the time this instrument was executed, (iv) this instrument has not been revoked, and/or (v) my Agent continues to serve as my Agent.

(4) **Alternate Agent May Give Affidavit or Certificate That He or She Currently Serves.** Any party dealing with any person named as Alternate Agent hereunder may rely on as conclusively correct an affidavit or certificate under penalties of perjury of such Alternate Agent that those persons named as prior Agents are no longer serving.

(5) **Affidavits or Certificates Given by Agent Bind Principal.** No Person who relies on any affidavit or certificate under penalties of perjury that this instrument specifically authorizes my Agent to execute and deliver to such person shall incur any liability to me, my estate or my personal representative for permitting my Agent to exercise any such authority, nor shall any Person who deals with my Agent be responsible to determine or insure the proper application of funds or property by my Agent.

(6) **Authorization to Release Information to Agent.** All Persons from whom my Agent may request information regarding me, my personal or financial affairs or any information which I am entitled to receive are hereby authorized to provide such information to my Agent without limitation and are released from any legal liability whatsoever to me, my estate or my personal representative for complying with my Agent's requests.

(7) **Authorization to Release Medical Information.** I hereby authorize all physicians and psychiatrists who have treated me, and all other providers of health care, including hospitals, to release to my Agent all information or photocopies of any records which my Agent may request. If I am incapacitated at the time my Agent shall request such information, all Persons are authorized to treat any such request for information by my Agent as the request of my legal representative and to honor such requests on that basis. I hereby waive all privileges which may be applicable to such information and records and to any communication pertaining to me and made in the course of any confidential relationship recognized by law. My Agent may also disclose such information to such Persons as my Agent shall deem appropriate.

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ARTICLE IV

RESTRICTION ON POWERS

Introduction. Notwithstanding any provision herein to the contrary, my Agent:

(1) **Prohibition on Power Over Life Insurance on Agent's Life**. Shall have no power or authority whatsoever with respect to any interest in or incidents of ownership in any policy of insurance I may own on the life of my Agent.

(2) **Prohibition on Power Over Prior Transfers**. Shall have no power or authority whatsoever with respect to (a) any irrevocable trust created by my Agent as to which I am a trustee or a beneficiary or (b) any asset given to me by my Agent.

(3) **Prohibition on Power to Benefit Agent**. Shall be prohibited, except as specifically authorized in this instrument, from (a) appointing, assigning or designating any of my assets, interests or rights directly or indirectly to my Agent, my Agent's estate, my Agent's creditors, or the creditors of my Agent's estate, (b) exercising any power of appointments I may hold in favor of my Agent, my Agent's estate, my Agent's creditors, or the creditors of my Agent's estate, (c) disclaiming assets to which I would otherwise be entitled if the effect of such disclaimer is to pass assets directly or indirectly to my Agent or his or her estate, or (d) using my assets to discharge any of my Agent's legal obligations, including any obligation of support which my Agent may owe to others, excluding those whom I am legally obligated to support.

(4) **Prohibition on Exercise of Fiduciary Powers**. Shall be prohibited from exercising any discretionary fiduciary powers that I now hold or may hereafter acquire.

(5) **Avoid Disrupting Principal's Estate Plan**. If it becomes necessary for my Agent to liquidate my assets to provide support for me, or if liquidation or conversion of assets becomes necessary for any other reason, whether specified in this instrument or otherwise, or such liquidation is deemed by my Agent to be appropriate or convenient, I direct that my Agent, to the extent reasonably possible, avoid disrupting the dispositive provisions of any estate plan of mine known to my Agent, whether or not such estate plan is embodied in a will, a trust, non-probate property, or otherwise. If it is necessary to disrupt the dispositive provisions of such plan, then my Agent is directed to use my Agent's best efforts to restore the dispositive provisions of such plan as and when the opportunity to do so is available to my Agent. My Agent shall make reasonable efforts to obtain and review my estate plan and any person having knowledge thereof or possession of any documents implementing such estate plan is authorized to make disclosure thereof to my Agent, and to furnish my Agent with copies of such documents.

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ARTICLE V

ADMINISTRATIVE PROVISIONS

Introduction. The following provisions shall apply:

(1) **Reimbursement and Compensation of Agent**. My Agent shall be entitled to reimbursement for all reasonable costs and expenses, including reasonable attorney's fees, actually incurred and paid by my Agent on my behalf at any time under any provision of this instrument. My Agent shall not be entitled to compensation for services rendered hereunder but shall be entitled to reimbursement for reasonable expenses.

(2) **Waiver of Acts of Omission and Commission**. My Agent (and my Agent's estate and personal representative), acting in good faith, are hereby released and forever discharged from any and all civil liability and from all claims or demands of all kinds whatsoever by me or my estate and personal representative arising out of the acts or omissions of my Agent, except for willful misconduct or gross negligence.

(3) **Waiver of Duty to Produce Income, Authority for Transactions between Agent as Agent and Agent as Individual and Eligibility of Agent to Serve in Other Fiduciary Capacities for Principal**. My Agent shall have no responsibility to make my property productive of income, to increase the value of my estate or to diversify my investments. My Agent shall have no liability for entering into transactions authorized by this instrument with my Agent in my Agent's individual capacity as long as my Agent believes in good faith that such transactions are in my best interests or the best interests of my estate and those persons interested in my estate. My Agent shall be eligible to serve in all other fiduciary capacities, for me or my benefit (but not in my place where I may serve as a fiduciary for others), including but not limited to serving as Trustee, Guardian, Conservator, Committee, Personal Representatives.

(4) **No Duty to Monitor Health**. My Agent shall have no responsibility to monitor on any regular basis the state of my physical health or mental capacity to determine if any actions need be taken under this instrument.

(5) **Severability**. If any part of any provision of this instrument shall be invalid or unenforceable under applicable law, such part shall be ineffective to the extent of such invalidity only, without in any way affecting the remaining parts of such provision or the remaining provisions of this instrument.

(6) **This Instrument Unaffected by Lapse of Time**. This power of attorney shall be legally unaffected by reason of lapse of time or staleness.

(7) **Agent Authorized to Sign Power of Attorney Forms**. In carrying out the authorizations set forth in this instrument, if in the sole opinion of my

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Agent it is necessary or convenient for my agent to sign my name, as principal, on forms of powers of attorney (the "Forms") required by governmental agencies, corporations or other entities in transactions with me, my agent is authorized to execute such Forms, and to appoint an agent or other person on the Forms to represent me.

(8) **Agent Authorized to Employ Principal's Attorney.** The Principal requests and authorizes the Agent to employ the attorney who prepared this power of attorney or other attorneys employed by the Principal in connection with the Principal's estate plan and business matters and hereby (a) waives any and all conflicts of interest that might arise through such employment, (b) authorizes all such attorneys to make full disclosure of the Principal's estate plan and business to the Agent and (c) authorizes such attorneys to accept such employment.

(9) **Governing Law and Applicability to Foreign Jurisdictions.** This instrument shall be governed by the laws of the State of South Carolina in all respects, including its validity, construction, interpretation and termination. To the extent permitted by law, this power of attorney shall be applicable to all property of mine, real, personal, intangible or mixed, wherever and in whatever state of the United States or foreign country the situs of such property is at any time located and whether such property is now owned by me or hereafter acquired by me or for me by my Agent. In addition, in regard to health care treatment affecting me, I intend for this Power of Attorney to be honored in any jurisdiction in which it may be presented and given the most liberal interpretation available for purposes of granting my Agent the fullest amount of discretion in making health care decisions on my behalf. I also intend that any such jurisdiction refer to the laws of the state referred to above to interpret and determine the validity of this instrument and any of the powers granted hereunder. Should any physician or health care provider fail to honor this Power of Attorney, then my Agent is authorized to terminate the services of such persons and to transfer my care to another physician or health care provider that will honor the instructions of my Agent.

(10) **Definitions.** Whenever the word:

(a) "Agent" or any modifying or equivalent word or substituted pronoun therefor is used in this instrument, such word or words shall be held and taken to include both the singular and the plural, the masculine, feminine and neuter gender thereof.

(b) "Guardian" or "Conservator" or any modifying or equivalent word or substituted pronoun is used in this instrument, such word or words shall be held and taken to mean respectively the fiduciary, appointed by a court of competent jurisdiction or by other lawful means, responsible for the person and/or the property of an individual.

(11) **Revocation, Amendment and Resignation.** This instrument may be amended or revoked by me at any time by the execution by me of a written instrument of revocation or amendment, delivered to my Agent and to all Alternate Agents. If this

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instrument has been filed or recorded in the public records, then the instrument of revocation or amendment shall be filed or recorded in the same public records. My Agent and any Alternate Agent may resign by the execution of a written resignation delivered to me or, if I am mentally incapacitated, by delivery to any person with whom I am residing or who has the care and custody of me or, in the case of an Agent's resignation, by delivery to the Alternate Agent. If my spouse has been appointed my Agent or an Alternate Agent hereunder and subsequent to the execution of this instrument my spouse and I are legally separated or divorced, or in the event that such an action is pending, such legal separation, divorce, or pending action shall automatically and without notice remove my spouse as Agent or Alternate Agent.

(12) **Substitute/Successor Agent Appointed by Court**. If at any time there is no person serving as Agent named herein, my successor or substitute Agent shall be some suitable person or institution, appointed by the court having jurisdiction over this instrument, ex parte, without the necessity of a hearing.

(13) **Appointment of Ancillary Agent**. If at any time my Agent deems it necessary or desirable in my Agent's discretion to appoint one or more Agents to act in another jurisdiction under this power of attorney (such Agent or Agents being hereinafter referred to in the aggregate as my "Ancillary Agent") my Agent from time to time and at any time may appoint one or more such Ancillary Agents. In making such appointment my Agent may execute and deliver such documents and instruments including living wills, Declarations of Desire for Natural Death, Health Care Declarations or Powers of Attorney as may be necessary, desirable, convenient or proper to effectuate any such ancillary appointment, and my Agent may grant to my Ancillary Agent, some or all of the powers and duties and authorities granted to my Agent hereunder, but may not grant to any such Ancillary Agent powers which are inconsistent with or different from those powers granted to my Agent hereunder.

(14) **Agent's Resignation and Selection of Substitute**. If my Agent desires to resign as my Agent, and there is no successor Agent named in this instrument who is willing and able to serve as my Agent, and I am incapacitated at the time of such resignation, then on such resignation my Agent is authorized and empowered to appoint a substitute Agent to act and serve as my Agent, such appointment to be made in a written instrument that shall be (i) signed by my Agent, (ii) delivered to my substitute Agent, and (iii) attached to this instrument.

(15) **Agent's Death, Incapacity, or Resignation and Selection of Substitute**. At any time after my incapacity, my Agent at any time may appoint a future successor Agent to act and serve as my Agent in the event that my Agent shall die or become mentally incapacitated or shall resign prior to my death, and my Agent at any time during my Agent's service as Agent may also revoke any such appointment theretofore made by my Agent, provided, however, that my Agent may not revoke, modify or supersede any appointment of a successor Agent made by me in this power of attorney. Any appointment made by my Agent shall be made in a written instrument that shall (i) specify the event or events on which such substitution shall become effective, (ii)

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be signed by my Agent, (iii) be delivered to my substitute Agent, and (iv) be attached to this instrument.

(16) **Counterpart Originals**. If this instrument has been executed in multiple counterpart originals, each such counterpart original shall have equal force and effect.

(17) **Photocopies**. My Agent is authorized to make photocopies of this instrument as frequently and in such quantity as my Agent shall deem appropriate. Each photocopy shall have the same force and effect as any original.

(18) **Binding Effect**. This instrument and actions taken by my Agent properly authorized hereunder shall be binding on me, my estate and my personal representative.

IN WITNESS WHEREOF, I have executed this Power of Attorney this 10 day of January, 2006, and I have directed that photographic copies of this power be made which shall have the same force and effect as an original.

Earline S. Cooley
EARLINE S. COOLEY, Principal

ATTESTATION

The foregoing Durable Power of Attorney was this 10 day of January, 2006, signed, sealed, published and declared by the said Principal as and for the Principal's Durable Power of Attorney in our presence, and 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 on the above date.

Melanie P Ace of Greenville SC

of Greenville, SC

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STATE OF SOUTH CAROLINA)
) PROBATE
COUNTY OF GREENVILLE)

BOOK 2185 PAGE 746

PERSONALLY appeared the undersigned witness and made oath that (s)he saw the within named Principal duly authorized, sign, seal and as the Principal's act and deed deliver the within Durable Power of Attorney and that deponent with the other witness whose name is subscribed above witnessed the execution thereof.

SWORN to before me this
13th day of January, 2006

Notary Public for South Carolina
My Commission expires: 4/18/15

FILED FOR RECORD IN GREENVILLE
COUNTY SC R.O.D. OFFICE AT 08:42 PM
01 19 06 RECORDED IN DEED
BOOK 2185 PAGE 0732 THRU 0746
DOC # 2006006888

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF PICKENS	)	C.A. No.: 2021-CP-39-01127 & 2021-CP-39-01128
	)	
Deonda Weldon, Individually and as Personal Representative of the Estate of Earline Cooley,	)	**AFFIDAVIT OF AMANDA VENABLE F/K/A AMANDA WEATHERFORD**
Plaintiff,	)	
v.	)	
Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square, Dominion Senior Living, LLC, Dominion Clemson, II, LLC, Dominion Management Group, LLC, and Dominion Group, LLC,	)	
Defendant(s).	)	

PERSONALLY appeared before me, the undersigned, who being duly sworn, hereby states and attests that the following is true and correct under penalties of perjury:

1. That I am and was the paralegal to Matthew W. Christian of Christian & Christian, LLC, attorney for Plaintiff.

2. That on June 11, 2020, I mailed to Defendant Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square a request for a copy of Earline Cooley's records which included a cover letter, HIPAA authorization, and a copy of the Durable Power of Attorney of Earline Cooley. A copy of this request is attached hereto at Exhibit A.

3. That on July 28, 2020, I received Earline Cooley's records electronically and bates stamped from Ramona Kaplan, COO of Dominion Group, LLC which also included

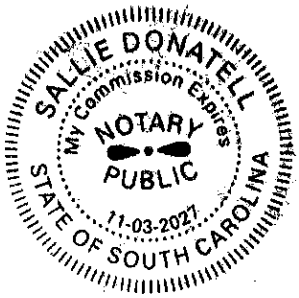


the Last Will and Testament of Earline Cooley and the Healthcare Power of Attorney for Earline Cooley.

Date: 10/17/22

Amanda Venable
Amanda Venable f/k/a Amanda Weatherford

SWORN to and subscribed before me this
17th day of October, 2022
Sallie Donatell
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 11-3-2027



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CHRISTIAN & CHRISTIAN
ATTORNEYS AT LAW

Joshua D. Christian | W. Harold Christian, Jr. | Matthew W. Christian

Christian & Christian, LLC
1007 E. Washington St
Greenville, SC 29601
PO Box 332 | Greenville, SC 29602
Phone: 864-232-7363
Fax: 864-370-3731
cclawfirm.com

June 11, 2020

Dominion Senior Living at Patrick Square
100 Pershing Avenue
Clemson, SC 29631

Re: Patient: Earline Cooley
DOB: [redacted]

Dear Sir/Madam:

Please find enclosed a HIPAA compliant medical authorization for the release of the medical records for Earline Cooley. If you should have any questions, please do not hesitate to contact us.

With kindest regards, I am

Sincerely,

CHRISTIAN & CHRISTIAN, LLC

Amanda Weatherford
Paralegal

/aw
enclosures

PLAINTIFF'S EXHIBIT
A
ALL-STATE LEGAL®

AUTHORIZATION FOR RELEASE OF MEDICAL INFORMATION
(HIPAA Compliant)

TO: Name & Address of Covered Entity authorized to release information:

Provider Name: Dominion Senior Living at Patrick Square

Address 100 Pershing Avenue

City, State, Zip Clemson, SC 29631

Patient/Client Information

Name: Earline S. Cooley

Address 304 East 2nd Avenue

City, State, Zip Easley, SC 29640

Date of Birth [redacted] Social Security No.: [redacted]

I authorize and request the below facility and the physician(s) who attended the above named individual while under the care of said medical provider to furnish medical information to:

Attn: Matthew Christian
CHRISTIAN & CHRISTIAN
Attorneys at Law
Post Office Box 332
Greenville, South Carolina 29602

Phone: 864.232.7363
Facsimile: 864.370.3731

Purpose of Disclosure: To aid in the investigation of a legal claim.

****IF THE COST FOR MEDICAL RECORDS EXCEEDS $50.00, PLEASE CONTACT OUR OFFICE BEFORE SENDING.****

Description Of Information To Be Disclosed: (including but not limited to)

[X] **Entire Record**

[ ] **Other** _____

Dates of Service: From All to All

Date of Expiration: 6/11/2022 or until final settlement or judgment is reached.

X I authorize release of information related to STDs, AIDS (Acquired Immunodeficiency Syndrome) or HIV (Human Immunodeficiency Virus) infection, psychiatric care and/or psychological assessment, and treatment for alcohol and/or drug abuse.

Rights of the Patient

I understand that my treatment will not be conditioned on signing this authorization and that I have the right to refuse to sign this authorization. *I understand that information disclosed as a result of this authorization may be subject to redisclosure by the recipient and may no longer be protected by federal or state law.* I understand I have the right to revoke this authorization by sending a written notice to both parties, and that a revocation is not effective if the information has already been used or disclosed but will be effective going forward. I understand that I have the right to inspect or copy the protected health information as described in this document as provided in CFR 164.524. In 164.508(c)(2)(ii) The covered entity may not prevent my ability to receive treatment, payment, enrollment or eligibility for benefits on whether the individual signs the Authorization when the prohibition on conditioning of Authorizations applies; or the consequences to the individual of refusing to sign the Authorization when the covered entity can prevent the ability to receive treatment, enrollment in the health plan, or eligibility for benefits on failure to obtain such Authorization. If I have questions about disclosure of my health information, I can contact the medical provider. I agree that a copy of this may be provided and used as an original. I have received a copy of the Notice of Privacy Practices.

June 11, 2020
Date

Leonda L. Weldon
Signature of Patient or Personal Representative

Matthew W. Christian

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DATE AUG - 1 2014
CERTIFIED TO BE A TRUE AND CORRECT COPY
OF DOCUMENT ON FILE IN THIS OFFICE
REGISTER OF DEEDS, GREENVILLE COUNTY

FILED
GREENVILLE, SC
2006 JAN 19 P 3:42
TIMOTHY L. HAMMEY
REGISTER OF DEEDS

DURABLE POWER OF ATTORNEY OF EARLINE S. COOLEY

Introductory Provision. I, **EARLINE S. COOLEY**, as principal (the "Principal") have this day appointed **DEONDA MICHELLE COOLEY WELDON** to serve as my agent ("Agent") and to exercise the powers and discretions set forth below. If **DEONDA MICHELLE COOLEY WELDON** shall be unable or unwilling or unavailable to serve or to continue to serve, then I appoint **PHYLLIS ROBIN COOLEY ELLIOTT** as substitute or successor Agent to serve with the same powers and discretions as set forth below. If **PHYLLIS ROBIN COOLEY ELLIOTT** shall be unable or unwilling or unavailable to serve or to continue to serve, then I appoint **DEBRA ALISON COOLEY GALLOWAY** as substitute or successor Agent to serve with the same powers and discretions as set forth below.

Statement of Intent to Create Durable Power of Attorney Under State Statute. By this instrument I intend to create a Durable Power of Attorney under South Carolina law.

THIS POWER OF ATTORNEY SHALL NOT BE AFFECTED BY ANY PHYSICAL DISABILITY OR MENTAL INCOMPETENCE WHICH RENDERS ME INCAPABLE OF MANAGING MY OWN ESTATE.

Revocation of Prior Powers of Attorney. I hereby revoke all powers of attorney, general and/or limited, heretofore created by me as principal and terminate all agency relationships created thereunder, including those of all successor Agents named therein, if any.

Delegation of All Powers Lawful to Delegate. I herewith delegate to my Agent each and every power that I may lawfully delegate, subject only to those limitations specifically set forth in this instrument, giving and granting unto my Agent full power and authority to do and perform all and every act, deed, matter, and things whatsoever in and about my estate, property, and affairs as fully and effectually to all intents and purposes as I might or could do in my own proper person if personally present, the specially enumerated powers herein being in aid and exemplification of the full and complete and general power herein granted and not in limitation or definition thereof, and I hereby ratify all that my Agent shall lawfully do or cause to be done by virtue of these presents.

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ARTICLE I

ASSET POWERS

Introduction. My Agent is authorized in my Agent's sole and absolute discretion from time to time and at any time, with respect to any and all of my property and interests in property, real, personal, intangible and mixed, as follows:

(1) Power to Sell. To sell any and every kind of property that I may own now or in the future, real, personal, intangible and/or mixed, including without being limited to contingent and expectant interests, marital rights and any rights of survivorship incident to joint tenancy or tenancy by the entirety, on such terms and conditions and security as my Agent shall deem appropriate and to grant options with respect to sales thereof; to make such disposition of the proceeds of such sale or sales, including expending such proceeds for my benefit, as my Agent shall deem appropriate.

(2) Power to Buy. To buy every kind of property, real, personal, intangible and/or mixed, on such terms and conditions as my Agent shall deem appropriate; to obtain options with respect to such purchases; to arrange for appropriate disposition, use, safekeeping and/or insuring of any such property.

(3) Power to Invest. To invest and reinvest all or any part of my property in any property or interests, including undivided interests, in property, real, personal, intangible and/or mixed, wherever located, including without being limited to securities of all kinds, stocks of corporations regardless of class, interests in limited partnerships, real estate or any interest in real estate whether or not productive at the time of investment, commodities contracts of all kinds, interests in trusts, investment trusts, whether of the open and/or closed fund types, and participation in common, collective or pooled trust funds or annuity contracts without being limited by any statute or rule of law concerning investments by fiduciaries; to sell, including short sales, and terminate any investments whether made by me or my Agent; to establish, utilize and terminate savings and money market accounts with financial institutions of all kinds; to establish, utilize and terminate accounts with securities brokers and in such accounts, to make short sales and to buy on margin and, for such purposes, my Agent may pledge any securities so held or purchased with such brokers as security for loans and advances made to the account.; to establish, utilize and terminate agency accounts with corporate fiduciaries; to employ, compensate and terminate the services of financial and investment advisors and consultants.

(4) Power to Manage Real Property. With respect to real property, including but not limited to any real property I may hereafter acquire or receive and my personal residence, my Agent is authorized to lease, sublease, release; to eject and remove tenants or other persons from, and recover possession of by all lawful means; to accept real property as a gift or as security for a loan; to collect, sue for, receive and receipt for rents and profits and to conserve, invest or utilize any and all of such rents, profits and receipts for the purposes described in this paragraph; to do any act of

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management and conservation, to pay, compromise, or to contest tax assessments and to apply for refunds in connection therewith; to employ laborers; to subdivide, develop, dedicate to public use without consideration, and/or dedicate easements over; to maintain, protect, repair, preserve, insure, build on, demolish, alter or improve all or any part thereof; to obtain or vacate plats and adjust boundaries; to adjust differences in valuation on exchange or partition by giving or receiving consideration; to release or partially release real property from a lien; to sell and to buy real property.

(5) **Power to Manage Personal Property**. With respect to personal property; to lease, sublease, and release; to recover possession of by all lawful means; to collect, sue for, receive and receipt for rents and profits therefrom; to maintain, protect, repair, preserve, insure, alter or improve all or any part thereof; to sell and to buy the same or other personal property

(6) **Power to Exercise Rights in Securities**. To exercise all rights with respect to corporate securities which I now own or may hereafter acquire, including the right to sell, grant security interests in and to buy the same or different securities; to establish, utilize and terminate brokerage accounts, including margin accounts; to make such payments as my Agent deems necessary, appropriate, incidental or convenient to the owning and holding of such securities; to receive, retain, expend for my benefit, invest and reinvest or make such disposition of as my Agent shall deem appropriate all additional securities, cash or property, including the proceeds from the sales of my securities, to which I may be or become entitled by reason of my ownership of any securities; to vote at all meetings of security holders, regular or special.

(7) **Power to Demand and Receive**. To demand, arbitrate, settle, sue for, collect, receive, deposit, expend for my benefit, reinvest or make such other appropriate disposition of as my Agent deems appropriate, all cash, rights to the payment of cash, property, real, personal, intangible and/or mixed, debts, dues rights, accounts, legacies, bequests, devises, dividends, annuities, rights and/or benefits to which I am now or may in the future become entitled, regardless of the identity of the individual or public or private entity involved, including but not limited to benefits payable to or for my benefit by any governmental agency or body, such as Supplemental Social Security (SSI), Medicaid, Medicare, and Social Security Disability Insurance (SSDI) and for the purposes of receiving Social Security benefits, my Agent is herewith appointed my "Representative Payee"; to utilize all lawful means and methods to recover such assets and/or rights, qualify me for such benefits and claim such benefits on my behalf, and to compromise claims and grant discharges in regard to the matters described herein; to utilize all lawful means and methods to recover such assets and/or rights, qualify me for such benefits and claim such benefits on my behalf. The authority herein granted shall include but not be limited to converting my assets into assets that do not disqualify me from receiving such benefits or divesting me of such assets. In any divestment actions or asset conversions, I direct that my Agent, to the extent reasonably possible, avoid disrupting the dispositive provisions of any estate plan of mine known to my Agent whether or not such estate plan is embodied in a will, a trust, non-probate property, or otherwise. If it is necessary to disrupt such plan, then my Agent is directed to use my

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Agent's best efforts to restore such plan as and when the opportunity to do so is available to my Agent. If a transfer of cash by my Agent is made to a pecuniary legatee under my will, my Agent shall ensure that such transfer is deemed a satisfaction of such legacy, pro tanto.

(8) **Power to Exercise Elective Share Rights**. To elect to take against any will and conveyances of my deceased spouse and/or any other person, if appropriate; to retain any property which I have the right to elect to retain; to file petitions pertaining to the election, including petitions to extend the time for electing and petitions for orders, decrees and judgments; and to take all other actions that my Agent deems appropriate in order to effectuate the election; provided, however, that if any such actions by my Agent require the approval of any court, my Agent is authorized to seek such approval.

(9) **Power with Respect to Employment Benefits**. To create and contribute to an employee benefit plan, including a plan for a self-employed individual, for my benefit; to elect retirement on my behalf; to select any payment option under any IRA or employee benefit plan in which I am a participant, including plans for self-employed individuals, or to change options I have selected; to make voluntary contributions to such plans; to make "roll-overs" of plan benefits into other retirement plans; to apply for and receive payments and benefits; to waive rights given to nonemployee spouses under state or federal law.

(10) **Power with Respect to Bank Accounts**. To establish accounts of all kinds, including checking and savings, for me with financial institutions of any kinds, including but not limited to banks and thrift institutions; to modify, terminate, make deposits to and write checks on or make withdrawals from and grant security interests in all accounts in my name or with respect to which I am an authorized signatory, except accounts held by me in a fiduciary capacity, whether or not any such account was established by me or for me by my Agent, to negotiate, endorse or transfer any checks or other instruments with respect to any such accounts; to contract for any services rendered by any bank or financial institution, and to execute, on my behalf as principal, agency or power of attorney forms furnished by any bank with respect to accounts with such bank, appointing as my Agent or any other person or persons.

(12) **Power with Respect to Safe-Deposit Boxes**. To contract with any institution for the maintenance of a safe-deposit box in my name; to have access to all safe-deposit boxes in my name or with respect to which I am an authorized signatory, whether or not the contract for such safe-deposit box was executed by me, either alone or jointly with others, or by my Agent in my name; to add to and remove from the contents of any such safe deposit box and to terminate any and all contracts for such boxes. In addition, I do hereby authorize and direct my Agent as Attorney-in-Fact under this durable power of attorney, to have access at any time or times to any safe deposit box rented by me, wherever located, in order to remove the original durable power of attorney; and any institution in which any such safe deposit box may be located is not required to make any inquiry, and shall not incur any liability to me or my estate as a

result of permitting the acting Agent under this durable power of attorney to exercise this power. This power is exercisable without: (i) any contact with or notice to me, my spouse, and/or any interested persons to my estate; (ii) any prior court order or authorization; (iii) any knowledge of or any prior determination as to my mental or physical capacity or incapacity; (iv) any knowledge as to my whereabouts regardless whether my whereabouts are known or unknown; or (v) any inquiry.

(13) **Power with Respect to Legal and Other Actions**. To institute, supervise, prosecute, defend, intervene in, abandon, compromise, arbitrate, settle, dismiss, and appeal from any and all legal, equitable, judicial or administrative hearings, actions, suits, proceedings, attachments, arrests or distresses, involving me in any way, including but not limited to claims by or against me arising out of property damages or personal injuries suffered by or caused by me or under such circumstances that the loss resulting therefrom will or may be imposed on me and otherwise engage in litigation involving me, my property or any interest of mine, including any property or interest or person for which or whom I have or may have any responsibility.

(14) **Power to Disclaim, Renounce, Release, or Abandon Property Interests**. To renounce and disclaim any property or interest in property or powers to which for any reason and by any means I may become entitled, whether by gift, testate or intestate succession; to release or abandon any property or interest in property or powers which I may now or hereafter own, including any interests in or rights over trusts, including the right to alter, amend, revoke or terminate, and to exercise any right to claim an elective share in any estate or under any will. In exercising such discretion, my Agent shall consider any reduction in estate or inheritance taxes that may be due on my death, and the effect of such renunciation or disclaimer on persons interested in my estate and persons who would receive the renounced or disclaimed property; provided, however, that my Agent shall make no disclaimer that is expressly prohibited by other provisions of this instrument.

(15) **Power with Respect to Insurance**. To purchase, maintain, surrender, collect, or cancel (a) life insurance or annuities of any kind on my life or the life of any one in whom I have an insurable interest, (b) liability insurance protecting me and my estate against third party claims, (c) hospital insurance, medical insurance, Medicare supplement insurance, custodial care insurance, and disability income insurance for me or any of my dependents, and (d) casualty insurance insuring assets of mine against loss or damage due to fire, theft or other commonly insured risk; to pay all insurance premiums, to select any options under such policies; to increase coverage under any such policy, to borrow against any such policy, to pursue all insurance claims on my behalf, to adjust insurance losses, and the foregoing powers shall apply to private and public plans, including but not limited to Medicare, Medicaid, SSI and Worker's Compensation.

(16) **Power with Respect to Taxes**. To represent me in all tax matters; to prepare, sign, and file federal, state, and/or local income, gift and other tax returns of all kinds, including, where appropriate, joint returns, FICA returns, payroll tax returns,

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claims for refunds, requests for extensions of time to file returns and/or pay taxes, extensions and waivers of applicable periods of limitation, protests and petitions to administrative agencies or courts, including the tax court, regarding tax matters, and any and all other tax related documents, including but not limited to consents and agreements under Section 2032A of the Internal Revenue Code or any successor section thereto and consents to split gifts, closing agreements and any power of attorney form required by the Internal Revenue Service and/or any state and/or local taxing authority with respect to any tax year; to pay taxes due, collect and make such disposition of refunds as my Agent shall deem appropriate, post bonds, receive confidential information and contest deficiencies determined by the Internal Revenue Service and/or any state and/or local taxing authority; to exercise any elections I may have under federal, state or local tax law; to allocate any generation-skipping tax exemption to which I am entitled, and generally to represent me or obtain professional representation for me in all tax matters and proceedings of all kinds and for all periods before all officers of the Internal Revenue Service and state and local authorities and in any and all courts; to engage, compensate and discharge attorneys, accountants and other tax and financial advisers and consultants to represent and/or assist me in connection with any and all tax matters involving or in any way related to me or any property in which I have or may have an interest or responsibility; and on my behalf to execute IRS Form 2848 and appoint my Agent or any suitable person selected by my Agent as my representative before the Internal Revenue Service.

(17) **Power to Make Gifts**. Having adopted and implemented a plan of making gifts to my children and others in the past, my Agent is specifically empowered to make gifts to herself and other of my children and my issue in order to take maximum advantage of any provisions of state and/or federal tax laws which allows for the making of gifts without any resulting gift tax. This Power of Attorney shall enable my Agent to take full advantage of these laws including the utilization of the annual exclusion and the exemption equivalent at her discretion. Provided however, my children are to treated equally in the making of these gifts so that no one child will receive more than another. This equality provision shall not apply to my issue other than children. Furthermore this power to make gifts includes the power to create trusts for the benefit of a donee into which a gift authorized hereunder may be placed and administered if my Agent in her/his discretion deems it advisable for the benefit of a donee. No person, firm or business relying upon this Power of Attorney shall have any duty to see to the application of the proceeds or items of value.

ARTICLE II

INCIDENTAL POWERS

Introduction. In connection with the exercise of the powers and discretions herein described, my Agent is fully authorized and empowered to perform any acts and things and to execute and deliver any documents, instruments, affidavits, certificates, and papers necessary or appropriate, to such exercise or exercises, including without limitation the following:

(1) Resort to Courts. To seek on my behalf and at my expense:

(a) a declaratory judgment from any court of competent jurisdiction interpreting the validity of this instrument and any of the acts authorized by this instrument, but such declaratory judgment shall not be necessary in order for my Agent to perform any act authorized by this instrument.

(b) a mandatory injunction requiring compliance with my Agent's instructions by any person, organization, corporation, or other entity obligated to comply with instructions given by me.

(c) actual and punitive damages and the recoverable costs, fees and expenses of such litigation, against any person, organization, corporation or other entity obligated to comply with instructions given by me who negligently or willfully fails or refuses to follow such instructions.

(2) Hire and Fire - All Personnel. To employ, compensate and discharge such domestic, health care and professional personnel including lawyers, accountants, doctors, nurses, brokers, financial consultants, advisors, consultants, companions, servants and employees as my Agent deems appropriate.

(3) Sign Documents and Incur Costs in Implementing the Agent's Instructions. To sign, execute, endorse, seal, acknowledge, deliver and file or record instruments and documents, including but not limited to contracts, agreements and conveyances of real and personal property, instruments granting and perfecting security instruments and obligations, orders for the payment of money, receipts, releases, waivers, elections, vouchers, consents, satisfactions and certificates. In addition, any Agent of mine who has the authority to incur costs on my behalf may render the bills for such costs to any Agent of mine who has been granted the authority to pay such costs or to any trustee of any revocable living trust of mine, or guardian, committee or conservator who has authority to pay such costs I request that costs be paid promptly. Any recipient thereof (i.e. my Agent with authority to pay or my trustee) shall promptly pay such costs.

(4) Payment of Medical Expenses. My Agent is directed to pay, or cause to be paid, all bills incurred and presented by any agent representing me under a Durable Power of Attorney for Health Care.

(5) Borrow, Spend, Liquidate, Secure. To expend my funds and to liquidate my property or to borrow money to produce such funds and to secure any such borrowings with security interests in any property, real, personal, or intangible that I may now or hereafter own.

(6) Power to Do Miscellaneous Acts. To open, read, respond to and redirect my mail; to represent me before the U.S. Postal Service in all matters relating to mail service; to establish, cancel, continue or initiate my membership in organizations and associations of all kinds, to take and give or deny custody of all of my important

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documents, including but not limited to my will, codicils, trust agreements, deeds, leases, life insurance policies, contracts and securities and, bearing in mind the confidential nature of such documents, to disclose or refuse to disclose such documents; to obtain and release or deny information or records of all kinds relating to me, to any interest of mine or to any person for whom I am responsible; to house or provide for housing, support and maintenance of any animals or other living creatures that I may own and to contract for and pay the expenses of their proper veterinary care and treatment; and if the care and maintenance of such animals or other living creatures shall become unreasonably expensive or burdensome in my Agent's opinion, to irrevocably transfer such animals to some person or persons willing to care for and maintain them.

ARTICLE III

THIRD PARTY RELIANCE

Introduction. For the purpose of inducing all persons, organizations, corporations and entities including but not limited to any physician, hospital, nursing home, health care provider, bank, broker, custodian, insurer, lender, transfer agent, taxing authority, governmental agency, or other party (all of whom will be referred to in this Article as a "Person") to act in accordance with the instructions of my Agent as authorized in this instrument, I hereby represent, warrant and agree that:

(1) **Third Party Liability for Revocation and Amendments**. If this instrument is revoked or amended for any reason, I, my estate, and my personal representative will hold any person, organization, corporation or entity, hereinafter referred to in the aggregate as "Person", harmless from any loss suffered, or liability incurred by such Person in acting in accordance with the instructions of my Agent acting under this instrument prior to the receipt by such Person of actual written notice of any such revocation or amendment.

(2) **Agent Has Power to Act Alone**. The powers conferred on my Agent by this instrument may be exercised by my Agent alone and my Agent's signature or act under the authority granted in this instrument may be accepted by persons as fully authorized by me and with the same force and effect as if I were personally present, competent, and acting on my own behalf. Consequently, all acts lawfully done by my Agent hereunder are done with my consent and shall have the same validity and effect as if I were personally present and personally exercised the powers myself, and shall inure to the benefit of and bind me and my estate and my personal representative.

(3) **No Liability to Third Parties for Reliance on Agent**. No Person who relies in good faith on the authority of my Agent under this instrument shall incur any liability to me, my estate or my personal representative. In addition, no Person who acts in reliance on any representations my Agent may make as to (a) the fact that my Agent's powers are then in effect, (b) the scope of my Agent's authority granted under this instrument, (c) my competency at the time this instrument is executed, (d) the fact that this instrument has not been revoked or amended, or (e) the fact that my Agent

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continues to serve as my Agent shall incur any liability to me, my estate or my personal representative for permitting my Agent to exercise any such authority, nor shall any Person who deals with my Agent be responsible to determine or insure the proper application of funds or property by my Agent. Any party dealing with any Person named as Agent (including any Person named as an Alternate Agent hereunder) may rely on as conclusively correct an affidavit or certificate of such Agent that (i) my Agent's powers are then in effect, (ii) the action my Agent desires to take is within the scope of my Agent's authority granted under this instrument, (iii) I was competent at the time this instrument was executed, (iv) this instrument has not been revoked, and/or (v) my Agent continues to serve as my Agent.

(4) **Alternate Agent May Give Affidavit or Certificate That He or She Currently Serves.** Any party dealing with any person named as Alternate Agent hereunder may rely on as conclusively correct an affidavit or certificate under penalties of perjury of such Alternate Agent that those persons named as prior Agents are no longer serving.

(5) **Affidavits or Certificates Given by Agent Bind Principal.** No Person who relies on any affidavit or certificate under penalties of perjury that this instrument specifically authorizes my Agent to execute and deliver to such person shall incur any liability to me, my estate or my personal representative for permitting my Agent to exercise any such authority, nor shall any Person who deals with my Agent be responsible to determine or insure the proper application of funds or property by my Agent.

(6) **Authorization to Release Information to Agent.** All Persons from whom my Agent may request information regarding me, my personal or financial affairs or any information which I am entitled to receive are hereby authorized to provide such information to my Agent without limitation and are released from any legal liability whatsoever to me, my estate or my personal representative for complying with my Agent's requests.

(7) **Authorization to Release Medical Information.** I hereby authorize all physicians and psychiatrists who have treated me, and all other providers of health care, including hospitals, to release to my Agent all information or photocopies of any records which my Agent may request. If I am incapacitated at the time my Agent shall request such information, all Persons are authorized to treat any such request for information by my Agent as the request of my legal representative and to honor such requests on that basis. I hereby waive all privileges which may be applicable to such information and records and to any communication pertaining to me and made in the course of any confidential relationship recognized by law. My Agent may also disclose such information to such Persons as my Agent shall deem appropriate.

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ARTICLE IV

RESTRICTION ON POWERS

Introduction. Notwithstanding any provision herein to the contrary, my Agent:

(1) **Prohibition on Power Over Life Insurance on Agent's Life**. Shall have no power or authority whatsoever with respect to any interest in or incidents of ownership in any policy of insurance I may own on the life of my Agent.

(2) **Prohibition on Power Over Prior Transfers**. Shall have no power or authority whatsoever with respect to (a) any irrevocable trust created by my Agent as to which I am a trustee or a beneficiary or (b) any asset given to me by my Agent.

(3) **Prohibition on Power to Benefit Agent**. Shall be prohibited, except as specifically authorized in this instrument, from (a) appointing, assigning or designating any of my assets, interests or rights directly or indirectly to my Agent, my Agent's estate, my Agent's creditors, or the creditors of my Agent's estate, (b) exercising any power of appointments I may hold in favor of my Agent, my Agent's estate, my Agent's creditors, or the creditors of my Agent's estate, (c) disclaiming assets to which I would otherwise be entitled if the effect of such disclaimer is to pass assets directly or indirectly to my Agent or his or her estate, or (d) using my assets to discharge any of my Agent's legal obligations, including any obligation of support which my Agent may owe to others, excluding those whom I am legally obligated to support.

(4) **Prohibition on Exercise of Fiduciary Powers**. Shall be prohibited from exercising any discretionary fiduciary powers that I now hold or may hereafter acquire.

(5) **Avoid Disrupting Principal's Estate Plan**. If it becomes necessary for my Agent to liquidate my assets to provide support for me, or if liquidation or conversion of assets becomes necessary for any other reason, whether specified in this instrument or otherwise, or such liquidation is deemed by my Agent to be appropriate or convenient, I direct that my Agent, to the extent reasonably possible, avoid disrupting the dispositive provisions of any estate plan of mine known to my Agent, whether or not such estate plan is embodied in a will, a trust, non-probate property, or otherwise. If it is necessary to disrupt the dispositive provisions of such plan, then my Agent is directed to use my Agent's best efforts to restore the dispositive provisions of such plan as and when the opportunity to do so is available to my Agent. My Agent shall make reasonable efforts to obtain and review my estate plan and any person having knowledge thereof or possession of any documents implementing such estate plan is authorized to make disclosure thereof to my Agent, and to furnish my Agent with copies of such documents.

ARTICLE V

ADMINISTRATIVE PROVISIONS

Introduction. The following provisions shall apply:

(1) Reimbursement and Compensation of Agent. My Agent shall be entitled to reimbursement for all reasonable costs and expenses, including reasonable attorney's fees, actually incurred and paid by my Agent on my behalf at any time under any provision of this instrument. My Agent shall not be entitled to compensation for services rendered hereunder but shall be entitled to reimbursement for reasonable expenses.

(2) Waiver of Acts of Omission and Commission. My Agent (and my Agent's estate and personal representative), acting in good faith, are hereby released and forever discharged from any and all civil liability and from all claims or demands of all kinds whatsoever by me or my estate and personal representative arising out of the acts or omissions of my Agent, except for willful misconduct or gross negligence.

(3) Waiver of Duty to Produce Income, Authority for Transactions between Agent as Agent and Agent as Individual and Eligibility of Agent to Serve in Other Fiduciary Capacities for Principal. My Agent shall have no responsibility to make my property productive of income, to increase the value of my estate or to diversify my investments. My Agent shall have no liability for entering into transactions authorized by this instrument with my Agent in my Agent's individual capacity as long as my Agent believes in good faith that such transactions are in my best interests or the best interests of my estate and those persons interested in my estate. My Agent shall be eligible to serve in all other fiduciary capacities, for me or my benefit (but not in my place where I may serve as a fiduciary for others), including but not limited to serving as Trustee, Guardian, Conservator, Committee, Personal Representatives.

(4) No Duty to Monitor Health. My Agent shall have no responsibility to monitor on any regular basis the state of my physical health or mental capacity to determine if any actions need be taken under this instrument.

(5) Severability. If any part of any provision of this instrument shall be invalid or unenforceable under applicable law, such part shall be ineffective to the extent of such invalidity only, without in any way affecting the remaining parts of such provision or the remaining provisions of this instrument.

(6) This Instrument Unaffected by Lapse of Time. This power of attorney shall be legally unaffected by reason of lapse of time or staleness.

(7) Agent Authorized to Sign Power of Attorney Forms. In carrying out the authorizations set forth in this instrument, if in the sole opinion of my

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Agent it is necessary or convenient for my agent to sign my name, as principal, on forms of powers of attorney (the "Forms") required by governmental agencies, corporations or other entities in transactions with me, my agent is authorized to execute such Forms, and to appoint an agent or other person on the Forms to represent me.

(8) **Agent Authorized to Employ Principal's Attorney**. The Principal requests and authorizes the Agent to employ the attorney who prepared this power of attorney or other attorneys employed by the Principal in connection with the Principal's estate plan and business matters and hereby (a) waives any and all conflicts of interest that might arise through such employment, (b) authorizes all such attorneys to make full disclosure of the Principal's estate plan and business to the Agent and (c) authorizes such attorneys to accept such employment.

(9) **Governing Law and Applicability to Foreign Jurisdictions**. This instrument shall be governed by the laws of the State of South Carolina in all respects, including its validity, construction, interpretation and termination. To the extent permitted by law, this power of attorney shall be applicable to all property of mine, real, personal, intangible or mixed, wherever and in whatever state of the United States or foreign country the situs of such property is at any time located and whether such property is now owned by me or hereafter acquired by me or for me by my Agent. In addition, in regard to health care treatment affecting me, I intend for this Power of Attorney to be honored in any jurisdiction in which it may be presented and given the most liberal interpretation available for purposes of granting my Agent the fullest amount of discretion in making health care decisions on my behalf. I also intend that any such jurisdiction refer to the laws of the state referred to above to interpret and determine the validity of this instrument and any of the powers granted hereunder. Should any physician or health care provider fail to honor this Power of Attorney, then my Agent is authorized to terminate the services of such persons and to transfer my care to another physician or health care provider that will honor the instructions of my Agent.

(10) **Definitions**. Whenever the word:

(a) "Agent" or any modifying or equivalent word or substituted pronoun therefor is used in this instrument, such word or words shall be held and taken to include both the singular and the plural, the masculine, feminine and neuter gender thereof.

(b) "Guardian" or "Conservator" or any modifying or equivalent word or substituted pronoun is used in this instrument, such word or words shall be held and taken to mean respectively the fiduciary, appointed by a court of competent jurisdiction or by other lawful means, responsible for the person and/or the property of an individual.

(11) **Revocation, Amendment and Resignation**. This instrument may be amended or revoked by me at any time by the execution by me of a written instrument of revocation or amendment, delivered to my Agent and to all Alternate Agents. If this

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instrument has been filed or recorded in the public records, then the instrument of revocation or amendment shall be filed or recorded in the same public records. My Agent and any Alternate Agent may resign by the execution of a written resignation delivered to me or, if I am mentally incapacitated, by delivery to any person with whom I am residing or who has the care and custody of me or, in the case of an Agent's resignation, by delivery to the Alternate Agent. If my spouse has been appointed my Agent or an Alternate Agent hereunder and subsequent to the execution of this instrument my spouse and I are legally separated or divorced, or in the event that such an action is pending, such legal separation, divorce, or pending action shall automatically and without notice remove my spouse as Agent or Alternate Agent.

(12) **Substitute/Successor Agent Appointed by Court**. If at any time there is no person serving as Agent named herein, my successor or substitute Agent shall be some suitable person or institution, appointed by the court having jurisdiction over this instrument, ex parte, without the necessity of a hearing.

(13) **Appointment of Ancillary Agent**. If at any time my Agent deems it necessary or desirable in my Agent's discretion to appoint one or more Agents to act in another jurisdiction under this power of attorney (such Agent or Agents being hereinafter referred to in the aggregate as my "Ancillary Agent") my Agent from time to time and at any time may appoint one or more such Ancillary Agents. In making such appointment my Agent may execute and deliver such documents and instruments including living wills, Declarations of Desire for Natural Death, Health Care Declarations or Powers of Attorney as may be necessary, desirable, convenient or proper to effectuate any such ancillary appointment, and my Agent may grant to any Ancillary Agent, some or all of the powers and duties and authorities granted to my Agent hereunder, but may not grant to any such Ancillary Agent powers which are inconsistent with or different from those powers granted to my Agent hereunder.

(14) **Agent's Resignation and Selection of Substitute**. If my Agent desires to resign as my Agent, and there is no successor Agent named in this instrument who is willing and able to serve as my Agent, and I am incapacitated at the time of such resignation, then on such resignation my Agent is authorized and empowered to appoint a substitute Agent to act and serve as my Agent, such appointment to be made in a written instrument that shall be (i) signed by my Agent, (ii) delivered to my substitute Agent, and (iii) attached to this instrument.

(15) **Agent's Death, Incapacity, or Resignation and Selection of Substitute**. At any time after my incapacity, my Agent at any time may appoint a future successor Agent to act and serve as my Agent in the event that my Agent shall die or become mentally incapacitated or shall resign prior to my death, and my Agent at any time during my Agent's service as Agent may also revoke any such appointment theretofore made by my Agent, provided, however, that my Agent may not revoke, modify or supersede any appointment of a successor Agent made by me in this power of attorney. Any appointment made by my Agent shall be made in a written instrument that shall (i) specify the event or events on which such substitution shall become effective, (ii)

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be signed by my Agent, (iii) be delivered to my substitute Agent, and (iv) be attached to this instrument.

(16) **Counterpart Originals**. If this instrument has been executed in multiple counterpart originals, each such counterpart original shall have equal force and effect.

(17) **Photocopies**. My Agent is authorized to make photocopies of this instrument as frequently and in such quantity as my Agent shall deem appropriate. Each photocopy shall have the same force and effect as any original.

(18) **Binding Effect**. This instrument and actions taken by my Agent properly authorized hereunder shall be binding on me, my estate and my personal representative.

IN WITNESS WHEREOF, I have executed this Power of Attorney this 10 day of January, 2006, and I have directed that photographic copies of this power be made which shall have the same force and effect as an original.

Earline S. Cooley
EARLINE S. COOLEY, Principal

ATTESTATION

The foregoing Durable Power of Attorney was this 10 day of January, 2006, signed, sealed, published and declared by the said Principal as and for the Principal's Durable Power of Attorney in our presence, and 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 on the above date.

Melanie P. Ace of Greenville, SC

of Greenville, SC

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STATE OF SOUTH CAROLINA)
) PROBATE
COUNTY OF GREENVILLE)

PERSONALLY appeared the undersigned witness and made oath that (s)he saw the within named Principal duly authorized, sign, seal and as the Principal's act and deed deliver the within Durable Power of Attorney and that deponent with the other witness whose name is subscribed above witnessed the execution thereof.

Melanie P. Fox

SWORN to before me this
13 day of January, 2006

Notary Public for South Carolina
My Commission expires: 4/18/15

FILED FOR RECORD IN GREENVILLE
COUNTY SC R.O.D. OFFICE AT 09:42 PM
01 19 06 RECORDED IN DEED
BOOK 2185 PAGE 0732 THRU 0746
DOC # 2006005688

ELECTRONICALLY FILED - 2022 Oct 18 10:09 AM - PICKENS - COMMON PLEAS - CASE#2021CP3901127

Amanda Venable

From: Ramona Koplan <RamonaK@DominionDG.com>
Sent: Tuesday, July 28, 2020 5:27 PM
To: Amanda Weatherford
Subject: RE: Earline Cooley Records

I have uploaded those as requested. Thank you!

Ramona Koplan, COO

DOMINION

ramonak@dominiondg.com
3834 Sutherland Ave, Knoxville, TN 37919
(O) 865-225-6506 ext 1018 | (C) 865-776-7887

The information transmitted is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited. If you have received this in error, please contact the sender and delete the material from any computer.

From: Amanda Weatherford <aweatherford@cclawfirm.com>
Sent: Tuesday, July 28, 2020 2:39 PM
To: Ramona Koplan <RamonaK@DominionDG.com>
Subject: Earline Cooley Records

Hi Ramona:

Below is a link to dropbox for you to upload the records as we discussed on the phone. Let me know if you have any questions.

https://www.dropbox.com/request/yldVl8dCaFX0gx1FeD7F

CHRISTIAN & CHRISTIAN
ATTORNEYS AT LAW

Amanda Weatherford
Paralegal to Matthew W. Christian
Christian & Christian
P.O. Box 332
Greenville, SC 29602
864.232.7363
864.370.3731 (f)

Please note that our email address has changed and my new email is aweatherford@[illegible]se make certain that all future correspondence is sent the new email. Thank you.

ALL-STATE LEGAL®
PLAINTIFF'S EXHIBIT
B

Perry D. Boulier
Joshua T. Thompson
A. Walker Barnes
Ayla Luers Connor

BOULIER THOMPSON & BARNES, LLC
ATTORNEYS AT LAW

101 W. St. John St., Suite 301
Spartanburg, SC 29306

P.O. Box 6476
Spartanburg, SC 29304

phone 864-606-9610
www.btblawfirm.com
jwallace@btblawfirm.com

Direct Dial: (864) 606-1108

January 4, 2022

Kindred at Home
Attn: Records Custodian
905 E Main St., #1
Spartanburg, SC 29302

RE: Cooley, Earline v. Dominion Clemson, LLC, et al.
C.A. Number: 2021-CP-39-01127 and 2021-CP-39-01128
Our File Number: 17107

Dear Sir or Madam:

This firm represents Dominion Clemson, LLC in the above-referenced matter. Enclosed is a subpoena for you to produce any and all records, including imaging studies and itemized billing statements, with regard to your treatment of Earline Cooley. Earline Cooley's date of birth is [redacted] and her Social Security number is [redacted]

According to HIPAA, we are providing satisfactory assurance that notice of this subpoena was sent to the Plaintiff's attorney. Unless the Plaintiff's attorney raises an objection within fourteen (14) days of the date of this subpoena, you should produce the records as specified in the subpoena.

It will not be necessary for you to appear on the date and time indicated if you forward the records and/or items requested in the subpoena to us by mail prior to the date and time on the subpoena. Please send a bill for the reasonable cost of copying these records. However, should your costs exceed $100.00, please notify me before making said copies. We will not be responsible for unauthorized copy costs.

Thank you for your help and do not hesitate to call if you have any questions.

Very truly yours,

BOULIER THOMPSON & BARNES, LLC

Julie Wallace

Julie Wallace, Paralegal

/jw
Enclosure

c: Matthew W. Christian, Esq. (via email: *mchristian@cclawfirm.com*)
Perry D. Boulier, Esq. (via email)

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PLAINTIFF'S EXHIBIT
5

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STATE OF SOUTH CAROLINA

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF PICKENS

Deonda Weldon, Individually and as Personal Representative of the Estate of Earline Cooley,

Plaintiff

v.

Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square, Dominion Clemson, II, LLC, Dominion Senior Living, LLC, Dominion Management Group, LLC, and Dominion Group, LLC,

Defendants

SUBPOENA IN A CIVIL CASE

Case Number: 2021-CP-39-01127

2021-CP-39-01128

Pending in Pickens County

TO: **Kindred at Home**

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME , AM

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents of objects:

Any and all records, including imaging studies and itemized billing statements, in your possession relating to your care of Earline Cooley; Date of Birth: [redacted] SS #[redacted] IN LIEU OF PERSONALLY APPEARING, THESE RECORDS MAY BE MAILED TO JULIE WALLACE PARALEGAL, BOULIER THOMPSON & BARNES, LLC, P.O. BOX 6470, SPARTANBURG, SC 29304.

PLACE	DATE AND TIME: Tuesday, January 18, 2022
Law Offices of Boulier Thompson & Barnes, LLC, P.O. Box 6470, Spartanburg, South Carolina 29304	9:00 AM

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME , AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Attorney/Issuing Officer's Signature — 01/04/2022 Date — Josh T. Thompson, Attorney for Defendants Print Name

Indicate if Attorney for Plaintiff or Defendant
Attorney's Address and Telephone Number :
P.O. Box 6470
Spartanburg, SC 29304
(864) 606-9610

SCCA 254 (05/2015)

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on pages 2 and 3)

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Clerk of Court/Issuing Officer's Signature | Date | Print Name

Pro Se Litigant's Name, Address and Telephone Number :

PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TO BE TENDERED TO WITNESS UPON DAILY ARRIVAL
	PLACE	☐YES ☐NO AMOUNT $
SERVED ON		MANNER OF SERVICE
SERVED BY		TITLE

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on_____

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

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(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1)(A)A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

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Perry D. Boulier
Joshua T. Thompson
A. Walker Barnes
Ayla Luers Connor

BOULIER THOMPSON
& BARNES, LLC
ATTORNEYS AT LAW

101 W. St. John St., Suite 301
Spartanburg, SC 29306

P.O. Box 6472
Spartanburg, SC 29304

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www.btblawfirm.com
jwallace@btblawfirm.com

Direct Dial: (864) 606-1108

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January 4, 2022

The Foothills Presbyterian Community
Attn: Records Custodian
205 Bud Nalley Dr.
Easley, SC 29642

RE: Cooley, Earline v. Dominion Clemson, LLC, et al.
C.A. Number: 2021-CP-39-01127 and 2021-CP-39-01128
Our File Number: 17107

Dear Sir or Madam:

This firm represents Dominion Clemson, LLC in the above-referenced matter. Enclosed is a subpoena for you to produce any and all records, including imaging studies and itemized billing statements, with regard to your treatment of Earline Cooley. Earline Cooley's date of birth is [redacted], and her Social Security number is [redacted].

According to HIPAA, we are providing satisfactory assurance that notice of this subpoena was sent to the Plaintiff's attorney. Unless the Plaintiff's attorney raises an objection within fourteen (14) days of the date of this subpoena, you should produce the records as specified in the subpoena.

It will not be necessary for you to appear on the date and time indicated if you forward the records and/or items requested in the subpoena to us by mail prior to the date and time on the subpoena. Please send a bill for the reasonable cost of copying these records. However, should your costs exceed $100.00, please notify me before making said copies. We will not be responsible for unauthorized copy costs.

Thank you for your help and do not hesitate to call if you have any questions.

Very truly yours,

BOULIER THOMPSON & BARNES, LLC

Julie Wallace

Julie Wallace, Paralegal

/jw
Enclosure

c: Matthew W. Christian, Esq. (via email: *mchristian@cclawfirm.com*)
Perry D. Boulier, Esq. (via email)

STATE OF SOUTH CAROLINA

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF PICKENS

Deonda Weldon, Individually and as Personal Representative of the Estate of Earline Cooley,

Plaintiff

v.

SUBPOENA IN A CIVIL CASE

Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square, Dominion Clemson, II, LLC, Dominion Senior Living, LLC, Dominion Management Group, LLC, and Dominion Group, LLC,

Case Number: 2021-CP-39-01127

2021-CP-39-01128

Pending in Pickens County

Defendants

TO: **The Foothills Presbyterian Community**

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME , AM

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents of objects:

Any and all records, including imaging studies and itemized billing statements, in your possession relating to your care of Earline Cooley; Date of Birth: [redacted], SS [redacted] IN LIEU OF PERSONALLY APPEARING, THESE RECORDS MAY BE MAILED TO JULIE WALLACE PARALEGAL, BOULIER THOMPSON & BARNES, LLC, P.O. BOX 6470, SPARTANBURG, SC 29304.

PLACE	DATE AND TIME: Tuesday, January 18, 2022
Law Offices of Boulier Thompson & Barnes, LLC, P.O. Box 6470, Spartanburg, South Carolina 29304	9:00 AM

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME , AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Attorney/Issuing Officer's Signature — 01/04/2022 Date — Josh T. Thompson, Attorney for Defendants Print Name

Indicate if Attorney for Plaintiff or Defendant

Attorney's Address and Telephone Number:

P.O. Box 6470

Spartanburg, SC 29304

(864) 606-9610

SCCA 254 (05/2015)

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on pages 2 and 3)

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Clerk of Court/Issuing Officer's Signature | Date | Print Name

Pro Se Litigant's Name, Address and Telephone Number :

PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TO BE TENDERED TO WITNESS UPON DAILY ARRIVAL
	PLACE	☐YES ☐NO AMOUNT $
SERVED ON		MANNER OF SERVICE
SERVED BY		TITLE

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on_____

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

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(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1)(A)A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

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Perry D. Boulier
Joshua T. Thompson
A. Walker Barnes
Ayla Luers Connor

BOULIER THOMPSON
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Direct Dial: (864) 606-1108

ELECTRONICALLY FILED - 2022 Oct 18 10:09 AM - PICKENS - COMMON PLEAS - CASE#2021CP3901127

January 4, 2022

Pickens County EMS
Attn: Records Custodian
1509 Walhalla Hwy.
Pickens, SC 29671

RE: Cooley, Earline v. Dominion Clemson, LLC, et al.
C.A. Number: 2021-CP-39-01127 and 2021-CP-39-01128
Our File Number: 17107

Dear Sir or Madam:

This firm represents Dominion Clemson, LLC in the above-referenced matter. Enclosed is a subpoena for you to produce any and all records, including itemized billing statements, with regard to your treatment of Earline Cooley. Earline Cooley's date of birth is [redacted] and her Social Security number is [redacted]

According to HIPAA, we are providing satisfactory assurance that notice of this subpoena was sent to the Plaintiff's attorney. Unless the Plaintiff's attorney raises an objection within fourteen (14) days of the date of this subpoena, you should produce the records as specified in the subpoena.

It will not be necessary for you to appear on the date and time indicated if you forward the records and/or items requested in the subpoena to us by mail prior to the date and time on the subpoena. Please send a bill for the reasonable cost of copying these records. However, should your costs exceed $100.00, please notify me before making said copies. We will not be responsible for unauthorized copy costs.

Thank you for your help and do not hesitate to call if you have any questions.

Very truly yours,

BOULIER THOMPSON & BARNES, LLC

Julie Wallace

Julie Wallace, Paralegal

/jw
Enclosure

c: Matthew W. Christian, Esq. (via email: *mchristian@cclawfirm.com*)
Perry D. Boulier, Esq. (via email)

STATE OF SOUTH CAROLINA

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF PICKENS

Deonda Weldon, Individually and as Personal Representative of the Estate of Earline Cooley,

Plaintiff

v.

Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square, Dominion Clemson, II, LLC, Dominion Senior Living, LLC, Dominion Management Group, LLC, and Dominion Group, LLC,

Defendants

SUBPOENA IN A CIVIL CASE

Case Number: 2021-CP-39-01127

2021-CP-39-01128

Pending in Pickens County

TO: **Pickens County EMS**

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME , AM

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents of objects:

Any and all records, including itemized billing statements, in your possession relating to your care of Earline Cooley; Date of Birth: [redacted] SS #[redacted] IN LIEU OF PERSONALLY APPEARING, THESE RECORDS MAY BE MAILED TO JULIE WALLACE PARALEGAL, BOULIER THOMPSON & BARNES, LLC, P.O. BOX 6470, SPARTANBURG, SC 29304.

PLACE	DATE AND TIME: Tuesday, January 18, 2022
Law Offices of Boulier Thompson & Barnes, LLC, P.O. Box 6470, Spartanburg, South Carolina 29304	9:00 AM

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME , AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Attorney/Issuing Officer's Signature — 01/04/2022 Date — Josh T. Thompson, Attorney for Defendants Print Name

Indicate if Attorney for Plaintiff or Defendant

Attorney's Address and Telephone Number :
P.O. Box 6470
Spartanburg, SC 29304
(864) 606-9610

SCCA 254 (05/2015)

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on pages 2 and 3)

ELECTRONICALLY FILED - 2022 Oct 18 10:09 AM - PICKENS - COMMON PLEAS - CASE#2021CP3901127

Clerk of Court/Issuing Officer's Signature | Date | Print Name

Pro Se Litigant's Name, Address and Telephone Number:

PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TO BE TENDERED TO WITNESS UPON DAILY ARRIVAL
	PLACE	☐ YES ☐ NO AMOUNT $
SERVED ON		MANNER OF SERVICE
SERVED BY		TITLE

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on_____

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

ELECTRONICALLY FILED - 2022 Oct 18 10:09 AM - PICKENS - COMMON PLEAS - CASE#2021CP3901127

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1)(A)A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

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(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

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Perry D. Boulier
Joshua T. Thompson
A. Walker Barnes
Ayla Luers Connor

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& BARNES, LLC
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101 W. St. John St., Suite 301
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jwallace@btblawfirm.com

Direct Dial: (864) 606-1108

ELECTRONICALLY FILED - 2022 Oct 18 10:09 AM - PICKENS - COMMON PLEAS - CASE#2021CP3901127

January 4, 2022

Prisma Health Baptist Easley Hospital
Attn: Health Information Mgmt. - ROI
200 Fleetwood Dr.
Easley, SC 29640

RE: Cooley, Earline v. Dominion Clemson, LLC, et al.
C.A. Number: 2021-CP-39-01127 and 2021-CP-39-01128
Our File Number: 17107

Dear Sir or Madam:

This firm represents Dominion Clemson, LLC in the above-referenced matter. Enclosed is a subpoena for you to produce any and all records, including imaging studies and itemized billing statements, with regard to your treatment of Earline Cooley. Earline Cooley's date of birth is [redacted] and her Social Security number is [redacted]

According to HIPAA, we are providing satisfactory assurance that notice of this subpoena was sent to the Plaintiff's attorney. Unless the Plaintiff's attorney raises an objection within fourteen (14) days of the date of this subpoena, you should produce the records as specified in the subpoena.

It will not be necessary for you to appear on the date and time indicated if you forward the records and/or items requested in the subpoena to us by mail prior to the date and time on the subpoena. Please send a bill for the reasonable cost of copying these records. However, should your costs exceed $100.00, please notify me before making said copies. We will not be responsible for unauthorized copy costs.

Thank you for your help and do not hesitate to call if you have any questions.

Very truly yours,

BOULIER THOMPSON & BARNES, LLC

Julie Wallace

Julie Wallace, Paralegal

/jw
Enclosure

c: Matthew W. Christian, Esq. (via email: *mchristian@cclawfirm.com*)
Perry D. Boulier, Esq. (via email)

STATE OF SOUTH CAROLINA

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF PICKENS

Deonda Weldon, Individually and as Personal Representative of the Estate of Earline Cooley,

Plaintiff

v.

Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square, Dominion Clemson, II, LLC, Dominion Senior Living, LLC, Dominion Management Group, LLC, and Dominion Group, LLC,

Defendants

SUBPOENA IN A CIVIL CASE

Case Number: 2021-CP-39-01127

2021-CP-39-01128

Pending in Pickens County

TO: **Prisma Health Baptist Easley – Health Information Mgmt.**

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME , AM

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents of objects:

Any and all records, including imaging studies and itemized billing statements, in your possession relating to your care of Earline Cooley; Date of Birth: [redacted] SS # [redacted] IN LIEU OF PERSONALLY APPEARING, THESE RECORDS MAY BE MAILED TO JULIE WALLACE PARALEGAL, BOULIER THOMPSON & BARNES, LLC, P.O. BOX 6470, SPARTANBURG, SC 29304.

PLACE	DATE AND TIME: Tuesday, January 18, 2022
Law Offices of Boulier Thompson & Barnes, LLC, P.O. Box 6470, Spartanburg, South Carolina 29304	9:00 AM

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME , AM

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I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Attorney/Issuing Officer's Signature — 01/04/2022 Date — Josh T. Thompson, Attorney for Defendants Print Name

Indicate if Attorney for Plaintiff or Defendant

Attorney's Address and Telephone Number :
P.O. Box 6470
Spartanburg, SC 29304
(864) 606-9610

SCCA 254 (05/2015)

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on pages 2 and 3)

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Clerk of Court/Issuing Officer's Signature | Date | Print Name

Pro Se Litigant's Name, Address and Telephone Number :

PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TO BE TENDERED TO WITNESS UPON DAILY ARRIVAL
	PLACE	☐YES ☐ NO AMOUNT $
SERVED ON		MANNER OF SERVICE
SERVED BY		TITLE

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on_____

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

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(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

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(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

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ELECTRONICALLY FILED - 2022 Oct 18 10:09 AM - PICKENS - COMMON PLEAS - CASE#2021CP3901127

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CHRISTIAN & CHRISTIAN
ATTORNEYS AT LAW

Joshua D. Christian | W. Harold Christian, Jr. | Matthew W. Christian

Christian & Christian, LLC
1007 E. Washington St
Greenville, SC 29601
PO Box 332 | Greenville, SC 29602
Phone: 864-232-7363
Fax: 864-370-3731
cclawfirm.com

March 1, 2022

Joshua T. Thompson
Boulier Thompson & Barnes, P.A.
PO Box 6470
Spartanburg, SC 29304

RE: Deonda Weldon, Individually and as Personal Representative of the Estate of Earline Cooley v. Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square, Dominion Senior Living, LLC, Dominion Clemson, II, LLC, Dominion Management Group, LLC, and Dominion Group, LLC
C/A Nos.: 2021-CP-39-01127 & 2021-CP-39-01128

Dear Josh:

Thank you for your clients' responses to Plaintiff's First Discovery which we received on recent date in the above-captioned matter. There are several issues with regard to Defendants' responses, particularly items which Defendants objected to and for which we believe full responses should have been provided.

I will take this opportunity to address each in turn:

INTERROGATORIES

#7 & #15 – These interrogatories seek the identification of the employees who provided care to my client at the facility including, but not limited to, their job title at the facility as well as whether or not they were a current or former employee and their last known contact information.

ALL-STATE LEGAL®
PLAINTIFF'S EXHIBIT
6

The Defendants' objected to providing this information and obviously, this identifies witnesses as well as vital information regarding these witnesses to which we are otherwise entitled. We would ask that you supplement this information.

REQUESTS FOR PRODUCTION

#19 – This request seeks copies of the proposed and actual budgets for the facility for the two years preceding Ms. Cooley's residency and the time of Ms. Cooley's residency. As you know, we have claims for corporate negligence as well as understaffing and underfunding and these documents are directly relevant to same. Therefore, at this time I am willing to limit our request to the year of Earline Cooley's residency.

#21 – This request seeks copies of timecards, schedules, and punch detail reports for the time of my client's residency. Given that we have claims for understaffing, these documents enable us to determine the staffing numbers at particular times during Ms. Cooley's residency. Therefore, these documents are relevant and should be produced.

#22 – This request seeks copies of employee work schedules and sign-in sheets and timesheets showing the identity and number/quantity and classification of any staffing personnel who worked at the Defendant's facility. Again, for the same reasons as number 21 above, these items are relevant and should be produced.

#23 – This request seeks copies of the actual numbers of available nursing personnel or the actual number of nurse assistants, orderlies, or medication aid's and nurses at any time during Ms. Cooley's residency/admission. For the same reasons identified herein above in number 21, these documents are relevant and should be produced.

#25 – This request seeks copies of in-service training reports, including sign in sheets, tenant rosters, handouts, videos, and other training documentation provided to any of Ms. Cooley's caregivers during the time that she was a resident and during the two years proceeding her residency. The Defendants objected to producing same. As you may know, we have made claims for lack of training and as a result, these documents are directly relevant to those issues. Furthermore, these documents are relevant to show what training for providing care the staff received. I am certain that if we are required to try this case that the Defendants will maintain that they provided adequate proper training to their employees and as a result we are entitled to see what training was provided and when.

#36 – This request seeks copies of personnel files for former employees who provided care to my client as well as personnel files for department heads during Ms. Cooley's residency and the current department heads. Personnel files are something that are routinely produced in these types of cases and are relevant to our claims regarding adequate hiring, staffing, training, etc. I am willing to limit this request to former employees who we specifically request files of as well as anyone we depose and the department heads during Ms. Cooley's residency. I would appreciate it if you would go ahead and supplement the personnel files of the department heads

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for the time of Ms. Cooley's residency and then we can later identify anyone else for which we need personnel files. We are willing to have these produced subject to a mutually agreeable confidentiality order.

Finally, I do believe that there were a number of requests which the Defendants indicated would be supplemented. Please let us know when we may expect to receive the supplemental responses.

Please let me know in the next ten (10) days if we can agree to resolve the above-referenced issues. If not, we will move forward with filing a motion to compel. If you would like to discuss these issues further or if you have any questions or concerns, please do not hesitate to contact me.

With kindest regards, I am

Very truly yours,

CHRISTIAN & CHRISTIAN, LLC

Matthew W. Christian
Attorney at Law

MC/jw

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STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
)
COUNTY OF GREENVILLE) Case Number: 2009-CP-23-6381

2010 JUL 13 P 3:22

Florence L. Briody, Personal Representative)
of the Estate of Harriett Lucy Hartsgrove,)

Plaintiff,)

vs.)

THI of South Carolina at Magnolia Place)
at Greenville, LLC, THI of South Carolina,)
LLC, THI of Baltimore, Inc., Fundamental)
Long Term Care Holdings, LLC,)
Fundamental Administrative Services, LLC)
and Fundamental Clinical Consulting, LLC)

Defendants.)

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
[illegible] PICKENS

ORDER

This matter comes before the Court on Defendant THI of South Carolina at Magnolia Place at Greenville, LLC's Motion to Stay and to Compel Arbitration as follows:

I. FINDINGS OF FACT

1. Harriett Hartsgrove was 92 years old when she became a resident of Magnolia Place of Greenville in June 15, 2005. Ms. Hartsgrove executed a durable power of attorney on June 10, 2005.

2. On June 15, 2005, Ms. Hartsgrove's daughter, Florence L. Briody, executed all of the admissions documents on behalf of her mother, including an "Admission Contract" which contained an arbitration provision to be "administered by the National Health Lawyers Association (the 'NHLA')." The NHLA is now the American Health Lawyers Association or AHLA. Also on June 15, 2005, Mrs. Briody also executed a separate Arbitration Agreement in which the parties agreed to arbitrate "as provided by the National Arbitration Forum Code of Procedure."

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3. Ms. Hartsgrove was injured in September 10, 2007 while in the custody and care of Defendant. Ms. Hartsgrove was hospitalized on September 15, 2007 as a result of this injury. Plaintiff alleges negligence related to the cause and treatment of this injury, which is the basis of the claims asserted in this action.

4. In 2004, the AHLA ceased administering pre-injury arbitration agreements.[1] At the time Mrs. Briody executed the Arbitration Agreement in June 2005, AHLA's rules of arbitration provided:

> The parties shall be bound by these Rules whenever they have agreed in writing to arbitration by the Service or under the Rules. The Service will administer a "consumer health care liability claim" under the Rules on or after January 1, 2004 *only if all of the parties have agreed in writing to arbitrate the claim after the injury has occurred and a copy of the agreement is received by the Service* at the time the parties make a request for a list of arbitrators. For purposes of the Rules, a "consumer health care liability claim" means a claim in which a current or former patient or a current or former patient's representative (including his or her estate or family) alleges that an injury was caused by the provision of (or the failure to provide) health care services or medical products by a health care provider or the manufacturer, distributor, supplier, or seller of a medical product.

5. Under the AHLA Rules, the parties may not vary the rules on communications, service, counting of days, publication and form of the award, release of documents, or administration. The parties are bound by a panel of arbitrators selected by the service. Standing alone, the parties' waiver of this set of rights in the Admissions Contract's arbitration provisions and the AHLA rules appear to reflect their specific intent to arbitrate *exclusively* before that body. The AHLA has its own fee schedule that applies to all aspects of the arbitration. The AHLA appears to be an integral part of the agreement to arbitration.

6. However, at the same time as Mrs. Briody executed the Admissions Contract,

[1] Defendant contends that a later amendment to the AHLA rule permits arbitration under a pre-injury arbitration agreement if a judge orders the AHLA to administer the arbitration agreement. This rule was not in place at the time the parties executed the agreement. Second, the AHLA is not a party to this action and it is difficult to understand how the court issue an order directed at AHLA. Third, because Defendant contends that in fact the National Arbitration Forum's rule govern the arbitration, it is difficult to reconcile this contention with the application of the AHLA's subsequent amendment.

Mrs. Briody signed a separate Arbitration Agreement requiring "arbitration as provided by the National Arbitration Forum Code of Procedure" ("NAF Code"). The NAF has its own fee schedule hat applies to all aspects of the arbitration. It also has rules on communications, service, counting of days, publication and form of the award, release of documents and administration. These terms are different than in the AHLA rules.

7. Importantly, as it relates to administration, the 2005 NAF Code provides:

> "This Code shall be deemed incorporated by reference in every Arbitration Agreement, which refers to the National Arbitration Forum, the International Arbitration Forum, the Arbitration Forum, arbitration-forum.com or this Code of Procedure, unless the Parties agree otherwise. **This Code shall be administered only by the National Arbitration Forum.**"

(Emphasis added). Standing alone, the parties' agreeing to arbitrate as provided by the NAF Code of Procedure would appear to reflect their specific intent to arbitrate *exclusively* before that body. Based upon these rules which by its terms are incorporated by reference into the Arbitration Agreement, the NAF appears to be an integral part of the agreement.

8. Mrs. Briody was not given a copy of either the AHLA rules nor the NAF Code or Procedure at the time she executed either agreement.

9. On July 17, 2009, the NAF entered into a Consent Judgment with the State of Minnesota, following a yearlong investigation by the Minnesota Attorney General's office. The terms of the Consent Judgment clearly and unequivocally state that the National Arbitration Forum is to stop "any business related to the arbitration of consumer disputes."

10. This divesture applies to all "Consumer Arbitration," which includes "any arbitration involving the dispute between a business entity and a private individual which relates to goods, *services*, or property of any kind *allegedly provided by any business entity to the*

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individual, or payment for such goods, services, or property.[2] Paragraph 3 of the Consent Judgment states:

> On or after July 24, 2009 no NAF Entity shall:
>
> a. Accept any fee for processing any new Consumer Arbitration.
>
> b. Administer or process any new Consumer Arbitration.
>
> c. In any manner participate in any new Consumer Arbitration.
>
> d. Attempt to influence the outcome of any arbitration proceeding currently pending before it.[3]

11. The parties mediated this case pursuant to S.C. Code §15-79-125 on April 22, 2009. Defendant did not move to compel arbitration nor demand arbitration before this mediation.

12. After filing the Notice of Intent but prior to filing litigation, counsel for Defendant, Mac White, represented to Plaintiff's counsel, W. Andrew Arnold, that there was an arbitration agreement between the parties.[4]

13. Plaintiff's counsel asked for a copy of the arbitration agreement between the parties, and Defendant's counsel provided him with a copy of an arbitration agreement, which stated that arbitration should be provided by the National Arbitration Forum Code of Procedure.

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[2] Id. ¶ 2. The language of the Consent Judgment clearly indicates that this divesture applies to claims arising in ALL states, not just potential claims in the State of Minnesota.

[3] Id. ¶ 3. Defendant does not dispute that this language encompasses actions involving allegations of negligent care at a nursing home in South Carolina.

[4] The findings of fact contained in paragraphs 13 through 30 are based upon the record of filings and the facts contained in uncontradicted Affidavit of Counsel filed on behalf of Plaintiff. Defendant's counsel did not file an opposing affidavit nor present any testimony contradicting the facts set out in the Affidavit of Counsel.

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Mr. White represented to Mr. Arnold that this agreement was *the* arbitration agreement between the parties.[5]

14. Plaintiff filed the Summons and Complaint in July 2009. It was served on Defendant in August 2009. Defendant did not move to compel arbitration nor did Defendant raise arbitration as a defense before serving an Answer in September 2009.[6]

15. Defendant served an Amended Answer in October 2009, which also failed to raise arbitration as a defense.

16. Plaintiff served discovery on Defendant in October 2009. Defendant asked for an extension and then served non-responses in December 2009, contending that they were not in possession of any documents responsive to such requests, which would have included arbitration agreements. (See Plaintiff's Motion to Compel.)

17. In December 2009, Plaintiff moved to compel discovery and moved to amend its complaint. Defendant opposed both motions. At no such time during these proceedings did Defendant raise either arbitration agreement as a defense to Plaintiff's claims or Plaintiff's motions. Plaintiff's motion to amend was granted and the court held that the amendments as it relates to THI of South Carolina at Magnolia Place at Greenville, LLC related back to August 2009.

18. In January 2010, Plaintiff had served subpoenas on several of Defendant's employees. In January 2010, Defendant made a motion to quash these subpoenas. At no time during these proceedings did Defendant raise either arbitration agreement as a defense.

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[5] This was shortly after the decision of *Grant* v. *Magnolia Manor of Greenwood*, 383 S.C. 125, 678 S.E.2d 435 (2009) had been decided which invalidated an agreement by the Supreme Court of South Carolina. This was also before the Minnesota consent order prohibiting the National Arbitration Forum (NAF) from administering arbitration in cases like the present case.

[6] Plaintiff misidentified Defendant as "Magnolia Place of Greenville, Inc. d/b/a as Magnolia Place of Greenville."

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19. In January 2010, Plaintiff filed and served its Amended Complaint. Plaintiff re-served discovery on Defendant in February 2010.

20. In February 2010, Defendant filed an Answer and for the first time, Defendant included a defense based upon the arbitration agreement. However, Defendant did not move to compel arbitration at that time.

21. Later in February 2010, Defendant served "responses" to Plaintiff's Interrogatories and Requests to for Production. In these responses, Defendant did not answer any interrogatories nor produce any documents, but instead objected to all discovery requests because of the existence of "an enforceable Arbitration Agreement." However, Defendant did not file a motion to compel arbitration at that time.

22. After receiving the discovery responses, Plaintiff's counsel alerted Defendant's counsel to the existence of the Minnesota consent order prohibiting NAF from administering arbitration in the present case. Defendant's counsel asked that Plaintiff's provide a copy of the consent order and indicated (perhaps implicitly) that he was unfamiliar with this consent order.

23. Plaintiff moved to compel responses to her Interrogatories and Requests to Produce. A hearing was scheduled for May 24, 2010.

24. As required by the standing court order, the parties mediated a second time on May 13, 2010.

25. On May 14, 2010 (ten days before the scheduled hearing on Plaintiff's motion to compel discovery), Defendant filed a motion to compel arbitration and requested that it be scheduled for May 24, 2010.

26. The delay in seeking to arbitrate this matter has resulted in Plaintiff's counsel spending 50 to 75 hours in attorney time, which would have been rendered unnecessary by a timely motion to compel arbitration.

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27. The delay in seeking to compel arbitration of this matter has also resulted in the incurring of unnecessary expenses, including mediation expenses and other court costs.

28. Moreover, Defendant's Senior Counsel, Eva Gonzalez, represented to Plaintiff's counsel that liability insurance is provided under a rapidly eroding insurance policy and that attorney fees and other expenses reduce the amount of insurance available to cover a judgment. (Defendant has refused to provide a copy of this insurance policy to Plaintiff.)

29. In addition, there is a factual dispute as to whether the medical director was advised of Harriett's Hartsgrove injury. There may be claims against the medical director, but because of the delay, discovery may be delayed until after the statute of limitations expires, which may be in September 2010.[7]

30. Defendant's 17 month delay in seeking to arbitrate this matter and filing a motion to compel arbitration since the filing of the Notice of Intent and the almost 10 month delay since the filing of this action has resulted in prejudice to Plaintiff. Accordingly, Defendant has waived its right to enforce arbitration in this case.

II. CONCLUSIONS OF LAW

A. Standard of Review

When ruling on a motion to compel arbitration, the court uses a standard analogous to the summary judgment standard. *See e.g., Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd., 636 F.2d 51, 54 (3d Cir.*1980). "Only when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement." *Id.* "Although we [South Carolina Courts] are constrained to resolve all

[7] This court does not intend to make a finding on the statute of limitations since there may be arguments regarding tolling, equitable and otherwise. This court merely takes note that the Ms. Hartsgrove's injuries occurred in September 2007 and generally, a three year statute of limitations applies to claims for negligence.

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doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis." *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007). Section 2 of the FAA states that:

> A written provision in...a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 USC § 2 (emphasis added). "[T]he court should apply 'ordinary state-law principles that govern the formation of contracts.'" *Towles v. United Healthcare Corp.* 338 S.C. 29, 37, 524 S.E. 2d 839, 844 (Ct. App. 1999) (citing *Johnson v. Circuit City Stores*, 148 F.3d 373, 377 (4th Cir. 1998) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995)). "Arbitration is a matter of contract and controlled by contract law." *South Carolina Pub. Serv. Auth. v. Great Western Coal (Kentucky), Inc.*, 312 S.C. 559, 563, 437 S.E.2d 22, 25 (1993) (citing 5 Am. Jur. 2d *Arbitration and Award* § 11 (1962). This court has applied South Carolina contract law to the facts in the record of this case.

B. The South Carolina Supreme Court's Holding in *Grant v. Magnolia Manor-Greenwood, Inc.* 383 S.C. 125, 678 S.E.2d 435 (2009) Mandates Denial of Defendant's Motion to Compel Arbitration.

Defendant seeks to enforce two separate arbitration agreements, each of which reference different arbitration forums administered in accordance with different rules for arbitration, different methods of selecting arbitrators from lists of panels maintained by two different arbitration services. Despite these facts, Defendant argues that the parties designated the AHLA as "their chosen forum." Although this Court finds this argument to be without merit because of the existence of two different agreements to arbitrate with conflicting sets of procedures,

(discussed below in Part C), the South Carolina Supreme Court holding in *Grant v. Magnolia Manor-Greenwood, Inc.* 383 S.C. 125, 678 S.E.2d 435 (2009) warrants denial of Defendants motion to compel arbitration even if the AHLA was the chosen forum of the parties. The Supreme Court in *Grant* held that because the selection of AHLA as an arbitration forum was an "integral" part of that arbitration agreement and because AHLA was no longer available to arbitrate the dispute, the arbitration agreement was unenforceable. *Id.* at 132. Because the same arbitration agreement is at issue in this case, this Court concludes that the decision in *Grant* is controlling and that a denial of Defendant's motion for arbitration to be administered by the AHLA.

Defendant seeks to re-litigate the issue decided in *Grant*, despite the fact that the law, the arbitration agreement, and the arbitration rules are the same as in *Grant*. Defendant argues that the Supreme Court overlooked a fact in the record of *Grant*, which Defendant explains in footnote 3 of its memorandum in support of its motion to compel arbitration:

> decision was predicted on the erroneous presumption that the AHLA had amended its rules in 2004 to provide that in health care liability cases, 'the AHLA would only arbitrate claims pursuant to arbitration agreements entered into after the alleged injury occurred.' In fact, under its amended rules, the AHLA continues to arbitrate health care liability claims pursuant to pre-injury arbitration agreements *when ordered by a court to do so.*

Accordingly, Defendant indicates that "*Grant* is inapposite because the AHLA is available to administer the parties arbitration." In support of this position, Defendant cites a copy of AHLA Rules that were amended in 2006 in support of this contention and seeks to have this court *order AHLA to administer an arbitration between the parties.*[8]

[8] Even if this court were to ignore all the other infirmities with Defendant's argument, the rule that Defendant's purport to rely upon makes clear that it only applies if "a judge orders that the service administer an arbitration...." This court does not believe that it can order the AHLA to do anything unless it is a party to this action. *See e.g., Green Tree Servicing, LLC v. Adams,* 375 S.C. 583, 654 S.E.2d 100 (S.C. App. 2007). The court may not act against a party without personal jurisdiction. *BB & T v. Taylor,* 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006). Moreover, a court should not render a judgment affecting the rights of a party without proper notice. *Ex*

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First, the amended rule relied upon by Defendant was not in effect when the parties to the current dispute executed the Admissions Contract in 2005, and thus, at that time AHLA the provision relied upon by Defendant was not in existence at that time. At that time, the AHLA's rules of arbitration provided:

> The parties shall be bound by these Rules whenever they have agreed in writing to arbitration by the Service or under the Rules. The Service will administer a "consumer health care liability claim" under the Rules on or after January 1, 2004 *only if all of the parties have agreed in writing to arbitrate the claim after the injury has occurred and a copy of the agreement is received by the Service* at the time the parties make a request for a list of arbitrators. For purposes of the Rules, a "consumer health care liability claim" means a claim in which a current or former patient or a current or former patient's representative (including his or her estate or family) alleges that an injury was caused by the provision of (or the failure to provide) health care services or medical products by a health care provider or the manufacturer, distributor, supplier, or seller of a medical product.

See Magnolia Healthcare, Inc. v. Barnes ex rel. Grigsby, 994 So.2d 159 (Miss. 2008).[9] This court believes that the scope of claims governed by the AHLA rules at the time of entering into the contract reflects the agreement of the parties.[10]

The Defendant cites *Adler v. Dell, Inc.* No. 08-CV-13170, 2009 WL 4580739 (E.D. Mich. Dec. 3, 2009) as authority supporting its position. First, *Adler* conducted the same analysis as our Supreme Court *Grant* and reached a different conclusion. This court is not at liberty to adopt the *Adler* approach instead of *Grant*, which represents binding precedent. Nonetheless, the arbitration agreement in *Adler* stated that the "SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM (NAF) **under its Code of Procedure then in effect...**"

Parte South Carolina Dep't of Revenue, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct.App.2002). Thus, the AHLA remains unavailable whether it applies the 2005 AHLA rule that existed at the time the parties executed the agreement or the 2006 rules that were amended after the parties had entered into an agreement.

[9] The Court relies on this *Magnolia HealthCare* case since a copy of the 2005 rules were not available to Plaintiff. Presumably, Defendant would have a copy of these rules dating back to 2005, and it has not contested this court taking judicial notice of the AHLA rules as found by the Mississippi Supreme Court.

[10] This conclusion relates to the "meeting of the minds" requirement discussed further in Part C of this opinion.

Id. at *1 (capital letters in original and bold emphasis added). Thus, for various reasons, this court does not find *Adler* persuasive.

Second, even if the 2006 AHLA amendments can be said to expand the scope of the arbitration rules, these rules pre-date the decision in *Grant* by three years and were the rules upon which the Supreme Court relied in reaching his holding in *Grant*. This court is simply not persuaded that the Supreme Court reached a erroneous decision in *Grant* because it failed to take note of a central fact. Even so, there are compelling reasons for this court to reach the same conclusion as *Grant* that AHLA is no longer "unavailable."

First, the 2006 AHLA rules urged by Defendant make clear that the AHLA will only arbitrate a dispute (such as exist in this case) if it is ordered to do so by a court of law. This is because the AHLA will not honor a pre-injury arbitration agreement, and thus, the AHLA requires the court to make a new post-injury agreement for the parties. According to the AHLA,

> If a judge gives a written order that the AHLA ADR Service administer an arbitration under the terms of a pre-injury arbitration agreement, signed by the parties, the AHLA ADR Service interprets the order as a *de facto* post-injury agreement to arbitrate the claim and thus will administer the matter.

http://www.healthlawyers.org/Resources/ADR/Pages/RulesAmendment.aspx[11] Considering the AHLA rules that existed at the times the parties contracted in 2005, such an order would indeed create a new agreement between the parties. The Court is "without authority to alter a contract by construction or to make new contracts for the parties." *C.A.N. Enterprises, Inc. v. South Carolina Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988) (citing *Gilstrap v. Culpepper*, 283 S.C. 83, 86, 320 S.E.2d 445 (1984)). This court is not willing

[11] This statement comes from the AHLA website cited by Defendant. Plaintiff provided the court with a copy of this website, without objection, during the hearing.

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to make a new post-injury agreement by way of an order of this court to remedy a situation the parties did not undertake voluntarily to remedy themselves.[12] *See Grant,* 678 S.E.2d at 437 ("The partiesdid not modify the admission contract to reflect the AHLA policy change.")

In addition, Defendant also seeks enforcement of a second arbitration agreement, which requires "arbitration as provided for by the *National Arbitration Forum Code of Procedure.*"[13] Putting aside at the moment the contradictory AHLA arbitration agreement, the NAF agreement considered independently suffers from the same deformity as the arbitration agreement that contains the AHLA provision. The NAF is prohibited by court order from participating "any business related to the arbitration of consumer disputes" or "in any manner participat[ing] in any new Consumer Arbitration."[14] However, an arbitration conducted "as provided by the [NAF] Code of Procedure" must comply with Rule 1 of the NAF Code which states that **"[t]his Code shall be administered only by the National Arbitration Forum."** (emphasis added).

Considering the NAF Agreement on its own terms, this court finds that the NAF is an "integral part" of the second arbitration agreement. *See e.g. Caridco v. Dell, Inc.*, 2009 WL 3485933 (W.D. Wash.)(holding NAF was integral to an agreement to arbitrate and expressly rejected approach of *Adler*); *Carr v. Gateway, Inc.*, 395 Ill.App.3d 1079, 918 N.E.2d 598 (Ill.App. 5 Dist. 2009)(holding NAF as forum was integral to the agreement.) In *Carr*, the Court quoted and cited *Grant* when it said: "'[T]he designation of a [specific arbitral] forum such as the [NAF] 'has wide-ranging substantive implications that may affect, *inter alia,* the arbitrator-selection process, the law, procedures, and rules that govern the arbitration, the enforcement of

[12] It is difficult to understand how Defendant gets the benefit of a 2006 amendment when Defendant advocates an construction that reconciles the two arbitration agreements by suggesting that the intent was for the AHLA to conduct the arbitration in accordance with the NAF Code of Procedure. Despite this argument, Defendant repeatedly makes reference to the AHLA rules, which if the NAF Code governs are moot.

[13] Plaintiff has attached a copy of the rules in existence at the time the parties signed the arbitration agreements.
[14] See Consent Judgment, ¶ 1.

the arbitral award, and the cost of the arbitration.'" *Id.* at 1087 (citation omitted). The adoption of a set of rules that by its own terms requires administration by a particular forum makes that forum "integral."

And, since the NAF is unavailable, the ruling in *Grant* is controlling as to the arbitration agreement in the Arbitration Agreement as well. Accordingly, this court denies Defendant's motion to stay this matter and compel arbitration.

C. There was no "Meeting of the Minds" on the Material Terms of an Enforceable Agreement to Arbitrate.

Assuming *arguendo*, that *Grant* is inapposite, Defendant's motion encounters perhaps an even greater obstacle in that its seeks at once to enforce two separate and contradictory sets of arbitration procedures both of which are to be administered by separate and distinct forums. "The Federal Arbitration Act recognizes that arbitration is strictly a matter of contract and that the parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate." *Dowling v. Home Buyers Warranty Corp., II*, 311 S.C. 233, 236, 428 S.E.2d 709, 710 (1993) (citing *Volt Info. Scis., Inc. v. Board of Trustees,* 489 U.S. 468, 479, 109 S. Ct. 1248, 1255, 103 L.Ed.2d 488, 500 (1989)). The contradictory nature of the two agreements makes it impossible to enforce fully enforce both without taking out the court's blue pencil, rewriting each set rules to reconcile the differences and to make guess as to the secret intentions of the parties.

General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 539, 542 S.E.2d 360, 364 (2001). The choice of the arbitral forum is one of the most important and material terms in an agreement to arbitrate. South Carolina common law requires that "[i]n order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with

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regard to all essential and material terms of the agreement. *Grant* at 130 *citing Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891(1989). This court finds that that the contradictory rules and the provisions of such rules that mandate administration by separate arbitral forums indicates clearly that the parties did not have a meeting of the minds in regards tot he material terms of an enforceable arbitration agreement.

First, the Supreme Court in *Grant* found that "[w]here designation of a specific arbitral forum has implications that may substantially affect the substantive outcome of the resolution," the designation of a forum such as AHLA is "an integral part of the agreement." *Id.* at 131. This provisions cannot be reconciled with the separate agreement to arbitrate "as provided by the National Arbitration Forum Code of Procedure," which according to Rule 1, **"shall be administered only by the National Arbitration Forum."** *See e.g., Collins v. Doe*, 352 S.C. 462, 574 S.E.2d 739 (2002)(use of words such as "shall" or "must" indicates a mandatory requirement). This court concludes that an agreement that requires that AHLA administer an arbitration under Rules that mandate that the NAF administer the arbitration cannot be reconciled.

Moreover, there are procedures that the AHLA considers non-negotiable if it is to administer an arbitration. "Under the AHLA policy, **the parties may not vary the rules on** communications, service, counting of days, publication and form of the award, release of documents, **or administration. The parties are bound by a panel of arbitrators selected by the service."** *Grant* at 131-32 (emphasis added). However, the NAF Code has different requirements regarding communications, service, counting days, publication and form of the award, release of documents and administration. Under the NAF, it provides its own panel of arbitrators. Applying the NAF Code would "vary" these non-negotiable and mandatory rules, on which AHLA participation is conditioned. Again, these provisions cannot be reconciled and this

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court cannot rewrite a set of rules in an attempt to make one agreement from two sets of contradictory rules.

It is nonsensical that the parties could have had a meeting of the minds to use two separate procedures, to be administered by separate forums, each of which is "integral" to arbitration process provided by the respective e rules, and each containing mandatory but contradictory procedures, not the least of which is separate and distinct methods of selecting arbitrators. Parties cannot be said to have had a meeting of the minds on matters which are indefinite, vague, uncertain, and even incomprehensible. "Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement have often been held to prevent the creation of an enforceable contract."[15] *Reed v. Boykin*, 282 S.C. 614, 320 S.E.2d 68 (S.C.App. 1984) *quoting* 1 CORBIN ON CONTRACTS, § 95 (1963). The existence of two contradictory arbitration provisions creates an indefinite and uncertain set of circumstances that is impossible for the parties and courts to decipher with any degree of confidence, especially five years after the fact.

In *Rockel v. Cherry Hill Dodge,* 368 N.J. Super. 577, 847 A.2d 621, 624 (N.J. 2004), the New Jersey Superior Court confronted a sufficient similar set of facts, which involved two distinct and different arbitration agreements. The New Jersey Superior Court held that "the arbitration agreement is highly ambiguous because the parties executed two documents which contain separate and somewhat disparate arbitration clauses. This ambiguity, we conclude, is fatal to the compelling of the arbitration of plaintiffs' CFA claims."

There was no meeting of the minds in regards to which forum would administer the arbitration, which rules would apply nor the scope of the claims subject to arbitration. There are

[15] Plaintiff omitted a phrase inserted into the quoted material "[such as consideration as we have in the instant case]" to avoid confusion

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no facts in the record which provide any clue to the manner in which both parties reconciled these contradictions in their minds, assuming such would have been possible since Plaintiff was never given a copy of either set of rules at the time of signing. *See Hooters of America, Inc. v. Phillips*, 39 F.Supp.2d 582 (D.S.C.1998) *affirmed and remanded* 173 F.3d 933 (4th Cir. 1999)(meeting of the minds includes a meeting of the minds on the rules governing arbitration) The Court is "not at liberty to consider the undisclosed or secret intentions of the parties but must be governed by their outward expressions." *Kubic v. Simmons*, 217 S.C.161, 60 S.E.2d 79, 81 (1950). Accordingly, Defendant's motion must be denied because there was no meeting of the minds.

D. The Defendant Waived Its Right to Enforce the Arbitration Agreement.

Finally, even if this court was to determine that an enforceable arbitration obligation exists, then it is clear to this Court that Defendant has waived its right to enforce the arbitration agreements. Served with the Notice of Intent in December 2008, Defendant failed to assert the arbitration agreement or request arbitration for over 17 months. Having waiting 17 months after it was first served with the Notice of Intent and almost 10 months since being served with the Summons and Complaint, Defendant has deliberately delayed seeking to compel arbitration to delay the action.[16] Defendant filed an Answer September 2009 and then an Amended Answer in October 2009, but in neither was arbitration asserted as a defense. Defendant served discovery in November 2009, filed a motion to quash in January 2010, sought a protective order in January 2010, participated in pre-suit mediation (April 2009) and then a year later, participated in court mandated mediation (May 2010). After objecting to discovery in March 2010, it held its motion to compel arbitration until the last possible day before it could use arbitration to further delay discovery. Defendant has certainly been unjustifiably slow in demanding arbitration.

[16] Defendant has not proffered any reason to justify its 17 month delay in seeking to compel arbitration.

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It is undisputed that "the right to enforce an arbitration clause may be waived." *Deloitte & Touche, LLP v. Unisys Corp.*, 358 S.C. 179, 184, 594 S.E.2d 523, 525 (S.C. Ct. App. 2004); *General Equip. & Supply Co. v. Keller Rigging & Constr., SC, Inc.*, 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct.App.2001); *Hyload, Inc. v. Pre-Engineered Prods., Inc.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct.App.1992); 6 C.J.S. Arbitration § 37 (1975). "**A party may waive the right to arbitration by being unjustifiably slow in seeking arbitration.**" *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 550, 575 S.E.2d 74, 76- 77 (S.C. Ct. App. 2003)(emphasis added). The "party seeking to establish waiver must show prejudice through an undue burden caused by delay in demanding arbitration." Id. (citing *Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 351, 338 S.E.2d 631, 634 (1985)).

In this case, Plaintiff has litigated for 17 months, and Plaintiff's counsel has wasted at least 50 hours of valuable time, including the attendance of two fruitless mediations, neither of which would have not been necessary if Defendant had timely sought to compel arbitration. In addition, Plaintiff's has been required to amend pleadings and move to compel discovery, which required an expenditure of attorney time, which all would have been rendered unnecessary by a timely motion to arbitrate. Moreover, these activities resulted in unnecessary expenses, including motion fees, service fees, and mediation expenses. *See* Evans v. Accent Manufactured Homes, Inc. 352 S.C. 544, 575 S.E.2d 74 (S.C. App. 2003)(holding incurring costs that would not have been incurred had party moved for arbitration constituted prejudice).

Moreover, under the NAF Code of Procedure, Plaintiff can be held liable for "all expenses and costs, including attorney fees…" for commencing litigation. Defendant's litigation and costs are much more significant after 17 months than such would have been if Defendant would have sought to arbitrate at the outset of the action. This exposure to thousands of extra

dollars in sanctions for filing an action is not only unconscionable but a clear example of prejudice.

In addition, according to the uncontradicted facts contained in the Affidavit of Counsel, Defendant's Senior Counsel, Eva Gonzalez, has represented to Plaintiff's counsel that liability coverage was provided under a rapidly eroding insurance policy and that attorney fees and other expenses reduce the amount of insurance available to cover a judgment. Because the entity that manages the facility d/b/a Magnolia Place of Greenville has little or no assets, this potentially could completely eliminate a remedy for Plaintiff's harm. In addition, after 17 months, Defendants have successfully frustrated discovery, and now the statute of limitations may expire in September 2010. Potential claims against others will be place in jeopardy if a stay is granted and the parties are required to select an arbitrator prior to being able to commence discovery.

"There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." Id; see Unisys, 358 S.E. at 184, 594 S.E.2d at 525. The determination of whether one's actions constitute waiver is a question of fact. *Laser Supply and Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 676 S.E.2d 139 (Ct.App.2009). Based upon the facts before this court, this Court concludes that Defendant has waived its right to enforce any agreement to arbitrate that may exist between the parties.

IV. CONCLUSION

For all the reasons stated above, this Court denies Defendant's motion to compel arbitration and to stay the proceedings.

IT IS SO ORDERED.

Judge Edward Miller
Thirteenth Circuit Court Judge

Dated: 7/13/10

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STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF GREENVILLE

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

CASE NO: 2014CP2306975

IN THE COURT OF COMMON PLEAS

2015 DEC 11 PM 1:08

Ashley S Smith vs New Glorified Health And Rehab Of Greenville LLC

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 11th day of December, 2015, and a copy mailed first class this 11th day of December, 2015, to attorneys of record or to parties (when appearing pro se) as follows:

Matthew W. Christian Christian & Davis P.O. Box 332 Greenville, SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

Robert Gerald Chambers Jr. PO Box 1473 Columbia, SC 29202

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court

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PLAINTIFF'S EXHIBIT
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STATE OF SOUTH CAROLINA COUNTY OF GREEENVILLE Ashley S. Smith as Guardian ad Litem for Jaywayne L. Henderson, Plaintiff, v. Glorified Health & Rehab of Greenville, LLC, New Glorified Health and Rehab of Greenville, LLC, New Ark Investment, Inc., f/k/a Ark Holding Company, Inc., Covenant Dove, LLC, Covenant Dove Holding Company, LLC, Ark South Carolina Holding Company, LLC, Olive Leaf, LLC, Greenville RE II, LLC, a/k/a Glorified RE, LLC, Ark III Real Estate, LLC, Ark Real Estate, LLC, New Ark SC Operator Holdings, Inc., New Ark Operator Holding, LLC, New Ark Master Tenant, LLC, New Ark Investment, Inc., DES New Ark TR, 4 West Holding, LLC, 4 West Investors, JS New Ark TR, HS New Ark TR and Heather Burton, Defendant(s).	IN THE COURT OF COMMON PLEAS C.A. No.: 2014-CP-23-06975 **ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND MOTION FOR PROTECTIVE ORDER AND GRANTING PLAINTIFF'S MOTION TO COMPEL DISCOVERY**

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2015 DEC 11 AM 9 41

PROCEDURAL HISTORY

This matter came before the Court on November 3, 2015, in Greenville, South Carolina. All parties were represented by counsel.

This matter rises out of certain claims set forth in complaints against Glorified Health & Rehab of Greenville, LLC (hereinafter "Facility"), New Glorified Health and Rehab of Greenville, LLC, New Ark Investment, Inc., f/k/a Ark Holding Company, Inc., Covenant Dove, LLC, Covenant Dove Holding Company, LLC, Ark South Carolina

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Holding Company, LLC, Olive Leaf, LLC, Greenville RE II, LLC, a/k/a Glorified RE, LLC, Ark III Real Estate, LLC, Ark Real Estate, LLC, New Ark SC Operator Holdings, Inc., New Ark Operator Holding, LLC, New Ark Master Tenant, LLC, New Ark Investment, Inc., DES New Ark TR, 4 West Holding, LLC, JS New Ark TR, HS New Ark TR and Heather Burton (hereinafter collectively referred to as "Defendants") for allegations of nursing home neglect and negligence involving the care and treatment of Jaywayne Henderson (hereinafter "Resident").

This matter was before the Court on Plaintiff's Motion to Compel Discovery and Defendants' Motion to Compel Arbitration and Motion for Protective Order. Having listened to oral arguments from counsel and having reviewed the parties' legal memoranda and attachments to same, for the reasons more fully set forth below, the Court hereby denies Defendants' Motion to Compel Arbitration and Motion for Protective Order and grants Plaintiff's Motion to Compel Discovery in the above-captioned matter.

This action is brought by Resident's daughter Ashley Smith (hereinafter "Daughter") as Guardian *ad Litem* for Resident. Plaintiff has specifically alleged that Resident developed skin breakdown and bedsores as a result of chemical burns from being left in and exposed for extended periods of time to feces and urine, that this required his emergent transfer to St. Francis Hospital and then emergent transfer to the Georgia Burn Center. Plaintiff has also alleged claims against Defendants other than the licensed facility alleging direct negligence for corporate negligence, underfunding the facility, understaffing the facility and negligently managing and operating the facility. The Defendants vigorously deny all of the allegations.

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At the time of admission, Resident's brother, Michael Henderson (hereinafter "Brother"), entered into an Admission Agreement for the provision of healthcare services. Further, subsequent to entering into the Admission Agreement, Brother signed an Arbitration Agreement regarding claims which might arise during the admission. In the Arbitration Agreement, under Brother's signature, it is checked that Brother signed as "General Power of Attorney" and as "Family". No Power of Attorney or authority for Brother to act on behalf of Resident has been introduced, submitted or discovered. In fact, Facility admits that Daughter was Resident's Power of Attorney during his residency at Facility.

If enforceable, the Arbitration Agreement would purport to, among other things, require that the claims alleged in Plaintiff's Complaint be subject to binding arbitration instead of Plaintiff having a right to a trial in court before a judge and/or jury.

Plaintiff filed the Notice of Intent on July 8, 2014. The parties engaged in the required pre-suit mediation on November 21, 2014. Thereafter, Plaintiff filed the Summons and Complaint and Defendants were served no later than January 20, 2015. Plaintiff served her First Interrogatories and First Requests for Production with the Summons and Complaint. The Defendants answered the Complaint on February 19, 2015, and served their first set of Interrogatories and Requests for Production with the Answer. An Amended Complaint was filed shortly thereafter with consent regarding name changes of some of the Defendants, for which the Defendants timely answered.

Plaintiff requested responses to discovery from the Defendants on multiple occasions between January and July. When Plaintiff did not receive any responses to her First Interrogatories and First Requests for Production, a Motion to Compel was filed in

July, 2015. Shortly before the hearing on the Motion to Compel was to be heard, Defendants provided limited answers (according to Plaintiff's Motion to Compel Discovery) on August 23, 2015. Plaintiff subsequently wrote to the Defendants seeking full and complete responses to discovery requests which were in issue. Defendants did not supplement these discovery requests and filed a Motion to Compel Arbitration on the day before the hearing on Plaintiff's Motion to Compel Discovery. At the first hearing, the trial court instructed the parties to try to resolve the discovery disputes and continued the Motion to Compel Discovery until the Motion to Compel Arbitration and Motion for Protective Order could be heard at the same time. The parties engaged in discovery limited to the arbitration issues after the filing of Defendants' Motion to Compel Arbitration.

LEGAL ANALYSIS AND CONCLUSIONS

Whether the parties agreed to arbitrate 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). 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). In making a determination as to whether a valid arbitration agreement exists, courts must consider "general contract defenses" to ensure a meeting of the minds existed. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 593, 553 S.E.2d 110, 116 (2001). Further, §2 of the F.A.A provides that state law contract defenses apply to the enforceability of an arbitration agreement. 9 U.S.C. §2. For the reasons set forth below, the Arbitration Agreement is

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not enforceable, and the Defendants' Motion to Compel Arbitration and Motion for Protective Order is denied.

I. THE ARBITRATION AGREEMENT IS UNENFORCEABLE AGAINST RESIDENT BECAUSE BROTHER HAD NO AUTHORITY TO EXECUTE THE ARBITRATION AGREEMENT

a. Third Party Beneficiary is Not Applicable

The Defendants rely upon two Federal District Court cases for their contention that the Arbitration Agreement is enforceable. Specifically Defendants rely upon McCutcheon v. THI (2011, U.S. Dist. Lexis 144288 D.S.C. 2011) and THI v. Wiggins (2011, U.S. Dist. Lexis 103638 D.S.C. 2011).

In light of this State's third party beneficiary law, and in light of Coleman v. Mariner, et al., 755 S.E.2d 450; 755 S.E.2d 450 (2014), this Court rejects Defendants' arguments. In Coleman, the South Carolina Supreme Court affirmed the trial court's refusal to enforce an arbitration agreement that was signed and executed by the resident's sister, who had no power of attorney, guardianship or other authority to act on her behalf. In addition to other contentions, the Defendants in Coleman argued that the Plaintiff was a third party beneficiary to the arbitration agreement, and therefore, the arbitration agreement should be enforced. The South Carolina Supreme Court rejected the nursing home Defendants' arguments in Coleman.

Furthermore, as argued by Plaintiff's counsel, the nursing nome Defendants in Coleman argued the McCutcheon and Wiggins cases to the South Carolina Supreme Court. McCutcheon and Wiggins are both 2011 cases, which existed three (3) years prior to Coleman. As such, the South Carolina Supreme Court did not follow McCutcheon and Wiggins, and Coleman is controlling on these issues. See also Malloy v. Thompson, 409

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S.C. 557, 762 S.E.2d 690 (2014), (discussing third party beneficiary and estoppel but not enforcing arbitration.)

Furthermore, for a third party beneficiary argument to be successful, the court must find that the underlying agreement is a valid contract. As the Arkansas Court of Appeals recently noted in Progressive Elder Care Services-Chicot, Inc., et al. v. Sue Long, as the Administrator for the Estate of Marion L. "Sugar" Long, 449 SW 3d 324, 2014 Ark. App. 661, there must be a valid contract underlying the premise of the third party beneficiary argument. In Progressive Elder Care Services-Chicot, Inc., et al., the nursing home sought to compel arbitration where the signatory to the arbitration agreement (not the resident) did not have authority to contract or enter into the arbitration agreement on behalf of the resident. Rather, the nursing home, as the Defendants do here, argue that the resident was a third party beneficiary. The trial court denied the nursing home's motion and the Arkansas Court of Appeals agreed. The court ruled that there was not a valid underlying agreement between the signatories to the contract/agreement because the signatory was not authorized to sign the documents. With no valid underlying contract, there could be no third party beneficiary. In the present case, there is no evidence that Brother had any authority to sign the Arbitration Agreement on behalf of Resident.

Plaintiff submitted the transcript of the 30(b)(6) deposition of Nursing Home Defendants. The 30(b)(6) designee (hereinafter "Wright") was the admission's director for Facility and presented the Admission Agreement and Arbitration Agreement to Brother. Wright's testimony reveals that Defendants' policies and procedures required them to: 1) obtain a copy of Brother's Power of Attorney (if it existed); 2) explain

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Brother's relationship to Resident in the relevant signatory portions of the Arbitration Agreement (Defendants did not provide any explanation); and 3) obtain Daughter's signature to the Arbitration Agreement and Admission Agreement when they learned Daughter had Power of Attorney for Resident during his admission (which they never did). Wright's testimony reflects that it was unclear who checked the line indicating that Brother had General Power of Attorney for Resident under the Arbitration Agreement signature.

Because the evidence shows that Brother had no authority to sign the Arbitration Agreement on behalf of Resident, there can be no third party beneficiary argument because there is no valid underlying agreement. Furthermore, as noted hereinabove, Coleman is controlling and the third party beneficiary argument fails when there is no authority for the signatory to the Arbitration Agreement to sign on behalf of the resident.

Finally, it is clear that the Admission Agreement and the Arbitration Agreement were two separate contracts (which is addressed more fully herein below), and as such, Resident is not a beneficiary under the unenforceable Arbitration Agreement.

a. Estoppel Does Not Apply

The Defendants also rely upon the McCutcheon case to argue that the resident is equitably estopped from denying the validity of the Arbitration Agreement. McCutcheon v. THI (2011, U.S. Dist. Lexis 144288 D.S.C. 2011). The Court rejects this argument for multiple reasons.

First, as noted hereinabove, this argument was made before the court in Coleman and rejected under the facts of the Coleman case, which are very similar and analogous to

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the case at hand. Second, equitable estoppel applies only to prevent a party from relying on one part of a contract while seeking to deny another part of the **same** contract.

The testimony of the Wright explicitly states that these were two separate contracts. Wright's testimony reflects: 1) the Arbitration Agreement was not a requirement to be signed before admission; 2) the Arbitration Agreement is entered into separately from the Admission Agreement; 3)the Arbitration Agreement is signed after the Admission Agreement; and 4) facility policies and procedures require that the Admission Agreement be signed, but not the Arbitration Agreement.

Additionally, the Arbitration Agreement attempts to include as parties the Facility's "parent, affiliates, any subsidiary companies, owners, officers, shareholders, directors, medical directors, employees, administrators, rehabilitation company, successors, assigns, agents, attorneys and insurers," while, the Admission Agreement purports to only include the Facility and the resident. Therefore, different entities are parties to the Arbitration Agreement and the Admission Agreement.

Furthermore, as the Coleman court noted, and as exists in this case, the Arbitration Agreement may be revoked within thirty (30) days of admission, and the revocation of the Arbitration Agreement does not affect the Admission Agreement. Also, the Admission Agreement states clearly that it is governed by South Carolina law and the Arbitration Agreement states clearly that it is governed by Federal law (Federal Arbitration Act). As in Coleman, the Arbitration Agreement here is not a pre-condition to admission and is not a requirement for the Admission Agreement, but the Admission Agreement must be signed and entered into before admission according to the Wright's testimony.

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The Admission Agreement also has portions and sections of the agreement that state that it shall withstand all other agreements, even if they are revoked. The Admission Agreement also states that it is the "entire agreement among the parties pertaining to the subject matter contained in it and supersedes all prior arrangements, representations, and all understandings of the parties." Therefore, in light of these facts, it is the Court's determination that the Arbitration Agreement and the Admission Agreement are two separate agreements and that is was the Defendants' intent to make these two separate agreements and therefore, there is no merger with the Arbitration Agreement and the separate Admission Agreement. As the court noted in Pearson v. Hilton Head Hospital, 400 S.C., 281, 290, 733 S.E.2d 597, 601 (2012) , the South Carolina Court of Appeals has ruled "in the arbitration context, the doctrine [of equitable estoppel applies]...when [one party] has consistently maintained that other provisions of the **same contract** should be enforced to benefit him". Id. *emphasis added.* In the present case, Plaintiff is not relying upon the Arbitration Agreement for any of the claims or causes of action Plaintiff is pursuing. Because there are two separate contracts with no merger of the documents, equitable estoppel cannot apply.

Further, for equitable estoppel to apply there must be a misrepresentation by the party. Underneath the signature on the Arbitration Agreement where it requests the "title or relationship to resident", it was written "brother". Brother did not write that he was Power of Attorney. Wright testified that she did not know who checked the lines indicating that Brother was general power of attorney. Wright also agreed the Facility failed to indicate the relation to the resident as required by Facility's policies and procedures. Wright also agreed that "responsible party" as indicated in the Admission

Agreement does not define the relationship to Resident or indicate that Brother had any authority to sign for Resident. Further, Wright testified that there was no specific recollection of conversations with Brother during the admission process where Brother represented that he had authority for Resident, but only that she had the "impression" that he was power of attorney. Wright also acknowledged that many times family members believe that just because they are a family member of the resident that they have a power of attorney. Based upon the evidence submitted, there is no evidence that Brother misrepresented his position and relationship with Resident and that Resident made a misrepresentation.

Equitable estoppel also requires that there is reasonable reliance by the party claiming estoppel and a lack of knowledge and means of knowledge of the truth as to the facts in question. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 589, 553 S.E.2d 110, 116 (2001). Estoppel cannot exist if the knowledge of both parties is equal and nothing is done by one to mislead the other. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 589, 553 S.E.2d 110, 116 (2001).

The evidence points to the fact that Facility knew or should have known that Brother had no power of attorney. The Defendants never obtained a power of attorney from Brother as required by Facility's policies, there was no power of attorney on record for Brother as required by the policies and procedures, and Facility actually became aware that Daughter had the Power of Attorney during Resident's admission and obtained a copy of Daughter's Power of Attorney, yet never had her sign the Admission Agreement and Arbitration Agreement as required by their policies and procedures.

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Therefore, Defendants cannot contend that they should not have known that Brother had no power of attorney or that they were misled by Brother or Resident.

Finally, estoppel cannot apply because the Defendants must prove that the party to be estopped (Resident) acted in a way amounting to a false representation, intended such conduct to be acted on by the Defendants, and had actual or constructive knowledge of the facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). Defendants present no evidence that Resident allowed Brother to falsely represent himself or that Resident had any knowledge of the facts or intended that Facility act upon Brother's representations. In fact, Wright testified that Resident likely was not present at the facility when Brother signed the Arbitration Agreement. Further, it is Nursing Home Defendants' contention that Resident was incompetent. There is no evidence that Resident acted in any way to amount to a false representation.

II. Defendants Other than Glorified Rehab are not Parties to the Arbitration Agreement

The Arbitration Agreement alleges to be between the Facility to include the "particular facility where the resident resides, its parents, affiliates, and any subsidiary companies, owners, officers, shareholders, directors, medical directors, employees, administrators, rehabilitation company, successors, assigns, agents, attorneys and insurers." However, these entities are not signatories to the Arbitration Agreement, nor did anyone sign on their behalf. The only entity that had a signatory on its behalf was Facility.

Wright testified that the only parties to the Arbitration Agreement were Facility and the Resident. Wright testified that she signed on behalf of Facility-Glorified Health

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& Rehab. Wright, who signed on behalf of the Facility also testified that she was employed by Facility (not other Defendants), received her paychecks from Facility, and had no authority to act on behalf of any other company other than Facility. She also testified that when she signed, she signed on behalf of Facility. Because Defendants other than Facility are not parties to the Arbitration Agreement, they cannot move to compel arbitration on the claims against them. The South Carolina Court of Appeals held in Pearson v. Hilton Head Hospital, et al, 400 S.C. 281, 733 S.E.2d 597 (S.C. Ct. App. 2012), that "generally arbitration is a matter of contract and a party cannot be required to submit to arbitration in a dispute which he has not agreed so to submit. Id. at 288 citing International Paper Company v. Schwabedissen Maschinen and Anlagen GMBH 206 F.3d 411 416 (4th Cir. 2000).[1] As the Pearson court noted, courts must not "ignore the corporate form of a non-signatory based solely on the interrelatedness of the claims alleged." Id. at 294.

III. Nursing Home Defendants Waive Their Right to Compel Arbitration

The right to enforce an arbitration clause may be waived. Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 647 S.E.2d 249, 251 (Ct. App. 2007); Davis v. KB Home of South Carolina, Inc., 394 S.C. 116, 713 S.Edd. 799, (Ct. App. 2011). Courts generally consider the following factors when determining whether a party has waived his rights to compel arbitration:

(1) Whether a substantial length of time transpired between commencement of the action and the commencement of a motion to compel arbitration;

[1] Pearson's holding regarding third party beneficiary for the non-signatory defendants is distinguishable from the present case because Plaintiff is not relying upon the Arbitration Agreement for any claim, and there is no evidence that there is arbitration agreements controlling the relationship between the Defendants, and there is no merger.

(2) Whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and

(3) Whether the non-moving party was prejudiced by the delay in seeking arbitration. Id.

Furthermore, the South Carolina Supreme Court recognized nursing homes can waive arbitration rights in Dean v. Heritage Healthcare of Ridgeway, LLC 401 S.C. 371, 759 (2014). In this case, Plaintiff filed a Notice of Intent to File Suit under S.C. Code §15-79-125 on July 8, 2014. The parties participated in an unsuccessful mediation on November 21, 2014. Plaintiff then timely filed her Summons and Complaint on December 18, 2014, and served the Defendants in January 2015. The Defendants filed an Answer in February, 2015.

The Defendants then served discovery upon the Plaintiff. Defendants, while belated, served responses to Plaintiff's discovery on August 23, 2015. When Plaintiff's Motion to Compel Discovery was scheduled to be heard, Defendants filed this Motion to Compel Arbitration and Motion for Protective Order on September 8, 2015, the day before Plaintiff's Motion to Compel Discovery hearing.

Unlike the nursing home defendants in Dean, the Defendants in this case failed to move "to compel arbitration at their first opportunity." Dean at 388. Defendants could have sought to compel arbitration after the Notice of Intent was filed and after the Complaint was filed but delayed in both instances. The Motion to Compel Arbitration was filed fourteen (14) months after Plaintiff first filed the Notice of Intent to File Suit and over eight (8) months after the Plaintiff filed the Summons and Complaint.

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Plaintiff further argues that Plaintiff has been prejudiced by the additional accrual of expenses in the litigation, which would not have been necessary if the parties were engaged in arbitration, and that Plaintiff has lost the ability to obtain witnesses or evidence through the Defendants' delay.

Given the substantial delay and participation in discovery and litigation process, the Defendants waived and abandoned their rights to compel arbitration.

IV. PLAINTIFF'S MOTION TO COMPEL DISCOVERY IS GRANTED

Plaintiff filed a Motion to Compel Discovery on July 10, 2015. According to Plaintiff's Motion, Memoranda, and exhibits attached thereto, Defendants have refused to answer numerous discovery requests and objected to significant discovery requests. When these matters were before the Court and these motions were heard, the Defendants contended that their objections to Plaintiff's discovery were based upon their Motion for a Protective Order which resulted from the underlying Motion to Compel Arbitration. Defendants were explicitly given the opportunity to place any further objections to discovery on the record and no objections were so placed.

Therefore, all Defendants are ordered to provide full and complete responses to Plaintiff's First Interrogatories and First Requests for Production within forty-five (45) days of the date of this Order.

WHEREFORE, for the reasons stated herein, the Court denies the Defendants' Motion to Compel Arbitration and Motion for Protective Order and grants Plaintiff's Motion to Compel Discovery.

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IT IS SO ORDERED.

The Honorable Edward W. Miller
Presiding Judge Thirteenth Judicial Circuit

Greenville, South Carolina
Date: 12/9, 2015

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD)
) SIXTH JUDICIAL CIRCUIT
Betty M. Cook,)
) Civil Action No. 13-CP-20-435
Plaintiff,)
)
vs.)
) **ORDER DENYING DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNTATIVE TO STAY PROCEEDINGS PURSUANT TO ALLEGED ARBITRATION AGREEMENT**
UniHealth Post-Acute Care – Tanglewood, LLC d/b/a UniHealth Post-Acute Care - Tanglewood, UHS Pruitt Corporation, United Clinical Services, Inc., and United Rehab, Inc.,)
)
Defendants.)

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FAIRFIELD COUNTY
CLERK OF COURT
BETTY S. BECKHAM

This matter came before the Court on the Defendants, UniHelath Post-Acute Care-Tanglewood LLC d/b/a UniHealth Post-Acute Care-Tanglewood's Motion to Dismiss or in the Alternative to Compel Arbitration and Stay Litigation. After hearing the arguments of counsel on March 20, 2014 and upon the review of the documents presented by the attorneys, the Court finds there is no enforceable arbitration agreement and Defendants' Motion to Dismiss or in the Alternative to Compel Arbitration and Stay Litigation should be **DENIED.**

I. FACTUAL BACKGROUND

On June 9, 2010, Plaintiff was admitted to Defendants' facility with compromised mobility and decreased function. On or around that same date, her husband signed the Admissions Agreement and an Arbitration Agreement on her behalf. At the time Mr. Cook executed the admissions documents, he was not Mrs. Cook's attorney-in-fact or court appointed guardian.

Plaintiff suffered multiple falls while at the Defendants' facility. As a result, Plaintiff subsequently filed a Notice of Intent to File Suit on July 23, 2013. The Notice of Intent stage

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resulted in an impasse at pre-suit mediation which occurred on November 5, 2013. The Summons and Complaint were subsequently filed on November 25, 2013. Defendants filed their Answers on January 22, 2014, and Defendants at this time, which was more than five months after the Notice of Intent stage, raised the issue of arbitration.

II. DISCUSSION

Arbitration is a matter of contract and South Carolina courts must determine the enforceability of an arbitration agreement based on principles of contract law. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). The policy of this State is to favor arbitration of disputes. Toler's Cove Homeowners Ass'n v. Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 S.E.2d 581 (2003). However, an arbitration agreement is not enforceable when a party to the contract lacks the capacity to contract.

1. The Arbitration Agreement is not enforceable because John Cook lacked the capacity to contract on behalf of his wife.

In South Carolina, actual authority is expressly conferred upon the agent by the principal, but apparent authority exists where the principal knowingly permits the agent to exercise authority or when the principal holds the agent out as possessing such authority. Roberson v. S. Fin. of South Carolina, Inc., 365 S.C. 6, 9, 615 S.E.2d 112, 115 (S.C. 2005). It is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority. Frasier v. Palmetto Homes of Florence, 473 S.E.2d 865 (S.C. App. 1996). Here, Defendants argue in their motion that because Mrs. Cook suffered dementia prior to and at the time of her admission, she did not have capacity to enter into a binding contract. Therefore by Defendants' own admission, Mrs. Cook could not explicitly authorize, hold out, or knowingly permit Mr. Cook to sign the Arbitration Agreement, in satisfaction of the elements of the doctrine of apparent authority. Additionally, a review of the admissions and arbitration documents by Defendants would have

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informed them that Mr. Cook did not have authority by way of a Power of Attorney to bind his wife.

Furthermore, the Adult Health Care Consent Act does not confer legal authority to Mr. Cook to enter into a contract on behalf of his wife. S.C. Code Ann. § 44-66-30 notes that "(A) where a patient is unable to consent, decisions concerning his health care may be made by the following persons in order of priority: . . . . . (4) a spouse of the patient. . ." The statute specifically provides for a surrogate to make decisions regarding procedures and treatment of human disease and ailments. However, the statute does not authorize surrogates to enter into separate legal contracts waiving a person's right to a jury trial.

This Court finds the Supreme Court of South Carolina's recent decision in Coleman v. Mariner Health Care, Inc., is on point with the facts of the case at hand. In Coleman, the Circuit Court denied the nursing home defendants' motion to stay the action and compel arbitration because the sister of the resident who signed the arbitration and admission agreements lacked capacity to bind her sister to the arbitration agreement. In affirming the Circuit Court's Order in Coleman, the Supreme Court found that although the South Carolina Adult Healthcare Consent Act did give the resident's sister "authority to make 'healthcare decisions' on behalf of her sister, consent for medical treatment for someone unable to consent is not the same as binding an incompetent person to a legally binding contract such as an arbitration agreement without authority to do so." Id. at 4. The Court reasoned that the Act extends authority to surrogates to make traditional healthcare decisions and financial decisions that arise out of those decisions.

Mr. Cook had no legal authority whatsoever to sign the Arbitration Agreement, and from the record so far through litigation, Defendants were well aware of this fact but asked him to sign

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nonetheless. Absent legal authority or at least some measure of apparent authority, the Arbitration Agreement is void and unenforceable.

2. **Betty Cook was not a third party beneficiary to the Arbitration Agreement because John Cook did not have capacity to bind her to the contract.**

Defendants' argument that Betty Cook is bound by the Arbitration Agreement executed by her husband as a third party beneficiary is without merit. Mrs. Cook did benefit from the Admissions Agreement to the facility of which her husband did have authority under the Adult Healthcare Consent Act to execute on her behalf. However, Mr. Cook did not have authority to legally bind his wife to the Arbitration Agreement contract for the reasons set forth above. As such, this Court finds Betty Cook was not a third party beneficiary to the Arbitration Agreement because the contract was never valid.

3. **Plaintiff is not equitably estopped from denying the Arbitration Agreement.**

Defendants' argument that Plaintiff should be estopped from denying the Arbitration Agreement because she received the benefits of the Admissions Agreement despite her non-signatory status is also misguided. First, the Defendants' argument assumes the Admissions Agreement and the Arbitration Agreement are equal. The Court finds that the agreement regarding Betty Cook's health care is not the same as the agreement to waive her right to a jury trial. Moreover, John Cook did not have legal authority to enter into an agreement to waive Betty Cook's legal and constitutional rights; and Defendants were fully aware he lacked such authority. The Defendants' argument concerning estoppel is therefore rejected.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Arbitration Agreement in question is unenforceable and Defendants' Motion to Dismiss is **DENIED.**

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Brian M. Gibbon
Presiding Judge, Sixth Judicial Circuit

Dated: 4/2, 2014
Winnsboro, South Carolina

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS C.A. No.: 2020-CP-42-03818 & 2020-CP-42-03819
Terry Putman, Individually and as Personal Representative of the Estate of Margaret Hensley, Plaintiff, v. White Oak Estates, Inc., White Oak Management, Inc., and White Oak Manor, Inc., Defendant(s).	)	**ORDER REGARDING DEFENDANTS' MOTION TO DISMISS, COMPEL ARBITRATION, AND FOR A PROTECTIVE ORDER OR, ALTERNATIVELY, TO STAY THE ACTION PENDING ARBITRATION**

Hearing Date:	March 17th, 2021, at 2:30 p.m.
Hearing Judge:	Grace Gilchrist Knie
Counsel for Plaintiff:	Matthew W. Christian
Counsel for Defendants:	Joshua T. Thompson
Court Reporter:	Linda D. Moffitt

This matter came before the Court on March 17 th, 2021, at 2:30 p.m. on Defendants White Oak Estates, Inc., White Oak Management, Inc., and White Oak Manor, Inc.'s Motion to Dismiss, Compel Arbitration, and for a Protective Order or, Alternatively, to Stay the Action Pending Arbitration filed with the Court on February 19th, 2021. Counsel for the parties appeared virtually pursuant to the South Carolina Supreme Court's recent Order regarding COVID-19 protocol. Present representing the Defendants was Joshua T. Thompson, Esq., of Boulier Thompson & Barnes, LLC, in Spartanburg, South Carolina, and present representing the Plaintiff was Matthew W. Christian, Esq., of Christian & Christian, LLC, in Greenville, South Carolina. The Court Reporter was Linda D. Moffitt.

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Having listened to oral arguments from counsel and having reviewed the parties' legal memoranda with attached exhibits for reasons set forth more fully below, the Court hereby denies the Defendants' Motions.

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 Margaret Hensley (hereinafter "Decedent"). Terry Putman (hereinafter "Daughter") was Decedent's daughter and serves as Personal Representative of Decedent's Estate. Decedent was admitted to White Oak Estates, Inc. (hereinafter "White Oak Estates") for short-term rehabilitation after undergoing a hip arthroplasty at Spartanburg Regional Medical Center. At the time of admission, Decedent had an articulating brace for her leg to help keep it immobilized as a result of her hip surgery. Plaintiff alleges that as a result of Defendants' negligence, that Decedent developed a wound near the area of the articulating brace which Plaintiff alleges to have significantly deteriorated resulting in infection, sepsis, emergency transport to the hospital, and ultimately, her death. At the time of admission, Daughter signed an admission agreement and an arbitration agreement presented to her by agents of White Oak Estates. The Arbitration Agreement was signed by Daughter as "resident/representative" and by an agent of the facility for "White Oak Estates".

Plaintiff filed the Notice of Intent to File Suit on March 25th, 2020 and subsequently served the Defendants on June 9th, 2020. The parties engaged in the mandatory pre-suit mediation which was unsuccessful. Daughter as Personal Representative then filed the Complaints on November 2nd, 2020, for wrongful death and

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survival actions and timely served the Defendants. Defendants filed their Motion to Compel Arbitration on February 19, 2021. Plaintiff contends that the arbitration agreement is unenforceable under state contract law.

LEGAL 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 (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).

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."). Arbitration agreements must satisfy the basic tenets and requirements of contract law. Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844, (Ct. App. 1999). Section 2 of the Federal Arbitration Act dictates that arbitration agreements are enforceable except "upon such grounds as exist at law or equity for the revocation of any contract". 9 U.S.C. §2. The courts, not arbitrators, are charged

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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). Thus, unless there is a valid, irrevocable, and enforceable contract, the Federal Arbitration Act does not apply. The purpose of the Federal Arbitration Act is "to make arbitration agreements as enforceable as other contracts, but not more so." Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967).

Further, the party seeking enforcement of the agreement bears the burden to prove a valid arbitration agreement exists that is enforceable, knowing, voluntary, and intentional. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008); Hinson-Barr, Inc. v. Pinckard, 292 S.C. 267, 268, 356 S.E.2d 115, 116 (1986). Whether the arbitration contract is valid is addressed by applying general principles of state law governing contract formation. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). Therefore, the burden is on the moving party to demonstrate the absence of any genuine dispute of material fact, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970), and that the movant is "entitled to judgment [compelling arbitration] as a matter of law." Burrell v. 911 Restoration Franchise Inc., 2017 WL 5517383, at *3 (D. Md. November 17, 2017) (citing Fed. R. Civ. P. 56(a)). The arbitration agreement at issue in this particular case with White Oak Estates is not valid and Defendants cannot meet their burden of proof.

Defendants' Motion to Dismiss, Compel Arbitration, and for a Protective Order or, Alternatively, to Stay the Action Pending Arbitration are effectively motions to enforce

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contracts. In the ordinary course, a nursing home resident who alleges injuries would bring her claim before the Court as the Plaintiff has done here and the nursing home would mount its defense in the same forum. A valid contract to arbitrate their disputes is the only way to opt out of the litigation process. The Court finds that Defendants have no such contract with Decedent. The arbitration agreement is invalid for numerous reasons as set forth hereinbelow.

I. The Admission Agreement and Arbitration Agreement are Separate and Do Not Merge.

South Carolina Appellate Courts have examined the issue of whether admission agreements and arbitration agreements have merged on at least three separate occasions and rejected the contention of merger each time. Coleman v. Mariner Healthcare, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014); Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. Appt. 2018). It should also be noted that the Court of Appeals recently rejected, for a fourth time, the argument of estoppel where the arbitration agreement was contained within the admission agreement itself. Weaver v. Brookdale Senior Living, Inc., 431 S.C. 223, 847 S.E.2d 268 (Ct. App. 2020). In the end, the Defendants' pursuit of the merger argument fails for the same reasons as the nursing homes in Coleman, Thompson, and Hodge.

In the case at hand, as noted in the aforementioned cases, the Courts have traditionally recognized that arbitration agreements which are separate and distinct from the admission agreement do not merge. As the Coleman Court noted, the merger principle cannot apply unless the writings in question were executed "at the same time, by the same parties, for the same purpose, and in the course of the same transaction." Coleman, 407

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S.C. at 355, 755 S.E.2d at 455. Even then, merger does not apply if there is "*anything* indicating a contrary intention." Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added). Thus, simultaneously executed writings related to the same general subject matter will not be viewed as a single or merged agreement if either the language or the circumstances even hint that the parties actually intended the writings to be distinct, separate contracts.

The Defendants cannot show that the Admission Agreement and Arbitration Agreement were executed for the same purpose. The Admission Agreement was "for the provision of nursing services for Margaret Hensley." Admission Agreement, p. 1. Therefore, the contract by its express terms sets forth the purpose of the agreement was for the provision of skilled nursing care. That purpose is born out in the nineteen (19) pages of the Admission Agreement. The facility agreed to provide services identified on pages 2-3 of the agreement in exchange for payment by the resident as outlined in pages 4-12. On the other hand, the Arbitration Agreement covers a completely different issue. It is solely devoted to directing an alternative dispute resolution method and purporting to eliminate its parties' right to relief through the courts. These two contracts cannot have the same purpose because, as Defendants admit, the Arbitration Agreement was not a pre-condition for admission.

Second, the terms and context show that the parties intended the Admission Agreement and Arbitration Agreement to be separate contracts. Also, admission and arbitration contracts cannot merge if they contain inconsistent terms, especially provisions related to how each contract may be terminated. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685. Moreover, courts look at the way the

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contracts are structured, finding it unlikely that parties intended two contracts to be treated as one if they chose separate titles, required separate signatures, and numbered each contract's pages differently. Thompson, 416 S.C. at 53 n. 1 784, S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562, 813 S.E.2d at 302. Finally, Hodge held a nursing home cannot argue for merger when it chose to separate arbitration and admission into two agreements while taking the position that agreeing to the former was not required to obtain the benefits of the latter. Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

As present in the aforementioned cases, the Admission Agreement contains the "entire agreement" provision identifying the contract's limited scope. Second, the parties did not intend for the two contracts to be read as one because they chose to apply different substantive law to both agreements. Hodge, 422 S.C. at 562, 813 S.E.2d at 302. In the present case, state law purportedly governs the Admission Agreement and federal law purportedly governs the Arbitration Agreement. Admission Agreement p. 16; Arbitration Agreement p. 1.

Coleman, Thompson, and Hodge made special notes of inconsistent provisions in admission and arbitration contracts regarding when each contract may be canceled at the resident's urging. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 551, 813 S.E.2d at 296. The Admission Agreement provides that the resident may terminate the contract with three days advance written or oral notification. However, the Arbitration Agreement provides that the resident may terminate/opt-out of the agreement within thirty (30) days. Admission Agreement p. 12; Arbitration Agreement p. 3-4. Further, the Admission Agreement allows the facility to unilaterally modify the terms of the agreement with thirty (30) days advance written

notice. However, the Arbitration Agreement states that the agreement may not be modified except by subsequent written agreement. Admission Agreement p. 16, ¶ 19.5; Arbitration Agreement p. 4, ¶ 22.

Finally, an arbitration contract is far less likely to merge with an admission contract if the nursing home admits arbitration is not required for admission. In Hodge, our Appellate Court cited as further evidence against merger where arbitration contract provisions state that arbitration was not a pre-condition to a resident's acceptance to the nursing home. Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302; See also Arrendondo v. SNH S.E. Ashley River Tenant, LLC, Op. No. 28011 (S.C. Sup. Ct. Filed March 10, 2021)(Shearhouse Adv. Sh. No. 8 at 40, 49-50)(finding that, since arbitration was optional, it was not a healthcare decision or "necessary" to such decisions and the son's power of attorney-based authority did not extend to arbitration matters). Similarly, in the present case, Defendants admit that executing the Arbitration Agreement was not mandatory and was not a pre-condition.

In sum, the arbitration agreement and admission agreement have the same four indicators that South Carolina Courts have cited in the past to find simultaneously executed contracts were not intended to merge into one. Further, the present arbitration and admission agreements have additional factors indicating their separateness. Any uncertainty about the four indicators must be resolved in Decedent's favor, not to her detriment. The facility must prove that all four of the indicators discussed hereinabove are absent here and the Defendants must not just oppose one of the four indicators discussed above but prove all four are absent here. Additionally, the facility drafted these form

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contracts of adhesion and any ambiguities must be construed against it. Therefore, based on all of the above factors, the two agreements do not merge.

II. The Arbitration Agreement is Unenforceable Because it is Unconscionable.

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them, and no fair and honest person would accept them. Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the agreement. S.C. Code Ann.§ 36-2-302(1) (2003). In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. See Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir.1999). It is under this general rubric that courts must determine whether a contract is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. See Carlson v. General Motors Corp., 883 F.2d 287, 295 (4th Cir.1989). In determining whether a contract was "tainted by an absence of meaningful choice," Id. at 295, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of

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the challenged clause; and the conspicuousness of the clause. Id. at 293. See also Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." (quoting 17 A Am.Jur.2d Contracts§ 279 (2004))); see also Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007).

The choice of a nursing home is made in the midst of a crisis brought on by a precipitous deterioration in health status, disability level, or the loss of a care giver or spouse.[1] Frequently, the need to find placement for a loved one arises quickly and nursing home admissions are often unplanned, and there is often little time to investigate options or wait for an opening at a nursing home. Time pressure impairs the ability to seek and consider alternatives. This is further confirmed by Daughter's Affidavit. Daughter and her family had no choice or time in making such a decision as Daughter's affidavit reflects that she was required to sign the Admission Agreement under stress during her mother's hospitalization shortly before discharge to the facility. As Daughter's Affidavit further reflects, she was not explained the Arbitration Agreement and no one made her aware of the Arbitration Agreement.

Further, Daughter lacked a meaningful choice in the terms of the Arbitration Agreement which are oppressive and one-sided, and it was presented to her on a take it or leave it basis. She did not contribute to the drafting of the agreement and did not possess the bargaining power to negotiate the terms of the Arbitration Agreement. Further, there

[1] *See, e.g.,* Podolosky v. First Healthcare Corp., 58 Cal.Rptr. 2d 89, 101 (Cal. Ct. App. 1996) (*citing* Donna Ambrogi, *Legal Issues in Nursing Home Admissions*, 18 Law Med. & Health Care 254, 258 (1990)); *see also* Marshall B. Kapp, *The "Voluntary" Status of Nursing Facility Admissions: Legal, Practical, and Public Policy Implications*, 24 N.E. J. on Crim. & Civ. Confinement. 1, 3 (1998) (stating that an older person's move to a nursing home also follows a period of acute hospitalization, when their care giving family is unable to adequately manage the demands of home care).

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is an inherent disparity in bargaining power between the parties in this transaction as the nursing home is a sophisticated entity well versed in arbitration agreements revolving around admissions to their facility. The alleged injuries are significant including wrongful death and serious injury.

Further, the terms of the Arbitration Agreement are unfair and no person would voluntarily agree to them. The Arbitration Agreement at issue in this case is fundamentally and substantively unfair on numerous levels. First, the Arbitration Agreement provides that three arbitrators will be on the panel to hear the case. However, two of the arbitrators do not have to be attorneys or have any education or experience in matters dealing with the subject matter or legal issues. Arbitration Agreement, pages 1-2, ¶ 4-6. Additionally, the arbitrator may be anyone that the party knows at the time with very limited exceptions. If the arbitrator chosen by Daughter and the arbitrator chosen by Defendants cannot agree to a third arbitrator, the third arbitrator will be determined by a coin toss wherein the winner of the coin toss gets to determine the third arbitrator. Arbitration Agreement, page 2, ¶ 6. The essential result is that the party prevailing on a matter of luck/coin toss is more likely to win discovery disputes, evidentiary concerns, and arbitration proceeding as the majority of the arbitrators will be anyone chosen by the winner of the coin toss. No party would agree to these fundamentally unfair principles regarding the Arbitration Agreement rendering the result to a matter of chance and luck. Further, not having two of the arbitrators being completely neutral or having any type of knowledge or education on the subject matter or legal field creates a fundamental unfairness.

Additionally, the Arbitration Agreement allows for extensive delays in the process when the entire purpose of arbitration is to promote efficiency and timeliness. The facility

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in this particular situation would have ninety (90) days/three months to name their arbitrator after the Plaintiff named the arbitrator. Arbitration Agreement, page 102, ¶ 5-6. Further, after the second arbitrator is chosen, another ninety (90) days/three months would pass before the third arbitrator is chosen. The third arbitrator would then have thirty (30) days to notify the parties as to whether or not he/she would agree to arbitrate the proceedings. Arbitration Agreement, page 2, ¶ 6. Therefore, a minimum of seven (7) months would pass before the parties could even begin the arbitration process. This is antithetical to the entire premise of arbitration and is further evidence of the unconscionability.

Third, the Arbitration Agreement provides that the decision regarding the outcome of the arbitration shall be made by the majority of the arbitrators picking an offer/demand made separately by both of the parties twenty-four (24) hours prior to the hearing. The arbitrators have no discretion to award any different decision other than one of the offers or demands given by each of the parties. Arbitration Agreement, page 3, ¶ 13. Finally, whoever the non-prevailing party is (the party whose offer/demand is not chosen by the majority of the arbitrators) will be required to pay all of the prevailing party's costs and expenses including, but not limited to, the third arbitrator's fees, costs of deposition, and any other costs associated with the hearing. Arbitration Agreement, page 2, ¶ 9; page 3, ¶ 19.

As a result, the cost of arbitration far outweighs the cost of proceeding in Court and therefore the agreement is unconscionable. Also, the costs of the arbitration must be paid by the parties including the Estate of Margaret Hensley which contains no money, income, or assets. Plaintiff's Affidavit on page 2 specifically states that the Estate has no assets and

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no income whatsoever. Plaintiff did not and does not have the financial wherewithal to pay or prepay arbitration fees or pay the opposing side's costs should the majority not pick her demand at the resolution. The amount of money that it would cost to begin and proceed through the arbitration process, including hearing, exceeds that available to the Plaintiff.

> Although the costs of arbitration may be a basis for determining that an agreement to arbitrate is substantially unconscionable, since Green Tree the issue of the prohibitive costs of arbitration has developed into a separate defense to the enforcement of an arbitration agreement. See Zephyr Haven, 122 So.3d at 921–22. "[W]here 'a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.' " Id. at 921 (quoting Green Tree, 531 U.S. at 92, 121 S.Ct. 513). In determining whether the costs of arbitration in a fee splitting arrangement are so prohibitive as to render the agreement unenforceable because it denies the plaintiff access to the arbitral forum, a case-by-case analysis is appropriate. Id. at 922. The focus is on the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigating in court, and whether the cost differential is so substantial as to deter the bringing of the claims. Id. In order to invalidate the arbitration agreement, the plaintiff, at an evidentiary hearing, must show the expected cost of arbitrating the specific claim is greater than litigating it and that the cost of arbitration would be prohibitively expensive. Id.
>
> Fi-Tampa, LLC v. Kelly-Hall, 135 So.3d 563 (Fla. App., 2014)
>
> An arbitration agreement may be substantively unconscionable if the fees and costs to arbitrate are so excessive as to "deny a potential litigant the opportunity to vindicate his or her rights." [Cite omitted] Green Tree Fin. Corp. Ala. v. Randolph, 531 U.S. 79, 81, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000) (holding that excessive arbitration costs may preclude litigants from effectively vindicating their rights). The party seeking to invalidate an arbitration agreement on such grounds has the burden of proving that arbitration would be prohibitively expensive. [cites omitted] Whether arbitration is prohibitively expensive is a question of fact that depends on the unique circumstances of each case. See Harrington, 119 P.3d at 1055 (explaining that "the Supreme Court adopted a case-by-case approach to determining whether fees imposed under an arbitration agreement deny a potential litigant the opportunity to vindicate his or her rights") (citing Randolph, 531 U.S. at 92, 121 S.Ct. 513). "

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Defendants contend that Daughter had previously signed the same arbitration agreement on two prior admissions in 2012 and 2014. The circumstances surrounding the execution of the prior arbitration agreements some three to five years earlier are unknown and are not relevant to the present case. The circumstances under which Decedent was admitted on those prior occasions was never presented by the Defendants. Further, previous admissions have no bearing on either of the unconscionability prongs of lack of meaningful choice or grossly unfair terms. However, even if the prior agreements were relevant to the present admission, they differ significantly in some of the material terms. For example, the prior agreements contain deadlines for the selection of the arbitrators which are much shorter and more efficient (one-third of the time shorter) than the present arbitration agreement in this case. As a result of the deadlines in the present Arbitration Agreement, the arbitration process would potentially not be able to start until at least after seven (7) months, assuming the arbitration selection process went smoothly. The prior arbitration agreements would have provided that the arbitration process could have started much sooner. Further, in the event the two arbitrators selected by each party could not agree on the third, the prior arbitration agreements determined that the third arbitrator in the panel of three would be by appointed by the American Arbitration Association. The arbitration agreement in the present case requires that in the event that the two arbitrators selected by each party cannot agreement upon the third arbitrator, that the third arbitrator will be selected by the party who wins a coin toss. Therefore, while the circumstances of the prior arbitration agreements are unknown and irrelevant to the issues of unconscionability, they nonetheless differ significantly from the present arbitration agreement in the current case.

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Therefore, based on all of the factors hereinabove, the Arbitration Agreement should not be enforced because it is unconscionable.

III. The Arbitration Agreement is Unenforceable Because it Lacks Consideration.

Plaintiff argued the Admission Agreement is unenforceable due to lack of valid consideration. The Court agrees that it is axiomatic that every contract in South Carolina be supported by mutual consideration in order to be valid and enforceable. Defendant argued the Arbitration Agreement was not involuntary and instead made in consideration of admission and that the Arbitration Agreement states it is "for valuable consideration." However, as discussed below, this does not constitute effective consideration to make the Arbitration Agreement enforceable.

While federal law preempts state laws that would invalidate arbitration agreements on most public policy grounds, the FAA looks to state law to decide the threshold questions of contract formation. Munoz v. Green Tree Financial Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'"). Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts. Rent-A-Center, West, Inc., 561 U.S. at 63, 130 S.Ct. at 2776; Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause."). The necessary elements of a contract are an offer, acceptance, and valuable consideration. Sauner v. Public Service Authority of S.C., 354 S.C. 397, 581 S.E.2d 161, 166 (2003). "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or

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responsibility given, suffered or undertaken by the other." Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998)). Where a contract lacks valuable consideration, the contract will be deemed unenforceable.

Our courts have held that where there is a mutual promise to arbitrate, there must be additional consideration. See Reidman Corp. v. Jarosh, 290 S.C. 252, 253, 349 S.E.2d 404, 405 (1986). However, in determining whether adequate consideration exists in a contract, or arbitration agreement under the FAA guided by principles of contract law, our courts must examine and stay within the confines of the four corners of the instrument. State Accident Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (internal citations omitted). Daughter was asked to sign the Admission paperwork prior to Decedent's presentation to the facility. Daughter was also asked to sign the separate Arbitration Agreement. Having already signed the admission paperwork, there was no additional consideration in agreeing to the Arbitration Agreement itself. Therefore, neither party gained a right, interest, profit, or benefit by agreeing to the Arbitration Agreement. Additionally, neither party suffered a forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other party when agreeing to the Arbitration Agreement. Further, simply because the Arbitration Agreement states that it is for valuable consideration does not make it so. Any allegedly legal consideration is not identified. There is no more meaning to such a statement than the Agreement attempting to improperly bind non-parties and non-signatories. Therefore, after analyzing the four

corners of the Arbitration Agreement itself, this Court finds no valuable consideration exists. As such, the Arbitration Agreement is unenforceable.

IV. The Arbitration Agreement Does Not Apply to the Wrongful Death 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). The alleged Arbitration Agreement with White Oak by its own terms is an agreement between "White Oak Estates ('The Facility'), and Margaret Hensley ('the Resident')." 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 Daughter on behalf of Decedent and White Oak Estates. The scope of the agreement does not include the statutory beneficiaries' claims.

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

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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. These analyses confirm that the wrongful death claimants have separate and distinct claims apart from that of the survival action. As such, Daughter and Decedent were incapable of waiving the statutory beneficiaries' right to a trial by jury.

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 her experience, knowledge, and judgment in managing the affairs of herself and her 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/her 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.

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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 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.

White Oak Estates 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 White Oak Estates asserts is that Decedent may not bring a claim in court but must pursue her remedies in

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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.

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, LLC, 422 S.C. 544, 813 S.E.2d 292(Ct.App.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 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.

The statutory beneficiaries' claim is much more akin to the claims of the non-signatory Plaintiffs in Wilson v. Willis, 926 S.C. 326, 827 S.E.2d 167 (2019), 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.

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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)." 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.

Further, Defendants' reliance on Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 at n3, is misplaced. The Dean court held that courts cannot refuse to enforce an arbitration agreement simply because a wrongful death claim is involved. However, courts may refuse to enforce an arbitration agreement on state law contract defenses such as the statutory beneficiaries not being parties and signatories to the agreement.

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 White Oak Estates cannot reach the claims of the wrongful death statutory beneficiaries.

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V. The Arbitration Agreement Does not Apply to Defendants White Oak Estates, Inc. and White Oak Manor, Inc.

The Arbitration Agreement clearly states that it is between "White Oak Estates ('the Facility') and Margaret Hensley ('the Resident'). The only signatories to the Agreement were Daughter as "Resident Representative" and Karen Baker for "White Oak Estates", the facility. No other entity or individual is identified as a party to the agreement at any point in the Arbitration Agreement. Defendants White Oak Management, Inc. and White Oak Manor, Inc. are not identified as parties to the Arbitration Agreement.

South Carolina law is clear in that White Oak's Co-Defendants are not third-party beneficiaries to either of these contracts. South Carolina courts have held that third-party non-signatories should only be included in arbitration agreements in exceptionally limited circumstances. Wilson v. Willis, 926 S.C. 326, 827 S.E.2d 167 (2019). Further, "South Carolina contract law carries a presumption that an individual who is not a party to a contract lacks privity to enforce it". Trancik v. USAA Insurance Company, 354 S.C. 549, 553, 581 S.E.2d 858, 861 (Ct. App. 2003). "It is to be observed that the presumption is that the parties contract for their own benefit and not for that of others not parties to the contract." Ancrum v. Camden Water, Light and Ice Company, 82 S.C. 284, 295, 64 S.E. 151, 155 (1909). The rule of contract interpretation is to ascertain and give legal effect to the intentions of the parties as determined by the contract language. Schulmeyer v. State Farm Fire and Casualty Company, 353 S.C. 492, 495, 579 S.E.2d 132, 134 (2003). Generally, courts do not have the authority to alter a contract by construction or make new contracts for the parties and words cannot be read into a contract which give an intent not expressed within the contract. Gilstrap v. Culpepper, 283 S.C. 83, 86, 320 S.E.2d 445, 447 (1984). Only if a contract is made for the benefit of the third person and the contracting

parties intended to create a direct, rather than incidental or consequential benefit to the third person, can the third person make a claim based on the contract. Windsor Green Owners Association v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004).

As a result, Defendants White Oak Management, Inc. and White Oak Manor, Inc. are unable to carry their burden to overcome the presumption that the contract was only intended for the benefit of the parties to the contract. Therefore, the Arbitration Agreement does not extend to these Defendants.

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 record, arguments of counsel, all memoranda of counsel, and the applicable law, and for the reasons set for above,

It is ordered that Defendants White Oak Estate, Inc., White Oak Management, Inc., and White Oak Manor, Inc.'s Motion to Dismiss and Compel Arbitration filed with the Court on February 19th, 2021, is respectfully denied; and

It is further ordered that Defendants White Oak Estate, Inc., White Oak Management, Inc., and White Oak Manor, Inc.'s Motion for a Protective Order or Alternatively, to Stay the Action Pending Arbitration, filed with the Court on February 19th, 2021, are denied as those motions are now moot.

IT IS SO ORDERED.

/s/Grace Gilchrist Knie
The Honorable Grace Gilchrist Knie
Resident Judge, Seventh Judicial Circuit

Date: April 9th, 2021
Spartanburg, South Carolina

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Spartanburg Common Pleas

Case Caption: Terry Putman , plaintiff, et al VS White Oak Estates, Inc. , defendant, et al

Case Number: 2020CP4203819

Type: Order/Other

IT IS SO ORDERED.

S/GRACE GILCHRIST KNIE - 2760

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ANDERSON	)	TENTH JUDICIAL CIRCUIT
		C/A Nos. 2015-CP-04-00100
		2015-CP-04-00101
Terry Lamar Whitfield and Cheryl Lynn Whitfield, individually and as Personal Representatives of the Estate of Robert Lamar Whitfield, deceased,	)	
Plaintiffs,	)	
v.	)	**Order**
North Pointe Assisted Living, CSL North Pointe SC LLC, Capital Seniore Living Corporation,	)	
Defendants.	)	

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COMMON PLEAS AND
GENERAL SESSIONS

PRESIDING JUDGE:	R. Scott Sprouse
DATE OF HEARING:	July 28, 2015
PLAINTIFF'S ATTORNEY:	Jennifer Burnett
DEFENDANT'S ATTORNEY:	Sandra L. Miller
COURT REPORTER:	Renee Tollison

This matter was before the Court pursuant to the Defendants' Motion to Dismiss and Compel Arbitration. The Court heard arguments from counsel. The parties submitted written memoranda along with exhibits for the Court to review. The Court also gave the parties an additional forty-eight (48) hours to supplement the record.

The Court, after hearing the arguments of counsel and reviewing the pleadings, memoranda, affidavit and exhibits, makes the following

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ALL-STATE LEGAL®
PLAINTIFF'S EXHIBIT
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FINDINGS OF FACT

1. The Plaintiff is the Estate of Robert Whitfield. Terry Lamar Whitfield and Cheryl Lynn Whitfield are co-personal representatives of the estate and brought this lawsuit in that capacity.

2. The Defendant is an assisted living facility located in Anderson County, South Carolina.

3. Terry Lamar Whitfield, having been granted durable general power of attorney by Robert Whitfield in a document dated July 17, 2008 (Defendant's Exhibit B in the Defendant's Brochure) entered into an agreement on behalf of Robert Whitfield with the Defendant on January 1, 2010, wherein the Defendant would provide assisted living services to Robert Whitfield. There is no allegation that the above-mentioned durable power of attorney was invalid.

4. Terry Lamar Whitfield executed several documents with the Defendant on January 1, 2010 (Exhibit A in the Defendant's Brochure). The first of these documents is entitled "Assisted Living Lease Agreement (Lease Agreement)." This document is six pages long and outlined basic terms of the agreement. Paragraph 14 (Page 4) is entitled "Insurance: Liability and Release." The pertinent parts of said paragraph read as follows:

> "Resident agrees that the Operator will not be liable to Resident for any personal injury... suffered by Resident, unless the injury or damage is caused by the gross negligence of the Operator or its employees or agents. Resident hereby releases the Operator from any

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liability for personal injury...suffered by Resident..., unless caused by the gross negligence of the Operator or its employees or agents...

Because of the delay and expense of the court systems, the Operator and Resident agree to use confidential binding arbitration, instead of going to court, for any controversy or claims that arise between the Resident and the Operator, or owner, or management company, and/or their related companies. This includes any claim concerning this Lease Agreement, resident rights, resident care, resident services and policies and procedures. Before arbitration, Resident agrees first to present any claims in writing and in full detail to the Operator and next, to cooperate with any internal review process by the management company. Such review shall be conducted and completed within ten (10) days of Resident's notice to the Operator. In any arbitration, the then-prevailing rules of the American Arbitration Association shall apply."

The second document is entitled "Addendum to Current Resident Agreement", which is a document which notifies the resident of "the inherent risks that come from our community (page 2)." The third document is entitled "Arbitration Agreement" which states that any claim "except for Community's effort to collect monies due from Resident and Community's option to discharge Resident for such failure," shall be submitted to binding arbitration. The document directs that the arbitration be done "in accordance with the *Commercial Arbitration Rules* of the American Arbitration Association then in effect." This document sets forth the method of payment of the arbitrator and the powers of the arbitrator. The final provision of this document is that the "obligation of Community and Resident to arbitrate their disputes or disagreements shall survive termination of this agreement." The remaining documents are the "Addendum: Assisted Living Personal Care Fee Agreement," the "Addendum: Responsible Party Agreement," an

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untitled document which gives the Defendant the right to handle personal money on behalf of the resident, a document entitled "Resident's Grievance Procedures (SC)," and a final document entitled "Pet Addendum." All of these documents appear to have the signature of Terry Lamar Whitfield. All were signed on the same day. All but the "Pet Addendum" document bear the trademark/seal of the Defendant at the top of the document. All of these documents appear to be pre-prepared forms that could be used for any new resident. Included in the documents provided by defense counsel is a "Basic Services Addendum (which provides for three meals per day plus snacks, among other things)." This document is not signed by any party, although the date "1/1/10" is typed at the bottom.

5. Robert Whitfield is now deceased. The Plaintiff brought suit against the Defendant in a wrongful death and survival action in the Court of Common Pleas of Anderson County. The Defendant has moved to dismiss the Plaintiff's Complaint and compel arbitration in this matter.

ARGUMENTS AND ANALYSIS

The Defendant argues that the arbitration clause in the Lease Agreement is binding on the parties and that, accordingly, this case should be dismissed, compelling the dispute to go to arbitration. The Plaintiff argues that the pertinent portions of the Lease Agreement and the Arbitration Agreement are unconscionable, ambiguous and unenforceable. The Plaintiff also argues that this dispute is not governed by the South Carolina Uniform Arbitration Act or the Federal Arbitration Act.

In analyzing the claims of each party, the Court must begin by examining the basic law regarding arbitration. Whether a claim is subject to arbitration is an issue for judicial determination. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E. 2d 663 (2007).

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Accordingly, I conclude that this Court has jurisdiction over the parties and subject matter. Venue is proper.

Arbitration is a matter of contract. The Court must consider general contract defenses to ensure a meeting of the minds to arbitrate existed, and that such an agreement was not the result of fraud, duress or unconscionability. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E. 2d 110 (2001). South Carolina has established a strong presumption of validity of arbitration agreements. Simpson v. MSA of Myrtle Beach, Inc. 373 S.C. 14, 644 S.E.2d 663 (2007). South Carolina courts also are subject to the federal rule that the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration. Green Tree Fin. Corp.-Ala v. Randolph, 531 U.S. 79 S.Ct. 513 L.Ed.2d 373 (2000). The Federal Arbitration Act applies to any agreements that involve interstate commerce, which has been defined very broadly. In Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014), the South Carolina Supreme Court held that meals and medical supplies are "instrumentalities of interstate commerce." The Court in Dean noted that the interstate commerce analysis "generally is a very fact-specific inquiry," although the Court stated very clearly that "nursing home residency contracts usually entail providing residents with meals and medical supplies that are inevitably shipped across state lines from out-of-state vendors (Id.)."

The Basic Services Addendum in our present case is unsigned. It has the same date as the other documents typed in at the bottom and displays the Defendant's trademark at the top of the page. The Defendant alleges that this document was part of the series of documents signed by Terry Lamar Whitfield on January 1, 2010. The Plaintiff denies that the Basic Services Addendum should be considered, arguing that it was not executed and is not otherwise incorporated into the Lease Agreement. The Defendant submitted an affidavit from Shae Stovall,

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who is the Executive Director of the Defendant's facility in question. In her affidavit, she alleges that the Basic Services Addendum was a part of the contract that she refers to as "the Residency Agreement." She also alleges in her affidavit that out-of-state vendors are utilized in securing food and supplies for the residents. In reviewing the Basic Services Addendum and the Stovall's affidavit, coupled with the very broad definition of interstate commerce set forth by the federal courts, I find that this agreement does affect interstate commerce and would be subject to the provisions of the Federal Arbitration Act should it otherwise be enforceable.

The Court must now determine if the agreement itself is enforceable. Defense counsel argued that the issue of unconscionability is one that should be determined by the arbitrator, not the Court. The Defendant relies on the case of Nitro-Lift Technologies, L.L.C v. Howard, 133 S.Ct. 500 (2012) in which it was held that "...when the parties commit to arbitrate contractual disputes, it is a mainstay of the Act's substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved 'by the arbitrator in the first instance, not by a federal or state court." In that case, the parties did not challenge the validity of the arbitration clause, but other provisions in the contract. The state court then invalidated the entire contract. I find the Nitro-Lift case inapplicable in our present case since the Plaintiff, while also attacking the validity of the contract as it applies to the Plaintiff's remedies, is directly challenging the validity of the arbitration provisions. Even in cases where the Federal Arbitration Act (FAA) otherwise applies, general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause. 9 U.S.C.A. § 1 et seq. I find that this Court has jurisdiction to determine the validity of the contract in question and its arbitration provisions.

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The Plaintiff alleges that the parties' agreement regarding remedies and arbitration is unconscionable, ambiguous and unenforceable. South Carolina law defines unconscionability as "the lack of meaningful choice on the part of one party due to one-sided contract provisions, together with terms so oppressive that no reasonable person would make them and no fair and honest person would accept them." Simpson, 373 S.C. at 24-25, 644 S.E. 2d at 668. In this case, the Plaintiff, in the Lease Agreement, relinquishes a right to his normal judicial remedies, including a jury trial in any dispute. I note that in the Lease Agreement, the Defendant gives up that right as well. Furthermore, in the Lease Agreement, the Plaintiff gives up the right to bring a personal injury claim against the Defendant for anything other than the "gross negligence of the Operator or its employees or agents ."

In determining whether or not the Plaintiff lacked a meaningful choice in this agreement, the Court must consider the nature of the injuries suffered by the Plaintiff; whether the Plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. York v. Dodgeland of Columbia, 406 S.C. 67, 749 S.E.2d 139 (SC App. 2013).

The agreement in question is an adhesion contract. South Carolina law defines an adhesion contract as "a standard form contract offered on a 'take it or leave it' basis with terms that are not negotiable." While not *per se* unconscionable, adhesion contracts are viewed with "considerable skepticism" under South Carolina law. Simpson, 373 S.C. at 27, 644 S.E. 2d at 669-70. The forms signed by Terry Lamar Whitfield, as noted above, appear to be pre-printed forms that all new residents must sign prior to being admitted into the facility. The Court reaches this conclusion because the documents are all signed at the same time, at the same place.

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They have blanks to be filled in. They are prepared by a business entity and presented to individuals. There is a significant disparity in the sophistication and bargaining power of the parties. The waiver of the Plaintiff's fundamental right to a jury trial is not conspicuously displayed in the text of the document.

After looking at the evidence before the Court, I find that the Plaintiff lacked meaningful choice in this agreement. The Court must now go to the second prong of the unconscionability test---whether the agreement consisted of oppressive, one-sided terms. The Defendant argues that there is mutuality in the agreement. As pointed out by defense counsel, it is possible to conceive of actions outside of the personal injury realm where the Plaintiff may have a claim against the Defendant. However, (assuming that the parties are operating under the terms of the second document entitled "Arbitration Agreement") the Defendant has carved out an exception to its benefit. Common sense points to the payment of fees and the expulsion of residents for the non-payment of fees as the most likely scenario in which the Defendant would be forced to initiate legal action against a resident. Common sense further dictates that personal injury claims would be the most likely scenario in which a resident would initiate legal action against the facility. The Court would note that the other area in which common sense would dictate that a resident may have a claim against the Defendant---the destruction or theft of the resident's personal property---is also covered under the arbitration clause. The fact that the Defendant has a separate document ("Addendum to Current Resident Agreement") which is devoted entirely to the notifying residents of potential risks (all of which pertain to personal injury or property damage/theft claims), indicates that the terms of the agreement are decidedly pointed in the Defendant's favor in the event of future litigation. The Plaintiff waived his right to a jury trial in the type of case he most likely would have against the Defendant, while the Defendant preserved

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its full legal remedies in the type case it most likely would have against the Plaintiff. There also is a fee provision in the Arbitration ~~Addendum~~ Agreement RSS that establishes a "loser pays" type arrangement covering arbitrator fees, attorney fees and costs with a $10,000.00 cap that is absent in the Lease Agreement. There is no mention of the payment of arbitrator fees, attorney fees and/or litigation costs in the Lease Agreement. As noted, the Courts will not invalidate arbitration agreements for the omission of or unartful wording of ancillary terms. However, I find that the fee-shifting arrangement, like the waiver of the right to a jury trial, is a material and essential term that directly affects the Plaintiff's fundamental rights. This fee arrangement would only apply in cases going to arbitration and not if a suit was brought on the issue of non-payment of the resident's bill and/or eviction of the resident. I find these terms so oppressive and one-sided as to be unconscionable, especially in light of the Lease Agreement having the Plaintiff waive any claim to an ordinary negligence cause of action in a personal injury action-- a waiver which this Court considers unconscionable in itself.

The Plaintiff also argues that the arbitration provisions are so ambiguous as to be unenforceable. As stated in York and numerous other cases, the Court must interpret a contract by looking at its language in its natural and ordinary sense, with the discovery of the parties' intent as the ultimate goal. It is impossible to do so in this case. The two arbitration provisions, as outlined above, are contradictory on their face. One document waives each party's rights to a jury trial, while the other does not. They were executed at the same time and same place. One of the contradictory arbitration clauses is in the body of the Lease Agreement while the other is in a completely separate document. It is impossible for the Court to ascertain the parties' intent by reading the two documents. The Defendant relies on the Dean case and other cases in which arbitration clauses that omitted ancillary details, such as the method of choosing the arbitrator,

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were upheld by the courts. In our present case however, the type of claim to be arbitrated is a material and essential term on which the documents are facially inconsistent.

South Carolina law does not allow this Court to select one or the other of the facially inconsistent provisions. The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the Court will consider and construe them together. *Cafe Assocs. v. Gerngross*, 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991). This Court may not re-write the contract in order to make the pertinent portions of the two documents in question consistent. The facial inconsistencies are in the body are not severable in that they are part of specific provisions pertaining to remedies in the two different documents. Accordingly, I find that the arbitration provisions as set forth in the simultaneous documents in the overall agreement are so ambiguous as to be unenforceable.

WHEREFORE, IT IS ORDERED, that.

1. The Defendant's Motion to Dismiss and Compel Arbitration is DENIED.

August 3rd, 2015
Walhalla, South Carolina

R. Scott Sprouse, Judge
Tenth Judicial Circuit

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ANDERSON SC
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COMMON PLEAS AND
GENERAL SESSIONS

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STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS

Ann Coleman, Individually, and as Personal Represenatative of the Estate of Mary Brinson,
☒ Plaintiff

v.

Mariner Health Care, Inc. F/K/A Mariner Post-Acute Network, LLC, Mariner Health Care Management Company, Mariner Health Central, Inc., Mariner Health Group, Inc., MHC Holding Company, MHC Florida Holding Company, MHC Gulf Coast Holding Company, MHC Midamerica Holding Company, MHC Rocky Mountain Holding Company, MHC Northeast Holding Company, MHC West Holding Company, MHC Texas Holding Company, MHC Midatlantic Holding Company, Living Centers-Southeast, Inc., Grancare South Carolina, Inc., Individually And D/B/A Faith Health Care Center, Savaseniorcare Management, LLC, Savaseniorcare Administrative Services, LLC, Savaseniorcare, LLC, Savaseniorcare, Inc., National Senior Care, Inc., Palmetto Health Care, LLC, Palmetto Faith Operating, LLC, Individually And D/B/A Faith Health Care Center, Ask Holdings, LLC, Leonard Gruntesin, An Individual, Murray Forman, An Individual, Boyd P. Gentry, An Individual, Abraham Shaulson A/K/A Abraham Shavlson A/K/A A. Shawson, A/K/A Abraham Shawson, An Individual, Avi Klein, An Individual, SC Property Holdings, LLC, SC Faith, LLC, And John Does 1-26.
☐ Defendant.

CASE NO.

2010-CP-21-00836

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

FILED
2011 MAR 25 PM 4:00
CONNIE REEL-SHEARIN
CCOP & GS
FLORENCE COUNTY, SC

Plaintiff's Attorney:	Defendant's Attorney:
Matthew Chrisitian, Bar No. 70516 Address: 1007 East Washington Street, Greenville, SC 29601 phone: 864-232-7363 fax: 864-370-3731 e-mail: mchristian@christiananddavis.com other:	, Bar No. Address: phone: fax: e-mail: other:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

CERTIFIED: A TRUE COPY
Connie Reel Shearin
CLERK OF COURT C.P & G.S
FLORENCE COUNTY, S.C.

SCCA/233 (11-03)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

March 24, 2011
Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: 25.00

☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

_____
JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Collected by: _____

Date Filed:

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11-03)

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF FLORENCE) C.A. No.: 2010-CP-21-836

FILED
2011 MAR 25 PM 4:00
CONNIE REEL-SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

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

Plaintiff,

v.

Mariner Health Care, Inc. f/k/a Mariner Post-Acute Network, LLC, Mariner Health Care Management Company, Mariner Health Central, Inc., Mariner Health Group, Inc., MHC Holding Company, MHC Florida Holding Company, MHC Gulf Coast Holding Company, MHC MidAmerica Holding Company, MHC Rocky Mountain Holding Company, MHC Northeast Holding Company, MHC West Holding Company, MHC Texas Holding Company, MHC MidAtlantic Holding Company, Living Centers-Southeast, Inc., GranCare South Carolina, Inc., Individually and d/b/a Faith Health Care Center, SavaSeniorCare Management, LLC, SavaSeniorCare Administrative Services, LLC, SavaSeniorCare, LLC, SavaSeniorCare, Inc., National Senior Care, Inc., Palmetto Health Care, LLC, Palmetto Faith Operating, LLC, Individually and d/b/a Faith Health Care Center, Ask Holdings, LLC, Leonard Grunstein, an Individual, Murray Forman, an Individual, Boyd P. Gentry, an Individual, Abraham Shaulson a/k/a Abraham Shavlson a/k/a A. Shawson a/k/a Abraham Shawson, an Individual, Avi Klein, an Individual, SC Property Holdings, LLC, SC Faith, LLC, and John Does 1-26.,

Defendant(s).

ORDER DENYING DEFENDANTS MARINER HEALTH CARE MANAGEMENT COMPANY, MARINER HEALTH CENTRAL, INC., GRANCARE SOUTH CAROLINA, INC., INDIVIDUALLY AND d/b/a FAITH HEALTH CARE CENTER, MARINER HEALTH CARE, INC. f/k/a MARINER POST ACUTE NETWORK, LLC, MARINER HEALTH GROUP, INC., MHC HOLDING COMPANY, MHC FLORIDA HOLDING COMPANY, MHC GULF COAST HOLDING COMPANY, MHC MIDAMERICA HOLDING COMPANY, MHC ROCKY MOUNTAIN HOLDING COMPANY, MHC NORTHEAST HOLDING COMPANY, MHC WEST HOLDING COMPANY, MHC TEXAS HOLDING COMPANY, MHC MIDATLANTIC HOLDING COMPANY, LIVING CENTERS-SOUTHEAST, INC., SAVASENIORCARE ADMINISTRATIVE SERVICES, LLC, SAVASENIORCARE, LLC, SAVASENIORCARE INC., NATIONAL SENIOR CARE, INC., LEONARD GRUNSTEIN, BOYD P. GENTRY, AND MURRAY FORMAN MOTION TO STAY ACTION AND COMPEL ARBITRATION (SURVIVAL ACTION)

CERTIFIED: A TRUE COPY

CLERK O
FLOREN

PLAINTIFF'S EXHIBIT 16

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PROCEDURAL

This matter came before the Court on the motion of Defendants Mariner Health Care Management Company, Mariner Health Central, Inc., Grancare South Carolina, Inc., individually and d/b/a Faith Health Care Center, Mariner Health Care, Inc. f/k/a Mariner Post Acute Network, LLC, Mariner Health Group, Inc., MHC Holding Company, MHC Florida Holding Company, MHC Gulf Coast Holding Company, MHC MidAmerica Holding Company, MHC Rocky Mountain Holding Company, MHC Northeast Holding Company, MHC West Holding Company, MHC Texas Holding Company, MHC MidAtlantic Holding Company, Living Centers-Southeast, Inc., SavaSeniorCare Administrative Services, LLC, SavaSeniorCare, LLC, SavaSeniorCare, Inc., National Senior Care, Inc., Leonard Grunstein, Boyd P. Gentry and Murray Forman, to stay the action and compel arbitration and was heard on January 6, 2011. All parties were represented by counsel and provided oral arguments and also submitted written memoranda and exhibits supporting their positions. The Court hereby denies Defendants' Motion to Stay Action and Compel Arbitration for the reasons set forth below.

BACKGROUND

Mary Brinson, deceased, was admitted to Faith Health Care Center on June 2, 2006 where she remained until September 16, 2006. She was then readmitted to Faith Health Care Center on December 13, 2006 and resided there until December 26, 2006. When Mary Brinson was admitted on June 2, 2006, the licensee was Grancare South Carolina, Inc., and when she was admitted on December 13, 2006, the licensee was Palmetto Faith Operating, LLC.

Ann Coleman is the Personal Representative of the estate of Mary Brinson. Ann Coleman is the sister of Mary Brinson, deceased. When Mary Brinson was admitted to Faith Health Care Center on June 2, 2006 and on December 13, 2006, no one had a Power of Attorney for Mary Brinson. Furthermore, at that time no one had a conservatorship and no one had been

appointed guardian for Mary Brinson during these times. Despite the fact that Ann Coleman did not have a Power of Attorney for her sister, Faith Health Care Center requested that Ann Coleman sign an Arbitration Agreement during the admission process when Mary Brinson was admitted on both occasions. It is from the June 1, 2006, Arbitration Agreement which these Defendants seek to enforce.

DISCUSSION

1. The Arbitration Agreement is not enforceable because Ann Coleman lacked the capacity to contract on behalf of her sister.

The Arbitration Agreement is not enforceable because Ann Coleman lacked the capacity to contract on behalf of her sister. South Carolina law recognizes that arbitration agreements are contracts. The interpretation and enforcement of arbitration agreements are scrutinized using contract principles of law. The Defendants' own Admissions Agreement also recognizes that the Arbitration Agreement is a contract. It is a basic tenant of contract law that the parties to the contract must have the capacity to contract.

"The first element of a contract is that the parties have the capacity to contract... Further, capacity to contract relates to the status of the person rather than to circumstances surrounding the contract." (17 C.J.S. Contracts §32) Ann Coleman did not have that authority. Furthermore, Defendants admit that they are not aware of any Power of Attorney held by Ann Coleman on behalf of Mary Brinson at the time that the Arbitration Agreement was signed (Defendants Answers to Interrogatories—Mariner Interrogatory 24 and Grancare Interrogatory 32).

Defendants rely upon the South Carolina Adult Health Care Consent Act (S.C. Code Ann. §44-66-10 *et seq*) and the South Carolina Bill of Rights for Residents of Long-Term Care Facilities (S.C. Code Ann. §44-81-10 *et seq*) as granting authority to Ann Coleman to enter into the Arbitration Agreement on behalf of her sister, Mary Brinson. S.C. Code Ann. §44-66-30

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notes that "(A) Where a patient is unable to consent, decisions concerning his health care may be made by the following persons in order of priority: ... (6) an adult sibling...of the patient..." S.C. Code Ann. §44-66-20(1) provides the definition of "health care" as meaning "a procedure to diagnose or treat a human disease, ailment, defect, abnormality, or complaint, whether of physical or mental origin. It also includes the provision of intermediate or skilled nursing care; services for the rehabilitation of the injured, disabled, or sick persons; and the placement in or removal from a facility that provides these forms of care." It says nothing that could be construed as conferring the ability to enter into a separate legal document waiving an individual's rights to due process under the law for another individual. Clearly, this act does not confer legal authority to enter into contracts for another person.

It is admitted by all parties that Mary Brinson did not have the capacity to contract for herself. The Defendants admit that Ms. Brinson was incompetent by virtue of their responses to Plaintiff's Request to Admit in addition to the fact that the medical director at the Faith Healthcare Center facility certified that Ms. Brinson was unable to consent to or make her own healthcare decisions.

While the South Carolina Adult Healthcare Consent Act does grant Ms. Coleman the authority to make "healthcare decisions" on behalf of her sister, consent for medical treatment for someone unable to consent is not the same as binding an incompetent person to a legally binding contract such as an arbitration agreement without the authority to do so.

Defendants also rely on S.C. Code Ann. §44-81-10 *et seq* to argue that Ms. Coleman has the legal authority to bind her sister to a contract and waive her sister's rights under the law. This Court declines to adopt this application of this Act. The Bill of Rights for long-term care facilities sets out the rights given to a long term care resident or resident's representative under the law; however, these rights are, once again, rights concerning the resident's access to

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healthcare and to be free from abuse and does not purport to grant others authority to enter into contracts for the resident. The Bill does not contemplate the resident's or the resident's representative's rights under the law for the authority or capacity to contract. The Bill defines representative as "a resident's legal guardian, committee, or next of kin or other person acting as agent of a resident who does not have a legally appointed guardian." The fact that the authors of this Bill felt it necessary to note that the resident may not have a guardian appointed under the law affirms their intentions that the Bill was designed to protect an individual's right of access to healthcare whether or not the individual has appointed a representative under the law. The Bill does not allow for an individual without any authority from the resident to be imbued with the legal authority to enter a contact waiving a resident's rights under the law.

The courts in North Carolina have recently decided an issue similar to the one at hand, finding that the authority granted by a state's Health Care Consent Act does not grant legal authority for the purpose of entering binding contracts. *Munn v. Haymount Rehabilitation & Nursing Center, Inc., et. al.*, No. COA 10-105 (NC Ct.App., Filed 21 Dec. 2010). In fact, in *Munn,* the Court specifically notes that "consent for medical care for another person who is unable to consent is a completely different issue than being an agent who has the authority to enter into a contract such as an arbitration agreement." Therefore, with similar reasoning this Court finds that Ann Coleman did not have actual authority to enter into the Arbitration Agreement on behalf of Mary Brinson.

The Defendants further argued that Ann Coleman acted as Mary Brinson's apparent agent. South Carolina case law on this issue is well established. Defendants argue that an agent's implied authority can be circumstantially provided by evidence and conduct and in doing so, rely on *Heil-Quaker v. Swindler*, 255 F.Supp. 445 (D.S.C. 1966), and *WDI Meredith & Co., v. American Telesis, Inc.*, 359 S.C. 474, 597 S.E.2d 885 (Ct.App. 2004). This reliance is

misplaced. *Heil-Quaker* and *WDI Meredith & Co.* hold that apparent agency is based upon the principal holding the agent out or allowing the agent to hold himself or herself out with the alleged authority. "Apparent authority is the authority that the principal intended the agent to have or such power that a principal holds his agent as possessing or permits him to exercise." *Heil-Quaker v. Swindler*, 255 F.Supp. 445 (D.S.C. 1966). Because Mary Brinson was incompetent, she was incapable of granting the power to Ann Coleman and incapable of making a decision to allow Ann Coleman to hold herself out as Mary Brinson's agent. Therefore, Mary Brinson as the principal did never and could never exercise such an intent. If a person does not possess the capacity to make their own healthcare decisions, they would not possess the capacity to convey their rights under the law to another individual. Furthermore, even if such an individual could convey such rights in such circumstances, there is no evidence that Mary Brinson exhibited such an intent.

The Defendants further rely on *WDI Meredith & Co., v. American Telesis, Inc.*, 359 S.C. 474, 597 S.E.2d 885 (Ct.App. 2004) for the proposition that "to establish apparent authority, either the principal must intend to cause the third person to believe the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief". As the court also noted in *WDI Meredith*, "an agency may not, however, be established solely by the declarations and conduct of an alleged agent." (citing *Muller v. Myrtle Beach Golf & Yacht Club*, 303 S.C. 137, 142-143, 399 S.E.2d at 433 (Ct.App. 1990) overruled on other grounds by *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 532 S.E.2d 868 (2000)). An incompetent individual such as Mary Brinson would be unable to possess this intent or realize that any conduct would create such a belief.

The Defendants also rely on *Carraway v. Beverley Enterprises Alabama, Inc.* 978 So. 2d 27 (Aa. 2007). In this Alabama case, the Plaintiff was a brother of a resident of a nursing home

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facility who executed a number of documents on his sister's behalf on her admission to the facility, including an arbitration agreement. The brother of the plaintiff did not have a Power of Attorney. Shortly after his sister's admission, a Power of Attorney was executed naming the brother as her attorney-in-fact. The fact that the sister provided a Power of Attorney shortly after her admission indicates that she was indeed competent, unlike the present case with Mary Brinson. Therefore, the sister could have allowed or exhibited the intent for her brother to be held out as her representative unlike Mary Brinson. Furthermore, in *Carraway* the sister in essence ratified the representation by the brother by shortly thereafter naming him as her power of attorney by her own decision. This court finds the reasoning of *Munn* to be on point and applicable. Therefore, since Mary Brinson, the principal, was incapable of making any decisions or demonstrating any intentions conveying any authority to Ann Coleman, Ann Coleman did not have the apparent authority to contract or to enter into a binding contractual agreement such as an arbitration agreement on behalf of Mary Brinson.

Furthermore, according to the Defendants' admission documents, they were aware that Ann Coleman did not have a Power of Attorney. The face sheet from the admissions documents as well as other documents indicate that Ann Coleman did not have any other legal oversight, durable power of attorney or healthcare proxy. The Defendants are sophisticated individuals and corporations which are accustomed to dealing with arbitration provisions and understand the implications of a Power of Attorney. (*Small v. HCF of Perrysburg, Inc.*, 159 Ohio App.3d 66, 823 N.E.2d 19 at 24 {¶29}). The Defendants cannot reasonably assert that Ann Coleman was the apparent agent of Mary Brinson when they had the knowledge to understand the meaning of a Power of Attorney and the fact that Ann Coleman did not have one. The fact that the Defendants have a form which would allow for the documentation of some form of authority indicates that they knew that there are certain requirements which much be met before an

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individual can be imbued with the authority to act as an agent, and further demonstrates that they knew that none of the documents which would give Ann Coleman such authority existed at the time that Mary Brinson was admitted to their facility.

Therefore, Ann Coleman had neither actual nor apparent authority to act on behalf of Mary Brinson and to sign away her right to a jury trial by entering into the arbitration agreement. As a result, the arbitration agreement is null and void because Ann Coleman lacked the capacity and authority to ever execute it on behalf of Mary Brinson.

2. The Arbitration Agreement is not enforceable against the statutory beneficiaries.

The agreement to arbitrate explicitly specifies that it is "an agreement to arbitrate any dispute that might arise between Mary Brinson ("Resident") and/or _____ ("Legal Representative") and Faith Healthcare ("Facility")…". The agreement clearly allowed for the application of the agreement to extend to a resident's representative and, in this instance, was not so applied. Even if so applied, in the current actions, Ann Coleman has filed both a wrongful death and a survival action. While this court finds independently that Ann Coleman lacked the authority to enter into the contract on behalf of Mary Brinson and is therefore, null and void, this court also finds that the arbitration agreement cannot be enforced because it cannot apply to statutory beneficiaries who are not parties to the agreement. This principal has been specifically upheld in other jurisdictions. (*Woodall v. Avalon Care Center-Federal Way, LLC*, 155 Wash.App. 919, 231 P.3d 1252 (2010). *Small v. HCF of Perrysburg, Inc.*, 159 Ohio App.3d 66, 823 N.E.2d 19).

While Ann Coleman did not have authority to waive the rights of Mary Brinson, even if she did, she did not have the authority to waive the right to statutory beneficiaries under the arbitration agreement at hand. South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries. Because the statutory beneficiaries are not parties to the contract, and

because the statutory beneficiaries have not conveyed any power to the signatory to the agreement, their claims could not be waived and any attempt to apply the agreement to them would be null and void.

3. The Arbitration Agreement is procedurally and substantively unconscionable and impossible to enforce.

The Defendants acted in a manner inconsistent with their own policies and procedures. The facility policy in effect at the time of Mary Brinson's admission clearly required that a member of the admissions staff explain the admissions and financial documents to the person signing them. This includes the Arbitration Agreement at issue here. Specifically, the policy states its purpose as intended to "provide an informative environment that should reduce the fears and anxieties of the resident and family during the admissions process" and requires that "the Administrator, through the Admissions Staff, is responsible for ensuring that the facility and the resident follow the established admission policy, as it may apply." Additionally, the policy requires that "the Admission staff will explain and offer an Arbitration Agreement to the resident or responsible party (emphasis added)". On the basis of the Affidavit of Ann Coleman and the admission of the Defendants that the Arbitration Agreement was presented as part of a larger admissions package, the Court finds that these documents were not explained to Ms. Coleman, nor was it made clear to her that the Arbitration Agreement was voluntary and not a requirement for Mary Brinson's admission to the facility.

Additionally, it is the finding of this Court that, even were the Arbitration Agreement valid, it can not be construed to apply to all claims at issue in the case at hand. An Arbitration Agreement, or any contract, for that matter, applies only to claims arising which would be made by someone standing in the shoes of the contractor, in this case, Mary Brinson, and cannot be construed so as to apply to those claims which may be brought on behalf of others with standing

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to a claim. Claims that have been made on behalf of Ann Coleman and the other statutory beneficiaries of Mary Brinson's estate are not and were not parties to the Arbitration Agreement and cannot retroactively be joined to the contract.

Moreover, not all of the Defendants to this case have moved for arbitration—specifically, there are five defendants to the case at hand who are not currently seeking to enforce arbitration. In fact, one of these defendants, Palmetto Health Care, LLC, had previously moved for enforcement and has subsequently withdrawn its petition. Parties who are not seeking arbitration cannot be forced to arbitrate a matter any more than individuals who are not party to the agreement can. As a result, this Court is faced with the possibility that, if the Arbitration Agreement is deemed valid portions of the claims along with some of the parties would be subject to arbitration while other portions of the claims and different parties to this action would be subject to trial by jury. Should this be allowed, the very real possibility of conflicting rulings on common issues of law and fact may result.

Instructive on this issue is the matter of *Birl v. Heritage Care, LLC*, 172 Cal.App.4th 1313, 91 Cal.Rptr.3d 777. In *Birl* a case was brought by the family of a deceased patient against a hospital, physicians, and a nursing facility and the nursing facility sought to compel arbitration. Of relevance, the Court here noted that "(1) the hospital and physicians with no arbitration agreement were involved in the same transaction as the nursing facility; (2) all defendants were involved in a series of related transactions with the patient; (3) there was a possibility of conflicting rulings on common issues of law or fact; and (4) patient's family members were third parties to the patient's arbitration agreement." In its ruling denying the nursing facility's motion to compel arbitration, California's Appellate Court noted that "the trial court properly noted the possibility of conflicting rulings on common issues of law or fact if defendant Heritage was not

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joined to the court action with the other defendants…Different triers of fact in different proceedings could come to different conclusions…" *Id.* at 1321.

The Court in *Birl* also took note that the Plaintiffs in that action asserted claims "not just as successors in interest, but also individually and as surviving heirs" (*Id.* at 1321), just as Ms. Coleman has done in the cases at issue now, and that such claims for "wrongful death and emotional distress were brought by plaintiffs in their individual capacities" and not as persons who had stepped into the shoes of the decedent. It was the conclusion of the *Birl* Court that the possibility of conflicting rulings on a common issue of law or fact was real and that "different triers of fact could reach different conclusions as to which party was at fault, the cause of any injuries, and the apportionment of liability—unless all the parties are jointed to one action" (*Id.* at 1322). Based on such a finding, the Court determined that it was proper to deny the nursing facility's motion to compel arbitration.

While the circumstances of the current actions differ slightly from those of *Birl*, it remains consistent that compelling arbitration of certain claims but not of others and compelling arbitration with respect to some defendants but not others will result in the conflicting rulings as contemplated in *Birl*. Furthermore, such a division of the cases would result in an unreasonable hardship for Plaintiff, as she and the other statutory beneficiaries of Ms. Brinson's estate would be effectively forced to litigate claims arising from the same or related events in two separate forums. Therefore, to uphold the Arbitration Agreement would not only pose a potential impossibility, it is also unreasonable and unconscionable to force a Plaintiff to prosecute her claims in such a fashion, especially when this issue was not explained to her. Our Courts have discussed and recognized that it is proper to deny Arbitration Agreements with impossibility of enforcement. (*Grant v. Magnolia Manor-Greenwood, Inc.*, 383 SC 125, 678 S.E.2d 435 (S.C. 2009)).

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It is the finding of this Court that the Arbitration Agreement was presented to Ms. Coleman as part of a larger admissions packet and the meaning of the Arbitration Agreement was not explained; that Ms. Coleman was not informed that her signature on the Arbitration Agreement was optional and not a prerequisite for her sister to receive care; that the current conditions are that most, but not all of the defendants are seeking to compel arbitration; and compelling arbitration of Plaintiff's claims while not compelling arbitration to some claims against other Defendants, or by statutory beneficiaries who are not seeking either arbitration or were not parties to the contract makes the Arbitration Agreement as a whole impossible, unconscionable and therefore, unenforceable.

4. **The Defendants' delay has effectively nullified the agreement and waived any right the Defendants may have had to force Arbitration.**

The Plaintiff's Notice of Intent was filed in July of 2009, providing the Defendants with notice of impending litigation. The Notice of Intent stage took a usual course and, in fact, was extended beyond the normal time frame due to the substantial number of defendants in the case. The parties completed the required pre-suit mediation in January of 2010 which was unsuccessful in reaching a resolution. The Plaintiff filed the Summons and Complaint in March of 2010. Defendants began filing their Answers in May of 2010, and it was at this time that Plaintiff was provided with the first notice of the existence of an Arbitration Agreement and the Defendants' allegation that the issues and incidents addressed by Plaintiff's Complaint were governed by said Arbitration Agreement only by virtue of one of the Defendants' affirmative defenses. Even in light of said notice, Defendants did not move to seek enforcement of the Arbitration Agreement until August of 2010, more than a year after they had been first placed on notice of pending litigation and had been served with the Notice of Intent to Sue. This was also well after Plaintiff had served Discovery and filed a Motion to Compel.

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The Courts in South Carolina have long recognized the act of abandonment as a valid basis for an exception to a contract's enforceability:

> Generally, no-damage-for-delay provisions are valid and enforceable so long as they meet ordinary rules governing the validity of contracts. *See* Annot., *Validity and Construction of "No Damage Clause" with Respect to Delay in Building or Construction Contract*, 74 A.L.R.3d 187 §2[a] (1976). A certain majority of jurisdictions, however, recognize certain exceptions to such clauses. *Id.* Among the recognized exceptions are (a) delay caused by fraud, misrepresentation, or other bad faith... (c) delay which has extended such an unreasonable length of time that the party delayed would have been justified in abandoning the contract... *U.S. f/u/b/a Williams Electric Company, Inc. v. Metric Constructors, Inc.* 325 S.C. 129, 480 S.E.2d 447 (1997).

The contract at issue here is, of course, the Arbitration Agreement. First, the Agreement does not contain a "no-damage-for-delay" provision, and, as such, had Defendants intended to rely upon the Agreement, they should have acted promptly upon the first notice of a civil action. Secondly, and being generous to Defendants, they waited a full nine months after Plaintiff's first filings to make any mention of an Arbitration Agreement and an additional three months more before moving to enforce said Agreement.

"[I]n South Carolina, there exists in every contract an implied obligation of good faith and fair dealing." *Id.* citing *Adams v. Creel*, 320 S.C. 274, 465 S.E.2d 84 (1995); *Parker v. Byrd*, 309 S.C. 189, 420 S.E.2d 850 (1992); *Tharpe v. G.E. Moore*, 254 S.C. 196, 174 S.E.2d 397 (1970). Continuing, "A number of courts recognize an exception to a no-damage clause where delays are so unreasonable in length or duration that they amount to an abandonment of the contract..." *U.S. f/u/b/a Williams Electric* at 134-135 citing *74 A.L.R.3d* at 226-230 §7(i). "An abandonment need not be express but may be inferred from the conduct of the parties and attendant circumstances." *Quality Concrete Products, Inc., v. Thomason*, 253 S.C. 579, 172

S.E.2d 297 (1970). "Abandonment of a contract by one party is the giving up of the right of benefit due from the other party." *Ro-Lo Enterprises v. Hicks Enterprises*, 294 S.C. 111, 362 S.E.2d 888 (Ct. App. 1987). "As with the above mentioned exceptions, an abandonment of the contract involves a breach of the implied obligation of good faith and fair dealing. Accordingly, we adopt this exception and find that if a party abandons the contract, they also abandon their right to rely on a no damage for delay clause." *U.S. f/u/b/a Williams Electric* at 135. Likewise, South Carolina Courts have previously considered and found that significant delay is tantamount to abandonment and constitutes a sufficient basis to support a finding of abandonment with respect to an arbitration agreement. (See also *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (S.C. App. 2003), *Deloitte & Touche, LLP v. Unisys Corp*, 358 S.C. 179, 594 S.E.2d 523).

As previously discussed, the Arbitration Agreement the Defendants now seek to enforce does not contain a no-damage-for-delay clause, which make the performance under the Agreement an even more time-sensitive issue. The Defendants delayed almost a year before notifying Plaintiff of such an agreement and waited more than a year before moving for the enforcement of the Agreement. During the entire length of their delay, they conducted themselves in a manner consistent with parties that intended to proceed with litigation through the confines of the judicial process. It is the ruling of this Court that, the Defendants, through their actions and delay, abandoned any rights they may have been afforded to force this matter to arbitration. To allow the Defendants to now insist on adherence to the Arbitration Agreement which was the subject of the Motion before this Court, not only amounts to an unconscionable act, but it is also in disagreement with established precedent—precedent that finds contracts far more lenient on the issue of delay than the one at hand to have been abandoned in the face of acts such as those displayed by the Defendants here.

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5. **Excepting GranCare South Carolina, Inc., Mariner Health Care Management Company, and Mariner Health Central, Inc., the Defendants bringing this motion have argued in a manner inconsistent with the parties who have standing to enforce an Arbitration Agreement.**

GranCare South Carolina, Inc., was the operator of Faith Healthcare Center at the time of Mary Brinson's June 2006 admission, and all of the other defendants bringing this motion have alleged elsewhere that they do not operate nursing homes, do not have any ties to Faith Healthcare Center, have never transacted business in South Carolina, do not own property in South Carolina, and have never had any influence over the operations of Faith Healthcare Center. In fact, simultaneous to the hearing of this Motion to Compel Arbitration, these same Defendants argued a Motion to Dismiss for Lack of Personal Jurisdiction. Yet despite these protestations, these Defendants have sought to enforce an Arbitration Agreement between a facility they contend they have no interest in or control over, in a state they do not transact business in, in an industry in which they do not participate, and that this Court holds no jurisdiction over them. It cannot be rationally argued that all of these Defendants are parties to this contract, while at the same time argue that they have never contracted in South Carolina, never conducted business in South Carolina or are not tied in with the operation of the nursing facility. If the Defendants' arguments were accepted as true, then they would not have standing to enforce the Arbitration Agreement and the impossibility of prosecuting the claims in two separate forums becomes even more significant as discussed hereinabove.

6. **The Defendants' argument that Mary Brinson was a third party beneficiary to the contract is illogical and premised on the rights of Ann Coleman as signatory, which said rights do not exist.**

Defendants' have sought to argue that Mary Brinson was the third party beneficiary to the Admissions and Arbitration Agreements. While this Court concedes that it was Ms. Brinson's admission into Faith Healthcare Center that was contemplated by the Admissions Agreement, the

Defendants' extension of this argument that seeks to cast Ms. Brinson as a third party beneficiary of said agreements is misplaced as it assumes that Ann Coleman had the right to contract on behalf of Ms. Brinson. As this Court has already discussed at length, while Ann Coleman did have the right under the Adult Health Care Consent Act to consent to medical treatment, she did not have the right to commit her sister to a legally binding contract that agreed to the removal of Ms. Brinson's rights under the law. Because Ann Coleman did not have the right to contract on behalf of her sister, Mary Brinson cannot possibly be a third party beneficiary as the contract itself was never valid.

7. **The Defendants' argument that Plaintiff should be equitably estopped from denying the existence of an enforceable Arbitration Agreement is rejected.**

As with the argument concerning the third party beneficiary status of Mary Brinson, the Court finds that the Defendants' argument with respect to the Arbitration Agreement and estoppel of the Plaintiff is, once again, misguided and assumes a premise which this Court has previously rejected.

> The principle of estoppel in equity stands on the very foundation of right and fair dealing. It considers and weighs the conduct of men in their dealings with each other and gives that effect and meanings to their actions which common sense and justice dictate. The essential elements of equitable estoppel are ignorance of the party invoking the estoppel of the truth as to the facts in question and a misrepresentation or deceptive conduct of the party against whom estoppel is sought to be applied, which in fact misleads the person asserting the estoppel to rely on the misrepresentation or conduct to change his position prejudicially as a result of the reliance. *SCJur* "Estoppel" §4.

The Defendants' estoppel argument is not only misguided, it misses the true nature of estoppel. As this Court has previously discussed, it was Faith Healthcare Center's failure to explain the Arbitration Agreement in accordance with the Defendants' policies and procedures coupled with the manner in which the Arbitration Agreement was presented to Ann Coleman that

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caused and contributed to Ms. Coleman not understanding the true nature of the document she was signing. The unconscionability of this process as described hereinabove serves as an additional sustaining ground for the finding that the Arbitration Agreement is not valid. The Defendants could not reasonably rely on the contract/agreement when they knew that Ann Coleman lacked the authority to enter into such a contract/agreement. The Defendants are assuming that it is the representation of the agent and not the principal that is the determinant of apparent authority and an establishment of agency when, as this Court has already discussed, it is the actions of the principal. As such, this Court rejects the Defendants' argument for equitable estoppel.

Furthermore, the Defendants have argued that Plaintiff cannot deny the validity of the Arbitration Agreement yet rely on the Admissions Agreement in alleging that the Defendants' were in breach of contract with respect to their contractual obligation to provide appropriate medical care to Mary Brinson. It is the Defendants' contention that the Arbitration Agreement and the Admissions Agreement are part of the same agreement between the parties and, as such, the Plaintiff can not disclaim the Arbitration Agreement. Defendants further argued that the Arbitration Agreement was part of the entire agreement between the parties and that the Plaintiff should not be able to argue that the Arbitration Agreement is invalid while asserting claims arising out of the relationship between the parties and that the Plaintiff should be equitably estopped form doing so. Plaintiff opposed these contentions. The errors in this argument have already been discussed. The Defendants again assume that the Arbitration Agreement and Admissions Agreement are on the same footing. As this Court has stated before, they are not. An agreement concerning the provision of health care is a far different matter than an agreement to waive legal and constitutional rights. As such, the Defendants' argument concerning estoppel is rejected.

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CONCLUSION

This Court declines to enforce the Arbitration Agreement. Ann Coleman lacked the authority to bind her sister to any contract which removed her rights under the law and the Constitution. That she has the statutory authority to assist in making decisions regarding the treatment and care on behalf of her sister is irrelevant to the determination of whether she had the authority to contract on behalf of her sister in a separate legal agreement. The determination of agency is made based upon the principal and not the agent, and the Defendants' own documents demonstrate that they were aware that Mary Brinson was incapable of demonstrating any such intention or making any such representation. The Defendants cannot now reasonably argue that they thought Ms. Coleman had "apparent" authority, as they were aware of the legal requirements governing arbitration agreements.

Likewise, the Arbitration Agreement does not apply to all parties to this suit as it governs neither the claims brought on behalf of Mary Brinson's statutory beneficiaries, nor a portion of the Defendants who have not sought to force arbitration. Such circumstances give rise to the possibility of conflicting findings based on the same facts depending on the forum in which the issues are heard. These circumstances render the Arbitration Agreement unconscionable and impossible. Adding to the Agreement's unconscionability is Faith Healthcare Center's failure to adequately and appropriately inform Ms. Coleman as to the nature of the documents she was signing. She was not advised of the meaning of the Arbitration Agreement, nor was she advised that her signature on said Agreement was voluntary and that a refusal to sign would have no affect on her sister's admission to the facility.

The Arbitration Agreement was further abandoned by the Defendants through their delay. The Defendants proceeded to engage in the litigation process with Plaintiff, allowing this case to

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more forward for more than a year after the filing of the Notice of Intent before they sought any enforcement of the Arbitration Agreement. South Carolina precedent is clear that, had the Defendants intended to seek enforcement of the Agreement, they should have done so at the outset of this matter, not more than a year after its genesis. And while it has been the finding of this Court in a separate Order that the Plaintiff has made a sufficient showing for jurisdiction over Defendants in this case, the myriad of issues discussed previously preclude any finding in favor of their Motion to Compel Arbitration, as they have argued inconsistent and irreconcilable positions.

Finally, it is the belief of this Court that the Defendants' arguments concerning the third party beneficiary status of Mary Brinson and the argument concerning equitable estoppel are misguided and are rejected by the Court.

Therefore, it is the finding of this Court that the Plaintiff did not have the legal authority to execute the Arbitration Agreement on behalf of her sister; the Arbitration Agreement does not apply to all parties to this suit, giving rise to the possibility of divergent outcomes premised on the same facts; that the Arbitration Agreement itself is impossible and unconscionable; and that the Defendants abandoned the Agreement through their delay in seeking its enforcement. As such, Defendants' Motion to Stay Action and Compel Arbitration is denied in its entirety.

IT IS SO ORDERED.

The Honorable Michael G. Nettles
Twelfth Circuit of the State of South Carolina

Florence, South Carolina
Date: 3-18-11

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STATE OF SOUTH CAROLINA) IN THE THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE) COURT OF COMMON PLEAS

PATRICIA YOUNG, Individually and as Personal Representative of the Estate of Donald Young,

Plaintiff,

vs.

NATIONAL HEALTHCARE COPRORATION, NHC/OP, L.P., NATIONAL HEALTH CORPORATION, NHC-MAULDIN, LLC d/b/a NCH HEALTHCARE MAULDIN, CAROLINA MEDICAL REHABILITATION, LLC, BYUNG HUNG CHOE, M.D., KEITH SCHENTZEL, M.D., and GARY BARCINAS, P.A.,

Defendants.

C. A. No. 2014-CP-23-00877
C.A. No. 2014-CP-23-00878

ORDER

This matter came before the Court on Defendants National Healthcare Corporation, NHC/OP, L.P., and National Health Corporation's (collectively hereinafter as "Corporate NHC Defendants") Motion to Dismiss and to Compel Arbitration and Defendant NHC-Mauldin, LLC d/b/a NCH Healthcare Mauldin's (hereinafter "NHC-Mauldin") Motion to Dismiss and to Compel Arbitration. Having listened to oral arguments from counsel and having reviewed the parties' legal memorandums, for the reasons more fully set forth below, the Court hereby grants the Motion to Compel Arbitration as to Civil Action number 2014-CP-23-00877 ("Survival Action"), but denies the Motion to Dismiss the Corporate NHC Defendants and to Compel Arbitration as to Civil Action number 2014-CP-23-00878 ("Wrongful Death Action").

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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 resulting in the death of Donald Young ("Decedent"). Patricia Young ("Plaintiff") was Decedent's spouse and serves as the personal representative of Decedent's estate.

On November 5, 2012, Decedent was admitted to NHC-Mauldin, a skilled nursing facility. National Healthcare Corporation is the parent corporation of NHC-Mauldin, and NHC/OP, L.P., and National Health Corporation are affiliate corporations. Plaintiff alleges that while the Corporate Defendants did not provide direct care or services to Decedent, they are proper Defendants in this matter because their control over NHC-Mauldin directly affected the quality of care received by Decedent.

At the time of admission, Decedent entered into an Admission and Financial Contract (the "Agreement") for the provision of health care services. As part of the Agreement, Decedent also executed an Agreement to Arbitrate ("Arbitration Agreement"). The Arbitration Agreement was also executed by Plaintiff, as an "other person signing on behalf of patient."

The Arbitration Agreement provides that the parties agree to follow the dispute resolution procedure set forth in the Arbitration Agreement. This Procedure can be summarized as follows:

1. The parties agree to follow the Grievance Procedure described in the Patient Rights Booklet for any claims or disputes arising out of or in connection with the care rendered to Mr. Young;
2. Where the amount in controversy sits within the limits for submission to South Carolina Small Claims Court, then the controversy will be submitted to

that Court;

3. Any disputes with an amount in controversy exceeding the limits for submission to small claims court shall be resolved by binding arbitration. There are no limits on the award of actual or punitive damages in the Agreement.

Plaintiff filed the instant actions on February 18, 2014. Plaintiff has not complied with the Grievance Procedure as described in the Patient Rights Booklet for claims or disputes arising out of or in connection with Decedent's care, nor, despite the fact that the amount in controversy exceeds the limits for submission to small claims court, has Plaintiff made an attempt to arbitrate this matter as Defendants contend is required under the Arbitration Agreement.

LEGAL ANALYSIS AND CONCLUSIONS

Whether the parties agreed to arbitrate 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 Court finds that the parties had a valid arbitration agreement; however, the agreement applies only to the Survival Action.

I. Survival Action Subject to Arbitration

The Survival Action is clearly within the scope of the Arbitration Agreement. The pertinent language of the Arbitration Agreement states,

> "The parties shall submit to binding arbitration all disputes... arising out of or in any way related or connected to the Patient's

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> stay and the care provided at the Center, including but not limited to any disputes concerning alleged personal injury to the Patient caused by improper or inadequate care, including allegations of medical malpractice; any disputes concerning whether any statutory or regulatory provisions relating to the Patient were violated; any dispute related to Center's charges to the Patient; and any other dispute under state or federal law based on contract, tort, or statute that exceeds the state's small claims court statutory limits as later defined."

The Arbitration Agreement implicitly recognizes that injuries may occur to Decedent while he was a resident of NHC-Mauldin and that personal injuries and tort claims arising therefrom are to be governed by the Arbitration Agreement. It is clear that the intent of the Arbitration Agreement is to resolve allegations of negligence and personal injury through arbitration.

It is undisputed that Decedent and Plaintiff both signed the Arbitration Agreement and that there is nothing improper about the Arbitration Agreement on its face. In opposition to the Motion to Compel Arbitration, Plaintiff argues that the Arbitration Agreement should be deemed unconscionable due to the circumstances upon which it was executed. Specifically, Plaintiff contends that the Arbitration Agreement was just one of many documents that Decedent executed in a short period of time during the admission process, so Decedent may not have had time to fully read it. However, whether the Decedent did or did not read the Arbitration Agreement is irrelevant since it is well established that a person who signs a contract cannot avoid the effect of the document by claiming he did not read it. Regions Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) ("Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it.") In addition, Plaintiff contends that Decedent had taken narcotic medications prior to admission that may have affected his mental status and his ability to understand the document. But, mere speculation that Decedent may have been incompetent at the time is insufficient. Plaintiff had the burden of proving Decedent's incompetence, and she failed to put forth any

evidence in support of her allegation. *See* Schmauch, 354 S.C. at 665, 582 S.E.2d at 441.

Therefore, this Court finds that Decedent knowingly entered into an agreement to arbitrate any claims that arose from his being a patient of NHC-Mauldin. As a result, this Court grants NHC-Mauldin's Motion to Dismiss the Survival Action and to Compel Arbitration pursuant to the terms of the Arbitration Agreement on all claims that were made or could have been made in the Survival Action. Further, the Court finds that the Corporate NHC Defendants were intended beneficiaries of the Arbitration Agreement; therefore, the order compelling arbitration of the Survival Action shall also apply to the Corporate NHC Defendants as the allegations against those Defendants are based on the same facts and are inherently inseparable from the claims made against NHC-Mauldin. *See* Int'l Paper Co. v. Schwabedissen Maschenen & Anlagen GMBH, 206 F.3d 411, 417 (4th Cir. 2000); *see also* Pearson v. Hilton Head Hospital, 400 S.C. 281, 733 S.E.2d 597 (S.C. Ct. App. 2012).

II. Wrongful Death Action Not Subject to Arbitration

While Decedent and NHC-Mauldin clearly intended to arbitrate any claims between them, it is less clear whether the Arbitration Agreement mandates arbitration for all claims related to Decedent's injuries and death. It appears that the question of whether a wrongful death action is subject to mandatory arbitration pursuant to the terms of a contract is one of first impression in South Carolina. Case law across many jurisdictions within the United States is split as to whether an arbitration agreement covers a wrongful death claim brought by the decedent's statutory beneficiaries who were not a party to the contract. *Compare* Carter v. SSC Odin Operating Company, *LLC*, 2012 IL 113204, 976 N.E.2d 344, 360, 364 Ill. Dec. 66 (Ill. 2012); Lawrence v. Manor, 273 S.W.3d 525, 530 (Mo. 2009); Bybee v. Abdulla, 2008 UT 35, 189 P.3d 40,47, 50 (Utah 2008); Peters v. Columbus Steel Castings Co., 115 Ohio St. 3d 134, 2007 Ohio 4787, 873

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N.E.2d 1258, 1262 (Ohio 2007); McFarren v. Emeritus at Canton, 2013 Ohio 3900, 997 N.E.2d 1254, 2013 WL 4822908 (Ohio App. 2013); Pisano v. Extendicare Homes, Inc., 2013 PA Super 232, 77 A.3d 651, 2013 WL 4046673 (Pa. Super. 2013); Woodall v. Avalon Care Center-Federal Way, *LLC*, 155 Wn. App. 919, 231 P.3d 1252, 1257-59 (Wash. App. 2010) *with* Graves v. B.P., 568 F.3d 221, 223 (5th Cir. 2009); Peltz ex rel. Estate of Peltz v. Sears, Roebuck & Co., 367 F.Supp.2d 711, 718-19 (E.D. Pa. 2005); Laizure v. Avante at Leesburg, Inc., 109 So. 3d 752, 762 (Fla. 2013); Ruiz v. Podolsky, 50 Cal. 4th 838, 114 Cal. Rptr. 3d 263, 237 P.3d 584, 591 n. 2 (Cal. 2010); In re Labatt Food Service, L.P., 279 S.W.3d 640, 647 (Tex. 2009); Briarcliff Nursing Home, Inc. v. Turcotte, 894 So.2d 661, 665 (Ala. 2004); Allen v. Pacheco, 71 P.3d 375, 379 (Colo. 2003); Estate of Richard Heiney v. Life Care Centers of America, Inc., 2013 Ariz. App. Unpub. LEXIS 496, 2013 WL 1846599 (Ariz. App. 2013).

This Court finds persuasive the reasoning of those jurisdictions that have held that an arbitration agreement executed by a decedent cannot bind the decedent's statutory beneficiaries who were not parties to the agreement. South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries, and that such claims are distinct and separate claims from those that are brought under the survival statute. *See* Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914). The Arbitration Agreement, by its own terms, "is an agreement to arbitrate any dispute that might arise between Donald W. Young ("Patient") and NHC Healthcare Mauldin, LLC ("Center")." Decedent had the authority to bind himself and his claims to arbitration, but this Court finds he did not have the legal authority to bind his statutory beneficiaries who were not a party to the Arbitration Agreement.

NHC-Mauldin contends that the Arbitration Agreement expressly covers the statutory beneficiaries' claims, and that by signing the agreement, Decedent knowingly bound those

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claims to arbitration. However, this Court agrees with the Supreme Court of Kentucky which 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 the contract are significantly intertwined. 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."

376 S.W.3d at 599-600.

NHC-Mauldin contends that the fact that Plaintiff signed the Arbitration Agreement distinguishes this case from Ping and the other cases cited above. While it is true that Plaintiff signed the Arbitration Agreement, by its own terms, she did so on behalf of Decedent, not on her own behalf. As a result, the Court finds Plaintiff did not knowingly agree to arbitrate her claims against NHC-Mauldin. Regardless, even if the Court were inclined to agree that Plaintiff signed the Arbitration Agreement on her own behalf, Plaintiff has represented to the Court that she is not the only statutory beneficiary seeking to recover damages via the Wrongful Death action; therefore, even if her individual claims should be subject to arbitration, she did not have the authority to bind the other statutory beneficiaries' claims. As a result, they have a right to have their claims decided by a jury of their peers should the evidence so warrant.

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III. Corporate NHC Defendants

The Court finds there are pending questions of fact as to whether the Corporate NHC Defendants had sufficient control over NHC-Mauldin and the care that was provided to Decedent so as to subject them to the jurisdiction of this Court. Questions regarding the Corporate NHC Defendants' level of involvement in the management of daily affairs including, employee scheduling and patient care, as well as the corporate involvement in the overall management of NHC-Mauldin must still be resolved through further discovery. Therefore, the Corporate NHC Defendants' Motion to Dismiss in the Wrongful Death action is denied at this time without prejudice. The Corporate NHC Defendants may raise the issue again at summary judgment as discovery warrants.

WHEREFORE, for the reasons stated herein, the Court grants the Motion to Dismiss the Survival Action and orders the parties to arbitrate the matter pursuant to the terms of the Arbitration Agreement. But, the Court denies the Motion to Compel Arbitration in the Wrongful Death action and also denies, without prejudice, the Motion to Dismiss the Corporate NHC Defendants.

IT IS SO ORDERED.

Robin B. Stilwell
Presiding Judge

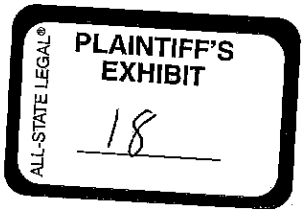
June 26, 2014
Greenville, South Carolina

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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS C.A. No.: 2019-CP-23-00473
Estate of Patricia Royston, by and through the appointed Personal Representative, Marianne McCoig, Individually, and on behalf of the statutory beneficiaries, Plaintiffs, vs. Hunt Valley Holdings, LLC a/k/a Fundamental Long Term Care Holdings, LLC; Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville, Defendants.	**ORDER DENYING DEFENDANTS' MOTION TO DISMISS, COMPEL ARBITRATION AND STAY COURT PROCEEDINGS**

This matter came before the Court on Defendants' Motion to Dismiss and Compel Arbitration. After reviewing the parties' submissions and arguments, the Court finds no valid arbitration contract between Ms. Royston and Defendants because: (1) the Arbitration Agreement is not signed by both parties and was produced, unsigned, by the Plaintiff during discovery, and (2) the parties on the Arbitration Agreement are not those parties specifically listed in the lawsuit. Accordingly, the Defendants' motion is **DENIED.**



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FACTUAL BACKGROUND

This matter arises out of two civil actions --- a Survival Action and a Wrongful Death action. Both actions involve allegations of corporate negligence and nursing home neglect resulting in the alleged wrongful death of Patricia Royston.

Magnolia Place-Greenville ("Facility") is owned and operated by Hunt Valley Holdings, LLC, formerly known as Fundamental Long Term Care Holdings, Inc. The claims are brought against the nursing home facility THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place – Greenville, as well as Fundamental Clinical and Operational Services, LLC, Fundamental Administrative Services, LLC, and Hunt Valley Holdings, LLC a/k/a Fundamental Long Term Care Holdings, LLC, these latter three entities being hereinafter referred to as the "Corporate Defendants."

Marianne McCoig was Patricia's daughter and now serves as the personal representative of Patricia's estate. Patricia was admitted as a short-term resident into the Facility on December 19, 2016. The Arbitration Agreement was allegedly provided to Patricia, but the facility claims they are not in possession of it, and the copy Plaintiffs produced was not signed by the facility. There is no evidence the Arbitration Agreement was signed by Patricia Royston during the admission process and provided to Defendants. Defendants acknowledge the copy at issue was not signed by any Facility representative.

Ms. McCoig initiated the current action on January 31, 2019. The Complaint alleges wrongful death and survival claims arising from Defendants' failure to monitor and supervise Patricia's safety and well-being while at the Facility. On July 26, 2019, Defendants filed a Motion to Dismiss, Compel Arbitration, and Stay Court Proceedings.

LEGAL STANDARD

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In order to compel arbitration, the Facility bears the burden to prove a valid and enforceable arbitration contract. Not all arbitration clauses are per se enforceable. 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). Courts interpret a jury trial waiver narrowly and construe contract ambiguities against the Facility as the party that drafted the Arbitration Agreement. WDI Meredith & Co. v. Am. Telesis, Inc., 359 S.C. 474, 480, 597 S.E.2d 885 (Ct. App. 2004). Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (2007). Whether the parties agreed to arbitrate is a question of substantive state law. In Chassereau v. Global Sun Pools, Inc., the Supreme Court stated:

> **Although we are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis.** While actions taken in an arrangement such as the one entered into by these parties might have the potential to generate several legal claims and causes of action, we have no doubt that Chassereau did not intend to agree to arbitrate the claims she asserts in the instant case. Accordingly, we hold that these claims are not covered by the arbitration agreement at issue in the instant case.

373 S.C. 168, 644 S.E.2d 718, 720-21 (2007) (emphasis added).

While the Federal Arbitration Act ("FAA") includes a presumption favoring arbitration, it only applies *after* the court finds there is a valid, enforceable arbitration agreement. 9 U.S.C. § 4 ("The court shall make an order directing the parties to proceed to arbitration" but only "upon being satisfied that the making of the agreement…is not in issue").[1] The FAA looks to state law to decide the threshold questions of contract formation.[2] Therefore, arbitration agreements guided

[1] See also EEOC v. Waffle House, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014); Toler's Cove Homeowners Ass'n v. Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 S.E.2d 581 (2003).

[2] Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'").

by the FAA are subject to the same defenses applicable to all other contracts.[3] The judicial inquiry may include an examination of contractual defects such as lack of mutual assent and want of consideration, as well as other grounds existing at law or equity, including fraud, duress, and unconscionability.[4]

LEGAL ANALYSIS

The Facility's motion to compel arbitration is effectively a motion to enforce a contract. In the ordinary course, a nursing home resident who alleges injury would bring her claims before the Court as Plaintiff has done here and the nursing home would mount its defense in the same forum. A valid contract to arbitrate their disputes is the only way for the parties to opt out of the litigation process. The Court finds the Facility had no such contract with Ms. Royston. The "Arbitration Agreement" on which the Facility's motion relies is invalid because it is not signed by both parties, and the parties on the Arbitration Agreement are not those parties specifically listed in this lawsuit.

A. The Arbitration Agreement is not a valid and enforceable agreement because it was not signed by the party seeking its enforcement.

The Arbitration Agreement is a separate document from the Admission Agreement with the Facility. At the bottom of the Arbitration Agreement there were lines provided for the resident and an agent of Facility to sign, date, and print their names. While not dated, Ms. Royston allegedly signed at the signature line reserved for "Resident/Representative Signature". A signature line existed for Facility to execute the agreement as well. A blank was provided for the facility to sign as "Authorized Agent of Facility", and a separate blank for the agent to print his/her

[3] Rent-A-Center, West. Inc. v. Jackson, 561 U.S. 63, 130 S. Ct 2772, 2776, 177 L.Ed.2d 403 (2010) Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

[4] See Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d.302, 205 (4th Cir.2001).

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name and title. At no time did anyone from Facility ever sign and execute the agreement on behalf of Facility. It is also interesting to note that the only agreement in the record, or known to exist, was found in her personal effects and produced by the Plaintiff in discovery. The Defendant did not have a copy in its possession. That leaves outstanding the question of whether the Plaintiff ever delivered to the Defendant her signed copy. As previously noted, the Facility bears the burden of proving that a valid arbitration agreement exists and was executed.

Because the facility did not sign the agreement, there is no indicia of mutual assent as required for a valid enforceable arbitration agreement. See Rodarte v. Univ. of S.C., 419 S.C. 592, 603, 799 S.E.2d 912, 917-18 (2017) (quoting Laser Supply & Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009) (noting South Carolina law requires court to consider only "objective manifestations of the parties' assent at the time the contract was made")). The alleged agreement by its express terms, "**THE PARTIES CONFIRM THAT EACH OF THEM UNDERSTANDS THAT EACH HAS WAIVED THE RIGHT TO TRIAL BEFORE A JUDGE OR JURY AND THAT EACH CONSENTS TO ALL OF THE TERMS OF THE VOLUNTARY AGREEMENT.,**" requires both parties to sign and confirm in writing that they are waiving their right to a jury trial and consenting to the terms of the agreement by affixing their signatures. The Arbitration Agreement itself references the parties' intention to select arbitration, however, there is no party signature on behalf of Facility and its affiliates. The fact that there is a signature line for "Authorized Agent of Facility" and that it is left blank further indicates that there was no mutual assent. See Baier v. Darden Restaurants, 420 S.W.3d 733, 739 (Mo. Ct. App. 2014).

B. The parties on the Arbitration Agreement are not those parties specifically listed in this lawsuit.

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All Defendants are all related entities[5] of the nursing home and have a significant relationship in the ownership, operation, and management of the nursing home, and derive significant economic benefits from its revenue.

In Hawthorne v. Fundamental et al., these same Defendants moved to compel arbitration on behalf of the Corporate Defendants stating that "The arbitration agreement contractually ***is enforceable by each of the moving defendants as either a parent company, agent or as an employee of the facility and legally is enforceable by these defendants under the circumstances*** and Pennsylvania law in any event. In addition, Defendants argued that Patricia and his estate equitably are estopped from arguing that the arbitration agreement is not binding and enforceable ***by each of the defendants***." Hawthorne v. Fundamental et al., No. 2:12cv1826 (2013).

Furthermore, Plaintiff's claims against Defendants are based on a theory of unified operation and control. Each is alleged to have participated in exactly the same wrongful conduct. Agency law extends the right to enforce an arbitration award against agents, sister corporations, subsidiaries, and parent/ownership entities of a contracting party "where the interests of such parties are directly related to, if not congruent with, those of a signatory." Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1112 (3d Cir. 1993) (citing Isidor Paiwonsky Associates, Inc. v. Sharp Properties, 998 F.2d 145, 155 (3d Cir. 1993)). Plaintiff alleges each Corporate Defendant is a parent entity, agent or employee of the Facility that shares a congruent interest. Plaintiff thus presumptively would be able to enforce any judgment from the proceeding against the Corporate Defendant and, in turn, each can rely on the principles of agency law and the broad scope of the FAA to compel and participate in the Arbitration Agreement. Id. ("Where the parties to such a clause unmistakably intend to arbitrate all controversies, which might arise

[5] Related entity is an industry term that means the entities are have common ownership, management, and control.

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between them, their agreement should be applied to claims against agents or entities related to the signatories."); Sharp Properties, 998 F.2d at 155 ("Applying Barrowclough [v. Kidder, Peabody & Co., 752 F.2d 923 (3d Cir. 1985)]' s logic here, because Bared's and ARI's interests are directly related, if not in fact congruent, it can fairly be assumed that within the arbitration proceedings ARI advanced arguments protective of Bared's interests. There is, therefore, no reason to conclude that the Federal Arbitration Act's overarching policy favoring the enforcement of arbitration awards does not apply to this case.").

It is also worth noting that at the beginning of the Arbitration Agreement in question where the parties are identified the Facility has listed itself as "Magnolia Place *of* Greenville." (Emphasis added). In actuality the Facility's correct title would be Magnolia Place – Greenville which is the name THI of South Carolina at Magnolia Place at Greenville, LLC is doing business as. It is up to the drafter of the Arbitration Agreement to be able to sufficiently and correctly identify themselves as a party of the Arbitration Agreement. Failure to do so must be construed against the drafting the party.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss and Compel Arbitration or Alternatively, to Compel Arbitration and Stay Proceedings, is DENIED.

AND IT IS SO ORDERED

Signature to Follow

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Greenville Common Pleas

Case Caption:	Patricia Royston , plaintiff, et al vs. Hunt Valley Holdings LLC , defendant, et al
Case Number:	2019CP2300473
Type:	Order/Other

So Ordered

s/ Robin B. Stilwell 2158

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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS C.A. No.: 2019-CP-23-00545 & 2019-CP-23-00546
Janet King, Individually and as Personal Representative of the Estate of Hartford Parks Boozer, Jr., Plaintiff, v. Emericare, Inc. d/b/a Emeritus at Greenville d/b/a Brookdale Greenville; Emerical, Inc.; Brookdale Senior Living, Inc.; Emeritus Senior Living; Emeritus Corporation a/k/a Brookdale Southpointe Drive; Bre Knight SH SC Owner, LLC; HCP MA3 South Carolina, LP; and Welltower, Inc. f/k/a Health Care REIT, Inc., Defendant(s).	)	**ORDER**

This matter came before the Court in Greenville County on July 22, 2019 on Defendants' Motion to Dismiss or, in the Alternative, Motion to Compel Arbitration and Stay Proceedings.

This matter arises out of civil actions for wrongful death and survival actions involving allegations of nursing home and assisted living facility abuse and neglect and corporate negligence with allegations of understaffing, underfunding, undertraining, and corporate mismanagement. Both parties submitted briefs/memoranda as well as exhibits in support of their positions. Having listened to oral arguments from counsel and having reviewed the parties' legal memoranda and exhibits and for the reasons set forth more fully



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below, the Court hereby denies the Defendants' Motion to Dismiss or, in the Alternative, Motion to Compel Arbitration and Stay Proceedings.

BACKGROUND

Plaintiff Janet King (hereinafter "Daughter") was the daughter and is the Personal Representative of the Estate of Hartford Parks Boozer, Jr. (hereinafter "Decedent"), a resident/patient at Defendants' assisted living facility and skilled nursing facility. The assisted living facility was Emeritus Corporation a/k/a Brookdale Southpointe Drive (hereinafter "Brookdale Southpointe"), an assisted living facility which Plaintiff contends was owned, controlled, and operated by Brookdale Senior Living, Inc., Welltower, Inc. f/k/a Healthcare REIT, Inc., and Emeritus Senior Living. Decedent was admitted to Brookdale Southpointe on or about September 24, 2015, at which time an arbitration agreement was signed.

Plaintiff alleges that Decedent suffered with numerous falls during the admission which resulted in a brain injury and transfer to the hospital on December 28, 2016. Decedent was discharged from the hospital to the skilled nursing facility, Emericare Inc. d/b/a Emeritus at Greenville d/b/a Brookdale Greenville (hereinafter "Brookdale Greenville") on January 3, 2017 for short-term rehabilitation at which time an arbitration agreement was signed by Daughter Brookdale Greenville. Plaintiff alleges that Decedent suffered with additional falls at Brookdale Greenville resulting in further brain injury and was shortly thereafter discharged to Brookdale Southpointe again where he suffered from further falls on the night of admission resulting in another brain bleed and was discharged back to the hospital on January 24, 2017, for his injuries. He suffered until he succumbed

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to his injuries and died on February 10, 2017. Defendants vehemently deny Plaintiff's allegations.

Defendants filed this Motion to Dismiss and Compel Arbitration on May 15, 2019. For the reasons stated hereinbelow, Defendants' Motion is denied as to the Motion to Compel Arbitration for any claims related to the Brookdale Greenville admission and granted as to any survival action claims only for Brookdale Southpointe. All wrongful death action claims against the Brookdale Southpointe Defendants are also denied.

LEGAL ANALYSIS AND CONCLUSION

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). 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.").

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I. The Arbitration Agreement with Brookdale Greenville is Unenforceable in its Entirety Because There was no Mutual Assent and Meeting of the Minds.

The arbitration agreement with Brookdale Greenville was included within the Admission Agreement with Brookdale Greenville. Page 16 of the agreement provides for the signature line for both the resident and the facility. On January 4, 2017, Daughter signed at the signature line reserved for "Resident Representative Signature". A signature line existed for the facility to execute the agreement as well. A blank was provided for the facility to sign as "Provider Representative", a separate blank for the Provider Representative to print his/her name, and a third blank for the Provider Representative to date when the facility executed the agreement on its own behalf.

At no time did anyone from Brookdale Greenville ever sign and execute the agreement on behalf of the facility. As previously noted, Brookdale Greenville bears the burden of proving that a valid arbitration agreement exists and was executed. Arbitration cannot be compelled in the absence of an express agreement to arbitrate. EEOC v. Waffle House, Inc., 534 U.S. 279 (2002); Emlenton Area Municipal Authority v. Miles, 548 A.2d 623, 625 (Pa. Super. 1988). The touchstone of any valid contract is mutual consideration. The issue whether the parties agree to arbitrate is generally one for the court, not for the arbitrators.

Because the facility did not sign the agreement, there is no indicia of mutual assent as required for a valid enforceable arbitration agreement. The alleged agreement by its express terms requires both parties to sign and confirm in writing that they are waiving their right to a jury trial and consenting to the terms of the agreement by affixing their signatures. The arbitration provision itself references the "signatories to this arbitration

provision" and references "the parties' decision to select arbitration", however, there is no party signature on behalf of Brookdale Greenville and its affiliates. The fact that there is a signature line for "Provider Representative" and that it is left blank further indicates that there was no mutual assent. See Baier v. Darden Restaurants, 420 S.W.3d 733, 739 (Mo. Ct. App. 2014).

As the Pennsylvania Superior Court noted in Bair v. Manor Care of Elizabethton, PA, LLC, et al., 108 A3d 94 (2015), the issue is not necessarily just whether or not the arbitration agreement was signed by the parties sought to be bound but whether there was a meeting of the minds, that is, whether the parties agreed in a clear and unmistakable manner to arbitrate their disputes. Id. at 97. The Court concluded that the parties did not agree in a clear and unmistakable manner to arbitrate the disputes due to the lack of signature on behalf of the nursing home facility. As the Court noted, by failing to affix its signature, the facility did not consent to arbitrate. Absent mutual assent at the time of the creation of the agreement, there was no enforceable agreement to arbitrate. Id. at 98. As the Pennsylvania Court noted, "it is not just the lack of the signature of the nursing home facility that is problematic but the fact that there was not mutual assent of the parties to the alleged contract. It is not the resident's consent that is the problem, it is Manor Care's failure to fill in essential terms and sign the agreement that fell short in manifesting its consent to arbitrate". Id. at 98.

South Carolina law requires that "in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 435 (2009) citing Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891

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(1989). Parties cannot be said to have a meeting of the minds on matters which are indefinite, vague, uncertain, and even incomprehensible. "Vagueness of expression, indefiniteness, and uncertainty as to any of the essential terms of an agreement have often been held to prevent the creation of an enforceable contract". Reed v. Boykin, 282 S.C. 614, 320 S.E.2d 68 (S.C. App., 1984). Because Brookdale Greenville never indicated its assent to the terms of the agreement, failed to complete all of the necessary portions of the agreement, failed to fill in the necessary blanks, and otherwise failed to come to agreement on the material terms of the agreement by signing the agreement, the arbitration agreement is unenforceable as to Brookdale Greenville.

II. The Brookdale Greenville Arbitration Agreement is Unenforceable Because it is Illegal Consideration for the Admission Agreement.

Plaintiff's Affidavit submitted for the Motion states that Plaintiff was not aware of the arbitration provision nor explained the arbitration provision in the Admission Agreement. No evidence was presented by the Defendants to indicate otherwise. The Admission Agreement contained the arbitration provision with no opportunity for the Plaintiff to decline the arbitration agreement. There was not a separate signature page for the arbitration agreement. As a result, the arbitration provision was required as a condition of admission to the facility. This requirement for admission to the facility is a violation of federal regulations.

Federal regulations require Medicare and Medicaid certified facilities to accept Medicare/Medicaid reimbursement rates as payment in full. See 42 C.F.R.§489.30; 42 C.F.R. §447.15. Moreover, such facilities, in the case of an individual who is entitled to

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medical assistance, must "not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the state plan...any other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay at the facility". 42 USC §1396r(c)(5)(A)(iii).

An illegal contract is unenforceable. Berkebile v. Outen, 426 S.E.2d 760, 762 n. 2 (1993). "The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Id. In the instant case, it is undisputed that Decedent was a Medicare beneficiary while residing at Defendants' facility. Further, there is no doubt that the arbitration provision was a mandatory term to the Admission Agreement and was, in part, illegal consideration for admission and an illegal required pre-condition to admission as Decedent and Daughter had no way to decline the arbitration provision and were required to sign the Admission Agreement which contained the arbitration provision and is therefore, unenforceable.

III. The Brookdale Greenville and Brookdale Southpointe Arbitration Agreements are Unenforceable Against Decedent's Wrongful Death Statutory Beneficiaries.

It is the conclusion and order of this Court that the Arbitration Agreement of Brookdale Greenville is unenforceable in its entirety for the above-stated reasons. However, even if there was a meeting of the minds and no illegal consideration, the Arbitration Agreements as to both Brookdale Greenville and Brookdale Southpointe are unenforceable against the Decedent's wrongful death statutory beneficiaries under South Carolina contract law defenses. The Arbitration Agreements neither cover the wrongful

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death statutory beneficiaries' claims within the scope of the agreement nor were the Arbitration Agreements signed by an individual who had authority to bind the 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 with Brookdale Southpointe by its own terms is an agreement between "Park Booser ('Resident', 'you', or 'your')" and "Emeritus Corporation d/b/a Brookdale Southpointe Drive ('The Company', 'us', 'we', or 'our')". The alleged admission agreement/arbitration agreement with Brookdale Greenville by its own terms is an agreement between "Emericare, Inc. d/b/a Brookdale Greenville AL/MC/SNF (SC) a licensed Nursing Care Institution located at 1306 Pelham Road, Greenville SC 29615 (the 'Provider', 'us', 'we', or 'our')" and "H P BOOZER (the 'Resident', 'you', or 'your') and/or (Name of 'Resident Representative') on behalf of Resident". Even if Decedent had agreed to arbitration, he did not have the legal authority to bind his statutory beneficiaries who are not parties to the Arbitration Agreements. The signatories to the agreements are Daughter as representative of Decedent and the agent for Brookdale Southpointe (no signature for Brookdale Greenville). No other persons are parties to these agreements. The scope of the agreements does not include the statutory beneficiaries' claims.

However, even if the Arbitration Agreements did contemplate the wrongful death statutory beneficiaries' claims, Decedent and/or Daughter had no authority to waive the statutory beneficiaries' claims. Daughter signed the Arbitration Agreements in her

individual capacity in a representative capacity of Decedent only. As the Hodge court noted, actions taken by Daughter in her *individual capacity* will not be held against the estate as the estate has other beneficiaries and may have other creditors. Moreover, the wrongful death claim is not based on the contract or agreement to arbitrate with the facility. The statutory beneficiaries received no benefit from any contract which Decedent may have entered into with the Defendants. See Wilson v. Willis, No. 27879, 2019 S.C. LEXIS 27.

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, 944 F.Supp.2d 577 (D.S.C. 2012). 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. This analysis supports the contention that the wrongful death claimants have separate and distinct claims apart from that of the survival action.

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.) As previously discussed, the only parties executing these agreements were Daughter purportedly on behalf of Decedent and an employee as an agent for Brookdale Southpointe. (No signature for Brookdale Greenville.) Defendants would contend that these agreements are binding

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on the non-signatory statutory beneficiaries simply because it contends the Arbitration Agreements say 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 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 Son against contractor was subject to repair contract's arbitration clause because Son, 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 contact-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 be 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

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> 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, Brookdale Southpointe and Brookdale Greenville's mentioning of "any spouse, children, heir, representatives, agents, executors, administrators, successors, family members, or other persons claiming through the Resident, or other person claiming through the Resident's estate, whether such third parties make a claim in a resident representative capacity or in a personal capacity. Any claims or grievances against the Community or the Community's corporate parent, subsidiaries, affiliates, employees, officers, or directors" 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

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> 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 from 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).

The Pennsylvania Superior Court 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,

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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.

Therefore, even if Daughter had actual or apparent authority/agency to execute the Arbitration Agreements, the Arbitration Agreements did not include the wrongful death

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statutory beneficiaries' claims within the scope of the Arbitration Agreements, nor did Decedent and/or Daughter have authority to bind the wrongful death statutory beneficiaries' claims to the Arbitration Agreements. As a result, the Arbitration Agreements cannot reach the claims of the wrongful death statutory beneficiaries.

CONCLUSION

Therefore, based upon the foregoing reasons, the Defendants' Motion to Dismiss or, in the Alternative, Motion to Compel Arbitration and Stay Proceedings as to all claims against Brookdale Greenville are hereby denied. Further, the Motion to Compel Arbitration as to Brookdale Southpointe is granted only as to the Survival Action claims and denied as to the Wrongful Death Action claims.

IT IS SO ORDERED.

Greenville, South Carolina
Date: _____

_____
The Honorable Edward W. Miller
Judge, Thirteenth Judicial Circuit
State of South Carolina

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Greenville Common Pleas

Case Caption: Janet King , plaintiff, et al vs. Emericare Inc , defendant, et al

Case Number: 2019CP2300546

Type: Order/Other

So Ordered

s/ Edward W. Miller

Electronically signed on 2019-08-28 13:59:11 page 16 of 16

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. No.: 2019-CP-23-02184 & 2019-CP-23-02185
	)	
Jack A. Joyner, Individually and as Personal Representative of the Estate of Dollie Alice Joyner,	)	
Plaintiff,	)	**ORDER**
v.	)	
NHC Healthcare/Greenville, LLC, National Healthcare Corporation, NHC/OP, L.P.,	)	
Defendant(s).	)	

This matter came before the Court in Greenville County on July 26, 2019, on Defendants' Motion to Dismiss and Motion to Compel Arbitration in regard to Plaintiff's Complaints. Present for hearing were Matthew W. Christian, Esq. of Greenville, S.C. for the Plaintiff and Andrew M. Rawl, Esq. and F. Matlock Elliott, Esq. of Greenville, S.C. for the Defendants.

This matter arises out of two civil actions involving allegations of nursing home abuse and neglect and corporate negligence with claims of underfunding, understaffing, and undertraining. Both parties submitted briefs/memoranda as well as exhibits in support of their positions. Having listened to oral arguments from counsel and having reviewed the parties' legal memoranda for the reasons more fully set forth below, the Court hereby denies the Defendants' Motion to Dismiss and Motion to Compel Arbitration.



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BACKGROUND

Plaintiff Jack A. Joyner (hereinafter "Son") was the son and is the Personal Representative of the Estate of Dollie Alice Joyner (hereinafter "Decedent"), a resident/patient at Defendants' skilled nursing facility. The skilled nursing facility was NHC Healthcare/Greenville, LLC (hereinafter "Facility"), an entity Plaintiff contends was owned, controlled, and operated by Defendants National Healthcare Corporation and NHC/OP, L.P. Decedent was admitted to the Facility on April 27, 2016, for short-term rehabilitation after a brief hospitalization for a urinary tract infection. Plaintiff alleges that Decedent suffered from multiple preventable pressure ulcers/bedsores and inadequate care regarding nutrition and hydration resulting in infected pressure ulcers/bedsores, dehydration, and nutritional compromise, all of which Plaintiff alleges resulted in Decedent's death. Defendants vehemently deny these allegations.

At the time of admission, Decedent and Son signed an agreement to arbitrate and waive jury trial ("Arbitration Agreement"). Plaintiff argued that the Arbitration Agreement was unenforceable in its entirety and in the alternative, if it was enforceable, that it was unenforceable as to the wrongful death actions and statutory beneficiaries. Plaintiff further argued that Defendants' Motion to Dismiss National Healthcare Corporation and NHC/OP, L.P. should be denied because there is significant evidence that these Defendants were involved in the management, operation, oversight, budget, staffing, training, and policies and procedures at the facility.

LEGAL ANALYSIS AND CONCLUSIONS

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

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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). 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.").

I. The Arbitration Agreement is Unenforceable Because There was no Meeting of the Minds and Mutual Assent by the Parties

The purported agreement to arbitrate is between "Alice Joyner ('Patient')" and "National Healthcare, LLC" as "('Center')". It is undisputed that the Facility's name and licensee of the skilled nursing facility where Plaintiff was admitted was "National Healthcare/Greenville, LLC".

Plaintiff argued that the Defendants operate under a complex corporate structure. Within that corporate structure, Plaintiff produced a corporate flowchart for the Defendants. Nowhere within the corporate flowchart is there an entity named "National Healthcare, LLC". The entity which whom Defendants contend Decedent/Son agreed to arbitrate does not exist.

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Courts have held that mutual assent and a meeting of the minds is necessary for an enforceable arbitration agreement. South Carolina law requires that in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 435 (2009) citing Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). Parties cannot be said to have had a meeting of the minds on matters which are indefinite, vague, uncertain, and even incomprehensible. "Vagueness of expression, indefiniteness, and uncertainty as to any of the essential terms of an agreement have often been held to prevent the creation of an enforceable contract." Reed v. Boykin, 282 S.C. 614, 320, S.E.2d 68 (S.C. App. 1984) *quoting* 1 CORBIN ON CONTRACTS, § 95 (1963).

The Arbitration Agreement states that "this is an agreement to arbitrate any dispute that might arise between Alice Joyner ('Patient') and National Healthcare, LLC ('Center')". The document must be construed against the Defendants as the drafting entities. Nowhere does the document identify that the Plaintiff was entering into an arbitration agreement with "National Healthcare/Greenville, LLC", "National Healthcare Corporation", or "NHC/OP, L.P." within the four corners of this agreement.

The identification of the parties to the agreement are essential and integral terms to which courts may not re-write for the parties. The issue is "whether there was a meeting of the minds, that is, whether the parties agreed in clear and unmistakable manner to arbitrate their disputes". Bair v. Manor Care of Elizabethton PA, LLC, et al., No. 435 MDA 2014, 108 A3d 94 (2015). Absent mutual assent at the time of the creation of the agreement, there can be no enforceable agreement to arbitrate. The identification

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of the parties with whom the parties agreed to purportedly arbitrate is an essential and integral part/term of the purported agreement. Failure on the part of the Defendants to have the valid correct name of an existing entity results in indefinite, vague, uncertain, and even incomprehensible terms which are essential to the agreement. Therefore, Plaintiff cannot be compelled to arbitrate his claims with an entity that neither exists nor is the entity with whom the current lawsuit involves and as such, the Arbitration Agreement is unenforceable in its entirety.

B. In the Alternative, if the Arbitration Agreement was Enforceable as to the Survival Action Claim, it is Unenforceable Against Decedent's Wrongful Death Statutory Beneficiaries.

It is the conclusion and order of this Court that the Arbitration Agreement is unenforceable for the above-stated reasons. However, even if Son had actual or apparent authority/agency to sign the Arbitration Agreement on behalf of Decedent, the Arbitration Agreement is unenforceable against the Decedent's wrongful death statutory beneficiaries under South Carolina contract law defenses. The Arbitration Agreement neither covers the wrongful death statutory beneficiaries' claims within the scope of the agreement nor was the Arbitration Agreement signed by an individual who had authority to bind the 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 "Alice Joyner ('Patient')" and "NHC Healthcare, LLC ('Center')". Even if Decedent had agreed to arbitration, she did not have the legal authority to bind her

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statutory beneficiaries who are not parties to the Arbitration Agreement. The signatories to the agreement are Decedent, Son on behalf of Decedent, and NHC Healthcare, LLC. No other persons are parties to this agreement. The scope of the agreement does not include the statutory beneficiaries' claims.

However, even if the Arbitration Agreement did contemplate the wrongful death statutory beneficiaries' claims, Decedent and/or Son had no authority to waive the statutory beneficiaries' claims. Son signed the Arbitration Agreement in his *individual capacity*. However, as the Hodge court noted, actions taken by Son in his *individual capacity* will not be held against the estate as the estate has other beneficiaries and may have other creditors. Moreover, the wrongful death claim is not based on the contract or agreement to arbitrate with the facility. The statutory beneficiaries received no benefit from any contract which Decedent may have entered into with the Defendants. See Wilson v. Willis, No. 27879, 2019 S.C. LEXIS 27.

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, 944 F.Supp.2d 577 (D.S.C. 2012). 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. This analysis supports the contention that the wrongful death claimants have separate and distinct claims apart from that of the survival action.

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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.) As previously discussed, the only parties executing this Agreement were Decedent, Son purportedly on behalf of Decedent, and an employee as an agent for NHC Healthcare, LLC. Defendants would contend that this agreement is binding on the non-signatory statutory beneficiaries simply because it contends 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 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 Son against contractor was subject to repair contract's arbitration clause because Son, 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 contact-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 be being mentioned in the contract as potential

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

Likewise, Defendants' mentioning of "agents, representatives, affiliates, fiduciaries…third party beneficiaries, heirs, executors, administrators, or any of them, and all persons, entities or corporations with whom any of the former have been, are now, or may be affiliated, arising out of or in any way related or connected to the Patient's stay and the care provided at the Center, including but not limited to any disputes concerning alleged personal injury to the Patient caused by improper or inadequate care, including allegations of medical malpractice; any disputes concerning whether any statutory or regulatory provisions relating to the Patient were violated…", 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."

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> "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."

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The wrongful death claim is a separate claim from 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.

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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).

The Pennsylvania Superior Court 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,

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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.

Therefore, even if Son had actual or apparent authority/agency to execute the Arbitration Agreement, the Arbitration Agreement did not include the wrongful death statutory beneficiaries' claims within the scope of the Arbitration Agreement, nor did Decedent and/or Son have authority to bind the wrongful death statutory beneficiaries' claims to the Arbitration Agreement. As a result, the Arbitration Agreement cannot reach the claims of the wrongful death statutory beneficiaries.

II. National Healthcare Corporation and NHC/OP, L.P.'s Motion to Dismiss

Defendants National Healthcare Corporation and NHC/OP, L.P. also moved independently to be dismissed from the actions pursuant to Rules 12(b)(1), (2), and (6), S.C.R.C.P. on the grounds that:

a) These Defendants are separate and distinct legal entities from NHC Healthcare/ Greenville, LLC;

b) The Complaint also fails to state a claim against these Defendants in that:

i. These Defendants do not provide care and treatment to patients at NHC Healthcare/Greenville, LLC, such as Ms. Joyner, and,

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in particular, had no involvement with the allegations involving Ms. Joyner;

ii. No act or omission of these Defendants were proximate cause of any injuries or damages to Ms. Joyner;

iii. At no point have these Defendants exerted sufficient control over NHC Healthcare/Greenville, LLC to create a principal-agent relationship, and at no point have these Defendants expressly authorized or insisted upon any act or omission of NHC Healthcare/Greenville, LLC related to this present litigation; and

iv. These Defendants are not liable for the tortuous acts of NHC Healthcare/Greenville, LLC.

The Court hereby denies Defendants National Healthcare Corporation and NHC/OP, L.P.'s Motions to Dismiss. Plaintiff argued and submitted significant evidence through the course of argument, brief, and exhibits that warrant the denial of these Defendants' Motion at this stage. The Court's decision is that Plaintiff has made a sufficient showing to overcome Defendants' Rule 12(b) Motions to Dismiss; however, the Court's ruling is not a dispositive determination of the Defendants' liability in this action.

CONCLUSION

Because Plaintiff has met the threshold of requirements to overcome Defendants' Rule 12(b)(1), (2), and (6) Motions to Dismiss, the Motions to Dismiss by Defendants National Healthcare Corporation and NHC/OP, L.P. are hereby denied.

Because there was no mutual assent and meeting of the minds and for the other reasons set forth hereinabove, Defendants' Motions to Compel Arbitration are denied. For the foregoing reasons and above-stated reasons, Defendants' Motion to Dismiss and Motion to Compel Arbitration ARE HEREBY DENIED.

IT IS SO ORDERED.

Greenville, South Carolina
Date: _____

_____
The Honorable Edward W. Miller
Judge, Thirteenth Judicial Circuit
State of South Carolina

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Greenville Common Pleas

Case Caption:	Jack A Joyner , plaintiff, et al vs. Nhc Healthcare Greenville, Llc , defendant, et al
Case Number:	2019CP2302185
Type:	Order/Other

So Ordered

s/ Edward W. Miller

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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS C.A. No.: 2019-CP-23-7282 & 2019-CP-23-7283
Troy Testerman, Individually and as Personal Representative of the Estate of Donald Testerman, Plaintiff, v. Emeritus Corporation d/b/a Brookdale Greenville, Emericare, Inc., Emerical, Inc., Brookdale Senior Living, Inc., HCP MA3 South Carolina, LP, Bre Knight SH SC Owner, LLC, Inpatient Consultants of North Carolina, P.C., Adam L. Schendel, MSN, ACNP-BC, Jaspreet Pestana, M.D., Defendant(s).	**ORDER**

This matter came before the Court on April 14, 2020 on Defendants' Motion to Dismiss or, in the Alternative, Motion to Compel Arbitration and Stay Proceedings.

This matter rises out of wrongful death and survival actions involving allegations of nursing home negligence and corporate negligence and allegations of understaffing, underfunding, undertraining, and corporate mismanagement. Both parties submitted briefs/memoranda as well as exhibits in support of their motions. The hearing was conducted via telephone conference with consent of all parties and pursuant to the South Carolina Supreme Court's recent Order regarding such hearings in light of the COVID-19 pandemic. Present for the Defendants were C. Stuart Mauney for Defendants Emeritus Corporation d/b/a Brookdale Greenville, Emericare, Inc., Emerical, Inc., Brookdale Senior Living, Inc., HCP MA3 South Carolina, LP, and Bre Knight SH SC Owner, LLC

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and Mark Wilby for Defendants Inpatient Consultants of North Carolina, P.C., Adam L. Schendel, MSN, ACNP-BC, and Jaspreet Pestana, M.D. and Matthew Christian for the Plaintiff. Having listened to oral arguments from counsel and from having reviewed the parties' legal memoranda and exhibits, for the reasons set forth more fully below, the Court hereby grants Defendants' Motion to Dismiss or, in the Alternative, Motion to Compel Arbitration and Stay Proceedings as to the survival action as to all Defendants. The Court denies Defendants' Motion to Dismiss or, in the Alternative, Motion to Compel Arbitration and Stay Proceedings as to the wrongful death action as to all Defendants.

BACKGROUND

Troy Testerman (hereinafter "Son") was the son and is the Personal Representative of the Estate of Donald Testerman (hereinafter "Decedent"), a resident/patient at Defendants' skilled nursing facility and where Defendants Inpatient Consultants of North Carolina, P.C., Adam L. Schendel, MSN, ACNP-BC, and Jaspreet Pestana, M.D. treated Decedent.

The skilled nursing facility was Emeritus Corporation d/b/a Brookdale Greenville (hereinafter "Brookdale Greenville") which Plaintiff contends was owned, controlled, and operated by Emericare, Inc., Emerical, Inc., Brookdale Senior Living, Inc., HCP MA3 South Carolina, LP, and Bre Knight SH SC Owner, LLC.

Decedent was admitted to Brookdale Greenville on January 17, 2018 for long-term care. Plaintiff alleges that during this admission, Defendants failed to properly prevent and/or treat skin breakdown/pressure ulcers/bedsores resulting in multiple pressure ulcers/bedsores, some of which became infected and malodorous and were very

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significant in size. Plaintiff further alleges Defendants failed to timely prevent and treat falls, weight loss, and infection. Additionally, Plaintiff alleges claims of understaffing and underfunding in conjunction with the corporate negligence claims. Plaintiff also alleges that as a result of these injuries, Defendants caused Decedent's death on May 8, 2018. All Defendants vehemently deny all of Plaintiff's allegations.

Defendants filed this Motion to Dismiss and Compel Arbitration on March 3, 2020 arising out of an arbitration agreement signed by Son on January 17, 2018 at Brookdale Greenville's facility in conjunction with Decedent's admission to Brookdale Greenville's facility. It is undisputed that Son held both a guardianship and a general durable power of attorney for Decedent. For the reasons stated hereinbelow, Defendants motion is denied as to the wrongful death causes of action and granted as to the survival action claims.

LEGAL 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 (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.

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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, 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.").

Because Son had authority under the language of the General Durable Power of Attorney to execute the agreement for arbitration, the arbitration agreement is enforceable as to Decedent's claims in the Survival Action, However, the Arbitration Agreement is unenforceable against the Decedent's wrongful death statutory beneficiaries under South Carolina contract law defenses. The Arbitration Agreement neither covers the wrongful death statutory beneficiaries' claims within the scope of the agreement nor was the Arbitration Agreement signed by an individual who had authority to bind the 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 admission agreement/arbitration agreement with Brookdale Greenville by its own terms is an agreement between "Emericare, Inc. d/b/a Brookdale Greenville AL/MC/SNF (SC) a licensed Nursing Care Institution located at 1306 Pelham Road, Greenville SC 29615 (the 'Provider', 'us', 'we', or 'our')" and "Donald Testerman (the 'Resident', 'you', or 'your') and/or (Name of 'Resident Representative') on behalf of Resident". Even if Decedent had agreed to arbitration, he did not have the legal authority to bind his statutory beneficiaries who are not parties to the Arbitration Agreement. The signatories to the agreement are Son as representative of Decedent and the agent for

Brookdale Greenville. No other persons are parties to these agreements. The scope of the agreement does not include the statutory beneficiaries' claims.

However, even if the Arbitration Agreement did contemplate the wrongful death statutory beneficiaries' claims, Decedent and/or Son had no authority to waive the statutory beneficiaries' claims. Son signed the Arbitration Agreement in his *individual capacity* in a representative capacity of Decedent only. As the Hodge court noted, actions taken by Son in his *individual capacity* will not be held against the estate as the estate has other beneficiaries and may have other creditors. Moreover, the wrongful death claim is not based on the contract or agreement to arbitrate with the facility. The statutory beneficiaries received no benefit from any contract which Decedent may have entered into with the Defendants. See Wilson v. Willis, No. 27879, 2019 S.C. LEXIS 27.

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, 944 F.Supp.2d 577 (D.S.C. 2012). 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. This analysis supports the contention that the wrongful death claimants have separate and distinct claims apart from that of the survival action.

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

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S.W.3d 525 (Mo. 2009) (Wrongful Death claimants not bound by arbitration agreement.) As previously discussed, the only parties executing these agreements were Son purportedly on behalf of Decedent and an employee as an agent for Brookdale Greenville. Defendants would contend that this agreement is binding on the non-signatory statutory beneficiaries simply because it contends 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 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 Son against contractor was subject to repair contract's arbitration clause because Son, 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 contact-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 be 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

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> 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, Brookdale Greenville's mentioning of "any spouse, children, heir, representatives, agents, executors, administrators, successors, family members, or other persons claiming through the Resident, or other person claiming through the Resident's estate, whether such third parties make a claim in a resident representative capacity or in a personal capacity. Any claims or grievances against the Community or the Community's corporate parent, subsidiaries, affiliates, employees, officers, or directors" 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."

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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 from 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).

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The Pennsylvania Superior Court 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

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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.

Therefore, even if Son had actual or apparent authority/agency to execute the Arbitration Agreement, the Arbitration Agreement did not include the wrongful death statutory beneficiaries' claims within the scope of the Arbitration Agreement, nor did Decedent and/or Son have authority to bind the wrongful death statutory beneficiaries' claims to the Arbitration Agreement. As a result, the Arbitration Agreement cannot reach the claims of the wrongful death statutory beneficiaries.

CONCLUSION

Therefore, based upon the foregoing reasons, the Defendants' Motion to Dismiss or, in the Alternative, Motion to Compel Arbitration and Stay Proceedings as to the Survival Action claims against the Defendants are granted. Further, the Defendants' Motion to Dismiss or, in the Alternative, Motion to Compel Arbitration and Stay Proceedings as to all of the wrongful death causes of action and claims are denied.

IT IS SO ORDERED.

_____
The Honorable Robin B. Stilwell
Judge, Thirteenth Judicial Circuit

Greenville, South Carolina
Date: _____

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Greenville Common Pleas

Case Caption: Troy Testerman , plaintiff, et al vs. Emeritus Corporation , defendant, et al

Case Number: 2019CP2307283

Type: Order/Other

So Ordered

s/ Robin B. Stilwell 2158

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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS C.A. No.: 2018-CP-23-00119 & 2018-CP-23-00120
Marlene Wilson, Individually and as Personal Representative of the Estate of Kenneth Wilson, Plaintiff, v. NHC Healthcare/Mauldin, LLC, National Healthcare Corporation, NHC/OP, LP, Bon Secours St. Francis Health System, Inc., Bon Secours Health System, Inc., Defendant(s).	)	**ORDER**

This matter came before the Court on Defendants National Healthcare Corporation' and NHC/OP, LP's (hereinafter "Nursing Home Defendants") Motion to Dismiss and to Compel Arbitration. Having listened to oral arguments from counsel and having reviewed the parties' legal memoranda for the reasons more fully set forth below, the Court hereby denies the Defendants' Motion to Dismiss and to Compel Arbitration.

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 Kenneth Wilson (hereinafter "Decedent"). Marlene Wilson (hereinafter "Daughter") was Decedent's daughter and serves as Personal Representative of Decedent's estate. On April 6, 2015, Decedent was admitted to NHC Mauldin for short-term rehabilitation after undergoing a hip arthroplasty at St. Francis

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Hospital. Plaintiff alleges that as a result of Nursing Home Defendants' negligence, Decedent developed necrotic and infected bedsores, became dehydrated, suffered from nutritional compromise, and developed multiple infections which went untreated, all of which Plaintiff alleges caused Decedent's injuries and death.

At the time of admission, Daughter signed an Agreement to Arbitrate and Waive Jury Trial ("Arbitration Agreement"). The Arbitration Agreement was signed by Jennifer Balon for "The Center" and by Daughter for "The Patient". The Arbitration Agreement provides that the parties agree to follow the dispute resolution procedures set forth in the Arbitration Agreement which include the waiver of a jury trial and the requirement that the parties submit to binding arbitration all disputes against each other which exceed an amount in controversy over $7,500.00.

Plaintiff filed the Notice of Intent to File Suit on September 14, 2017. The parties engaged in the mandatory pre-suit mediation on December 28, 2017. Plaintiff then filed the Summons and Complaint on January 5, 2018 and served same. Nursing Home Defendants filed this Motion to Dismiss and to Compel Arbitration on February 28, 2018. Nursing Home Defendants contend that this Arbitration Agreement requires that this Court order that this case be dismissed and that the claims be submitted to binding arbitration in accordance with the Arbitration Agreement. Plaintiff contends that the Arbitration Agreement is unenforceable under state contract law and this Court agrees for the various reasons set forth hereinbelow.

LEGAL ANALYSIS AND CONCLUSIONS

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

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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). 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.").

I. Daughter had No Authority to Sign the Arbitration Agreement for Decedent

Because Decedent did not sign the Arbitration Agreement, Daughter was required to have authority to execute the Arbitration Agreement for the Arbitration Agreement to be enforceable. Daughter had no such authority. 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 (Ct. App. 2004). In the present case, neither actual or apparent authority exists for Daughter.

A. No Actual Agency/Authority

While it is true that Daughter held a "Power of Attorney" on behalf of Decedent, this Power of Attorney did not confer the necessary authority to execute an arbitration agreement on Decedent's behalf. This document is titled "Power of Attorney" and is not

identified a "General Durable Power of Attorney." More importantly, the document does not confer sufficient authority to enter into contracts generally, to enter into releases on behalf of Decedent, to waive the constitutional right to a jury trial, nor does it include the "catch all provision giving the attorney-in-fact the authority 'to sign any and all releases or consent required.'" Sovereign Healthcare of Tampa v. Schmitt, 195 So. 3d, 1175 (Fla. Dist. Ct. App. 2016).

The powers and authorities which Daughter held were specifically delineated in the Power of Attorney. These powers granted to Daughter the authority to make decisions regarding financial matters and decisions regarding healthcare.

This analysis is akin to that in Hodge v. UniHealth Post-Acute Care of Bamberg, 2018 S.C. App. LEXIS 13. As noted in Hodge, "'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 at 29 quoting Dickerson v. Longoria, 95 A.2d 721, 743, 414 Md. 419 (2010). The Hodge court further noted that the authority to sign healthcare documents does not include the authority to sign an arbitration agreement. Hodge at 40. Our courts have held a healthcare power of attorney does not provide authority to sign an arbitration agreement. Hodge v. UniHealth Post-Acute Care of Bamberg, 2018 S.C. App. LEXIS 13; 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.

Furthermore, the South Carolina Supreme Court has held that "The authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby

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waiving the principal's right of access to the courts and to a jury trial." Hodge at 37 quoting Thompson at 55, 784 S.E.2d at 686. As previously indicated, this Power of Attorney did not have 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, but rather, deals with the limited circumstances enumerated therein of making financial or healthcare decisions for Decedent. Therefore, no actual authority existed for Daughter to sign the Arbitration Agreement.

B. No Apparent Agency/Authority NAAA

Daughter did not have apparent authority/agency to execute the Arbitration Agreement on behalf of the 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.

Nursing Home Defendants have presented no evidence that Decedent represented, implicitly or explicitly, to the Nursing Home Defendants that Daughter had the authority to enter into the Arbitration Agreement on his behalf. The Affidavit presented by Plaintiff reflects that Decedent was not present when Daughter signed the Arbitration Agreement as he was still in the hospital. The Affidavit further reflects that Decedent was never aware that Daughter had signed the Arbitration Agreement and never authorized Daughter to sign such contracts or agreements. Further, based upon the Affidavit of Daughter and the records submitted as exhibits at the hearing, Decedent was confused from the effects of the anesthesia and had "moderate" mental impairment.

It should further be noted that despite the fact that Decedent's mental impairment improved to "cognitively intact", according to Nursing Home Defendants' own records during his admission, Defendants never requested that Decedent sign the Arbitration Agreement personally. Further, the Arbitration Agreement does not reflect any authority which Daughter had to execute such agreement despite the Arbitration Agreement's own requirement that any such authority be delineated.

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Nursing Home Defendants must also show a detrimental change of position. It should also be noted that the Arbitration Agreement is separate from the Admissions Agreement. The facility cannot show that it changed its position for the worse as required to prove any apparent authority/agency as reflected in Hodge.

Because Decedent did not consciously or impliedly represent that Daughter was his agent and because there was no change of position by the Nursing Home Defendants, Nursing Home Defendants cannot show that Daughter had apparent authority/agency to execute the Arbitration Agreement on behalf of Decedent.

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

It is the conclusion and order of this Court that the Arbitration Agreement is unenforceable for the above-stated reasons. However, even if Daughter had actual or apparent authority/agency to sign the Arbitration Agreement on behalf of Decedent, the Arbitration Agreement is unenforceable against the Decedent's wrongful death statutory beneficiaries under South Carolina contract law defenses. The Arbitration Agreement neither covers the wrongful death statutory beneficiaries' claims within the scope of the agreement nor was the Arbitration Agreement signed by an individual who had authority to bind the 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 "Kenneth Wilson ('patient')" and "NHC Healthcare/Mauldin, LLC ('center')". While at some point during Decedent's admission to the facility, he might have had the authority to

bind himself and his claims to arbitration but was never given the chance. However, even if Decedent had agreed to arbitration, he did not have the legal authority to bind his statutory beneficiaries who are not parties to the Arbitration Agreement. The signatories to the agreement are Daughter on behalf of Decedent and NHC Healthcare/Mauldin, LLC. No other persons are parties to this agreement. The scope of the agreement does not include the statutory beneficiaries' claims.

However, even if the Arbitration Agreement did contemplate the wrongful death statutory beneficiaries' claims, Decedent and/or Daughter had no authority to waive the statutory beneficiaries' claims. Daughter signed the Arbitration Agreement in her *individual capacity*. However, as the Hodge court noted, actions taken by Daughter in her *individual capacity* will not be held against the estate as the estate has other beneficiaries and may have other creditors. Daughter's Affidavit reflects that other statutory beneficiaries exist in this case.

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, 944 F.Supp.2d 577 (D.S.C. 2012). 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. This analysis supports the contention that the wrongful death claimants have separate and distinct claims apart from that of the survival action.

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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.) As previously discussed, the only parties executing this Agreement were Daughter purportedly on behalf of Decedent and employee as an Agent for NHC Mauldin. NHC Mauldin would contend that this agreement is binding on the non-signatory statutory beneficiaries simply because it contends 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 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 contact-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 be being mentioned in the contract as potential claimants. This is

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> 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, NHC-Mauldin's mentioning of "employees, agents, representatives, affiliates, fiduciaries, medical directors, officers, directors, governing bodies, management companies, insurers, attorneys, predecessors, successors, assigns, third party beneficiaries, heirs, executors, administrators, or any of them, and all persons, entities or corporations with whom any of the former have been, are now, or may be affiliated, arising out of or in any way related or connected to the patient's stay and the care provided at the Center", 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

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> 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 from 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).

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The Pennsylvania Superior Court 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

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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.

Therefore, even if Daughter had actual or apparent authority/agency to execute the Arbitration Agreement, the Arbitration Agreement did not include the wrongful death statutory beneficiaries' claims within the scope of the Arbitration Agreement, nor did Decedent and/or Daughter have authority to bind the wrongful death statutory beneficiaries' claims to the Arbitration Agreement. As a result, the Arbitration Agreement cannot reach the claims of the wrongful death statutory beneficiaries.

WHEREFORE, for the reasons stated herein, the Court denies Defendants' Motion to Dismiss and Motion to Compel Arbitration.

IT IS SO ORDERED.

_____
The Honorable Michael G. Nettles
Presiding Judge

Greenville, South Carolina
Date: _____

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Greenville Common Pleas

Case Caption: Marlene Wilson , plaintiff, et al vs. NHC Healthcare/Mauldin LLC , defendant, et al

Case Number: 2018CP2300120

Type: Order/Other

So Ordered

s/ Michael Nettles

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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Estate of Mozana Clinkscales, by and through the appointed Personal Representative Charlie E. Clinkscales, Individually, and on behalf of Statutory Beneficiaries, Plaintiffs, v. Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville, Defendants.	IN THE COURT OF COMMON PLEAS C.A. No: 2018-CP-23-05088 **ORDER DENYING MOTION TO COMPEL ARBITRATION**

This matter came before the Court on December 18, 2018 for Defendant THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville's Motion to Dismiss and to Compel Arbitration. Having listened to oral arguments from counsel and reviewed the parties' legal memoranda, for the reasons more fully set forth below, the Court hereby denies the Motion to Compel Arbitration as to "Survival Action" and the "Wrongful Death Action".

I. BACKGROUND

This matter arises out of two civil actions --- a Survival Action and a Wrongful Death action. Both actions involve allegations of nursing home neglect and corporate negligence resulting in the wrongful death of Mozana Clinkscales ("Decedent"). Charlie Clinkscales was Decedent's son and serves as the personal representative of Decedent's estate. The claims are brought against the nursing home facility THI of South Carolina at Magnolia Place at Greenville, LLC (d/b/a Magnolia Place – Greenville), as well as Fundamental Clinical and Operational Services, LLC (which Defendants assert provided "clinical services" to the facility), and

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Fundamental Administrative Services, LLC (which Defendants assert provided "administrative services" to the facility), these latter two entities being hereinafter referred to as the "Corporate Defendants."

Plaintiffs allege that while the Corporate Defendants did not provide direct care or services to Decedent, they are indispensable parties and proper Defendants in this matter because their control over the Facility directly affected the quality of care received by Decedent. Plaintiffs allege the Corporate Defendants are related entities[1] of the nursing home and have a significant relationship in the operation and management of the nursing home, and derive significant economic benefits from its revenue.[2] Agency law extends the right to enforce an arbitration award against agents, sister corporations, subsidiaries, and parent/ownership entities of a contracting party "where the interests of such parties are directly related to, if not congruent with, those of a signatory."[3] Plaintiffs allege the Corporate Defendants should be included in the arbitration proceedings if the Court compels arbitration because the Court finds the Corporate Defendants were intended beneficiaries of the Arbitration Agreement as the allegations against them are based on the same facts and are inherently inseparable from the claims made against the Facility.[4]

Decedent was admitted to Magnolia Place-Greenville ("Facility") on January 15, 2011 according to the original Admission Agreement. The Admission Agreement governed the type of care Decedent would receive at the Facility and Decedent's financial obligation to pay for those

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[1] Related entity is an industry term that means the entities are have common ownership, management, and control.
[2] A parent company has been forced to arbitrate under a theory of equitable estoppel even though the parent company was not a party to the agreement when the subsidiary was a party to the agreement. Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416 (4th Cir. 2000) quoting J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-21 (4th Cir. 1988)) (citing Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757 (11th Cir. 1993). Pearson v. Hilton Head Hosp., 400 S.C. 281, 733 S.E.2d 597 (Ct. App., 2012).
[3] Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1112 (1993) (citing Isidor Paiwonsky Associates, Inc. v. Sharp Properties, 998 F.2d 145, 155 (3d Cir. 1993)).
[4] Int'l Paper Co. v. Schwabedissen Maschenen & Anlagen GMBH, 206 F.3d 411, 417 (4th Cir. 2000); see also Pearson v. Hilton Head Hospital, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012).

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services. On the Admission Agreement's final page, labeled as "Page 12 of 12," there was an "Entire Agreement"[5] provision indicating these 12 pages constituted "the entire agreement and understanding between the parties" concerning Decedent's admission to the Facility. The date on this document is January 15, 2011.

A contract called "Arbitration Agreement" was signed on August 30, 2013. This contract was not part of the 12 pages comprising the Admission Agreement but was its own separate entity (labeled "Page 1 of 1") with its own signature blocks. The Arbitration Agreement, purportedly a contract between the Facility and Decedent, provides for alternative dispute resolution to any claim a party may bring against another arising out of Decedent's care at the Facility. Defendant has admitted agreeing to arbitrate was not a prerequisite to admission at the Facility or a condition of admission. The Arbitration Agreement was allegedly signed by Charlie Clinkscales on **August 30, 2013**—more than 30 months after the original Admission Agreement was signed.

II. BURDEN OF PROOF

The party seeking to force arbitration has the burden of establishing the existence of a valid arbitration agreement.[6] Of those courts that have decided this question, most have held the proponent of the waiver bears the burden, reasoning that the jury trial right is fundamental, and should not be waived absent clear evidence.[7] A party seeking judicial enforcement of a contract

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[5] "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."

[6] 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).

[7] See e.g., Leasing Serv. Corp. v. Crane, 804 F.2d 828, 833 (4th Cir. 1986) ("Where waiver is claimed under a contract executed before litigation is contemplated, we agree with those courts that have held that the party seeking enforcement of the waiver must prove that consent was both voluntary and informed."); Nat'l Equip. Rental Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977) (implying that party defending waiver bears burden of proof); Luis Acosta, Inc. v. Citibank, N.A., 920 F. Supp. 15, 18 (D.P.R. 1996) (rejecting a waiver, after concluding that "the burden of proving the waiver of such a fundamental right properly rests upon the party seeking to enforce such a waiver"); Phoenix Leasing Inc. v. Sure Broadcasting, Inc., 843 F. Supp. 1379, 1384 (D. Nev. 1994) ("An informal survey indicates the majority of courts having considered this question followed the approach in Leasing Service [and placed

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bears the burden of persuasion.[8] Defendant carries the burden to prove a valid and enforceable arbitration agreement was signed in a "knowing, voluntary and intentional" capacity. In interpreting a jury trial waiver narrowly, some courts have also emphasized "the basic principle that ambiguities in a contract are construed against the drafting party."[9] When faced with a motion to compel arbitration that is opposed based on whether an agreement to arbitrate has been made between the parties, the court must give to the opposing party the benefit of all reasonable doubts and inferences that may arise.[10] Pro-arbitration policy does not validate a contract that lacks the building blocks of a binding contract. Whether the parties agreed to arbitrate is a question of substantive state law.[11] In Chassereau v. Global Sun Pools, Inc., 373 S.C. 168, 644 S.E.2d 718 (2007), the Supreme Court stated: "Although we are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis."

The parties agree the FAA applies and that it represents pro-arbitration federal policy. "Congress's purpose in enacting the FAA was "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."[12] However, the policy only applies in instances where a valid arbitration agreement has been established. See 9 U.S.C. § 4. ("The court shall make an order directing the parties to proceed to arbitration" but only "upon being satisfied that the making of the agreement…is not in issue."). When the parties dispute the existence of a valid arbitration agreement, the presumption in favor of arbitration

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burden of proof on proponent of waiver]."); Smyly v. Hyundai Motor Am., 762 F. Supp. 428, 429 (D. Mass. 1991) (concluding that "since it is a waiver of a constitutional right," proponent of waiver bears burden of showing agreement was made knowingly and intentionally).

[8] Hinson-Barr, Inc. v. Pinckard, 292 S.C. 267, 268, 356 S.E.2d 115, 116 (1986).

[9] Nat'l Acceptance Co., 381 F. Supp. at 271).

[10] See Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd., 636 F.2d 51, 54 (3d Cir. 1980).

[11] Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 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.").

[12] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

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disappears.[13] The FAA requires state courts enforce arbitration agreements unless the agreement is otherwise revocable under existing legal or equitable principles. 9 U.S.C. § 2. Moreover, while it is true the U.S. Supreme Court has held that the FAA "leaves no place for the exercise of discretion," the Court also cited the FAA's savings provision that denies enforcement of agreements susceptible to the general contract defenses of fraud, duress, and unconscionability.[14] The FAA requires the Court to look to South Carolina law to decide the threshold questions of contract formation.[15] The judicial inquiry may include an examination of contractual defects such as lack of mutual assent and want of consideration, as well as other grounds existing at law or equity, including fraud, duress, and unconscionability.[16] Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts.[17] Arbitration agreements may thus be invalidated by generally applicable contract defenses, such as vagueness, indefiniteness, lack of consideration, fraud, duress, or unconscionability. Id. A court should only decide as a matter of law whether the parties entered into an agreement to arbitrate when there is no genuine issue of material fact concerning the formation of the agreement.[18] In determining whether adequate consideration exists in a contract or arbitration agreement under the FAA guided by principles of contract law, we must examine and stay within the confines of the four corners of the instrument.[19]

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[13] Dumais v. American Golf Corp., 299 F.3d 1216, 1220 (10th Cir. 2002).
[14] Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985).
[15] Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'").
[16] See Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d.302, 205 (4th Cir. 2001).
[17] Rent-A-Center, West. Inc., 130 S. Ct at 2776; Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").
[18] See Avedon Engineering, Inc. v. Seatex, 126 F.3d 1279, 1283 (10th Cir. 1997).
[19] State Acc. Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)).

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III. LEGAL REASONING

A. *The Arbitration Agreement is not a valid and enforceable agreement because a lack of consideration and mutuality exists under the circumstances.*

The necessary elements of a contract are an offer, acceptance, and valuable consideration.[20] To be legally enforceable, a contract must have an offer, acceptance, consideration, and mutual assent or meeting of the minds on all material terms. It is well settled that to be valid and enforceable, a contract must be supported by valuable consideration.[21] "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."[22] Consideration is a promise to do something that a party has no legal obligation to do or to forbear from doing something it has a legal right to do. A valid contract requires that both sides provide consideration. The Arbitration Agreement is only enforceable if it contains bargained for consideration and a mutuality of obligations between its parties. The Court finds these essential contract formation requirements are not met here. Many of the arguments Defendant raises in support of the Arbitration Agreement are misguided because they conflate the Arbitration Agreement and the Admission Agreement which, for the reasons discussed above, are distinct documents that do not merge.

The Arbitration Agreement was signed on August 30, 2013, but the Admission Agreement was signed on January 15, 2011.[23] Thus, the Admission Agreement and Arbitration Agreement

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[20] Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003).
[21] Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984).
[22] Plantation A.O., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)).
[23] No family member had Power of Attorney when Mozana was admitted on January 15, 2011.

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are separate contracts that do not merge.[24] Our Supreme Court in Coleman refused to apply the merger doctrine when language in the contracts "recognized the 'separateness' of the admission and arbitration agreements."[25] Our Supreme Court went further in Thompson and Hodge applying Coleman and providing further examples of factors demonstrating "separateness" and preventing merger including the fact that the Arbitration Agreement was not necessary for admission and that *there was no bargain for exchange nor consideration to the Arbitration Agreement.*[26]

An admission contract with an "Entirety of Agreement" provision is separate "on its face" from an arbitration contract especially where the provision identifies the two contracts distinctly—i.e. "this Admission Agreement *or* in the Arbitration Agreement."[27] In fact, when the arbitration and admission contracts have different pagination with different signature pages and the arbitration contract has "Arbitration Agreement" atop its first page, these factors further "indicate the parties' intent for it to stand by itself as an independent contract."[28] Separateness is further demonstrated when the nursing home makes clear that agreeing to arbitrate is not required to gain admission to the home.[29]

The "Admission Agreement" in this case contains an "Entire Agreement" provision stating that "this Agreement represents the entire agreement" related to admission to the Facility. Thus, "Agreement" is a defined term in this contract and, as stated in the contract's opening paragraph, is limited to the "Admission Agreement," not the separate Arbitration Agreement. Like in Hodge, the separate contracts have separate signature pages and separate pagination—i.e. the Admission

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[24] See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) (cert. denied Aug. 21, 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016); Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014).
[25] 407 S.C. at 355, 755 S.E.2d at 455.
[26] 416 S.C. at 52, 784 S.E.2d at 684; 422 S.C. at 563, 813 S.E.2d at 302.
[27] Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).
[28] Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.
[29] Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

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Agreement ends with "Page 12 of 12" while the Arbitration Agreement is "Page 1 of 1." As in Thompson, the arbitration agreement states its independence with its "Arbitration Agreement" title. To the extent there are any ambiguities in this contract language, they must be resolved against merger.[30] The Facility was in sole control of the language chosen for these form contracts of adhesion and it was their responsibility to make merger clear if they so desired. In sum, the Facility cannot meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit. Where a contract lacks valuable consideration, the contract will be deemed unenforceable. No valuable consideration exists in this case. There was no consideration given for Charlie Clinkscales to sign the Arbitration Agreement, because Mozana Clinkscales had already been admitted and received care.

In its most elemental sense, the doctrine of mutuality of obligation means that unless both parties to a contract are bound by its terms, neither is bound. Mutuality of obligation in bilateral contracts is but another way of stating that consideration is essential. 25 Richard Lord, Williston on Contracts § 67:42 at 332 (4th ed.2002)). Mutuality becomes a nonissue when consideration has otherwise been conferred upon one of the parties. There exists a lack of mutuality that makes the Arbitration Agreement unenforceable. The mutuality requirement is satisfied if each party has given sufficient consideration for the other's promise—something of value. Valuable consideration for a contract consists of some right, interest, profit or benefit accruing to one party or undertaken by the other. Where there is a mutual promise to arbitrate, there must be additional consideration. The mutual promise to arbitrate is illusory and of no benefit to Decedent or Plaintiff. The agreement provides that claims primarily brought by patients, such as those for medical malpractice, claims arising from the provision of services by defendant, and

[30] Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685 (citing Coleman).

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elder abuse claims are to be arbitrated. Defendants argue the Arbitration Agreement meets the mutuality requirement because both sides are forced to arbitrate. However, while the Arbitration Agreement purports to require arbitration for any "dispute over care," the reality is that this obligation falls almost exclusively on the patient. It is virtually inconceivable that Defendants would sue its patient regarding a dispute over care. Since admission is unavailable as a "direct benefit" to support estoppel, Defendants would be required to point to some benefit Mrs. Clinkscales received from the Arbitration Agreement alone. Any such attempt to find a benefit would have been futile given the Court of Appeals' unambiguous ruling in Thompson which held that "any possible benefit emanating from the [arbitration agreement] alone is offset by the [arbitration agreement's] requirement that [resident] waive her right to access the courts and her right to a jury trial."[31] The contract is also silent as to any consideration exchanged between the parties. The Arbitration Agreement itself contains insufficient consideration in the form of a mutual exchange of promises to arbitrate. There is no direct benefit to nursing home residents from a pre-admission arbitration contract separate from the Admission Agreement. Admission can be the "direct benefit" that forces Plaintiff to arbitrate only if admission and arbitration are governed by the same contract.

In sum, Defendants have not met their burden to prove merger, consideration, or any other benefit for the Arbitration Agreement. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a single contract. If the jury waiver was not a precondition to admission, then it fails for lack of consideration. The Court finds it would

[31] 416 S.C. at 60, 784 S.E.2d at 688 (emphasis added).

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be inconsistent for Defendants to argue that agreeing to arbitrate was not consideration for the admission but, on the other, argue that the admission was valuable consideration to support arbitration. For the proposed arbitration contract to be enforceable as a non-pre-condition to admission, it must be supported by some other valuable consideration, which it is not. Having already signed the admission paperwork there was no additional consideration in agreeing to the Arbitration Agreement. Neither party gained a right, interest, profit or benefit by agreeing to the Arbitration Agreement. Plantation, 386 S.C. at 206, 687 S.E.2d at 718. Additionally, neither party suffered a forbearance, detriment, loss or responsibility given, suffered or undertaken by the other the party, when agreeing to the Arbitration Agreement. Id. Finally, viewing the Arbitration Agreement itself there is no mention of consideration. The court is required to make its assessment by viewing only the four-corners of the Arbitration Agreement, and cannot go beyond the confines of the Arbitration Agreement itself.

The Arbitration Agreement was not part of the Admission Agreement and thus, separate consideration was required for the Arbitration Agreement to be valid. See Thompson v. THI of N.M. at Casa Arena Blanca, LLC, No. CIV 05-1331 JB/LCS, 2006 WL 4061187, at *12 (D.N.M. Sept. 12, 2006); THI of N.M. at Vida Encantada, LLC v. Archuleta, No. CIV 11-399 LH/ACT, 2013 WL 2387752 (D.N.M., 2013).

Plaintiffs also rely upon the fact that the federal government at the time prohibited a nursing home from requiring a current resident to sign an arbitration agreement as a condition of continued residency, relying on a policy set forth by the Center for Medicaid and State Operations ("CMS") on January 9, 2003. The memorandum states: "A current resident is not obligated to sign a new admission agreement that contains binding arbitration. Federal regulations, at 42 C.F.R. § 483.12(a)(2) limit the circumstances under which a facility may discharge or transfer a resident."

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The Court is further persuaded by Plaintiff's argument that to construe admission as valid consideration to support the Arbitration Agreement would be inconsistent with federal law. The parties agree Decedent was a Medicare and Medicaid beneficiary while residing at Defendants' facility and that the facility was billing and accepting payment from Medicare and Medicaid for Decedent's care. Federal regulations require Medicare and Medicaid certified facilities to accept Medicare/Medicaid reimbursement rates as payment in full and *expressly forbid* acceptance of additional consideration for nursing home services. See 42 C.F.R. § 489.30; 42 C.F.R. § 447.15. Such facilities must "not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the state plan...any other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay at the facility." 42 U.S.C. § 1396r(c)(5)(A)(iii).

It is undisputed that this Federal Medicare and State Medicaid law applies to the Defendants' nursing home in this case. The fact is if a facility were to charge an additional five dollar fee to Medicaid beneficiaries as a condition for any reason, this would be strictly prohibited. Therefore, a facility should not be able to demand a waiver of a constitutional right as the price of admission. See Berkebile v. Outen, 311 S.C. 50, 53 n. 2, 426 S.E.2d 760, 762 n. 2 (1993) (noting general rule that courts will not enforce a contract which is "violative of public policy, statutory law, or provisions of the Constitution").

B. ***The Arbitration Agreement does not govern the wrongful death claim***

The Court further finds the Arbitration Agreement should not include the wrongful death cause of action because no one with legal authority could enter an agreement that waives the right to a jury trial on behalf of Decedent's statutory beneficiaries. Only the court-appointed personal representative can waive the beneficiaries' rights.

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A wrongful death claim is separate from a Decedent's personal injury/survival claim and an individual's wrongful death beneficiaries are defined by statute. S.C. Code Ann. § 15-51-20 (1977). South Carolina law provides that a wrongful death claim exists for the statutory beneficiaries, and that such claims are distinct and separate claims from those that are brought under the survival statute.[32] It appears the question of whether a wrongful death action is subject to mandatory arbitration pursuant to the terms of a contract is one of first impression in South Carolina, and there is a split in authority in other jurisdictions. This Court finds persuasive the reasoning of those jurisdictions that have held that an arbitration agreement executed by a decedent cannot bind the decedent's statutory beneficiaries who were not parties to the agreement.[33]

For example, in Ping v. Beverly Enterprises, the Supreme Court of Kentucky held:

> [W]e 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. 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.

376 S.W.3d 581, 599-600 (Ky. 2012).

In line with these principles, the Court finds the Arbitration Agreement neither covers the wrongful death statutory beneficiaries' claims within the scope of the agreement nor was the

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[32] See Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914).

[33] See e.g., Woodall v. Avalon Core Ctr.-Fed. Way, LLC, 231 P.3d 1252, 1258 (Wash. App. Div. 1 2010) (refusing to compel arbitration of wrongful claim because wrongful death claim never belonged to decedent); Lawrence v. Beverly Manor, 273 S.W.3d 525, 528-29 (Mo. 2009) (en banc); Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1262 (Ohio 2007) (concluding decedent "could not restrict his beneficiaries to arbitration of their wrongful death claims, because he held no right to those claims"); Bybee v. Abdulla, 189 P.3d 40, 43 (Utah 2003) ("a decedent does not have the power to contract away the wrongful death action of his heirs").

Arbitration Agreement signed by an individual who had authority to bind the statutory beneficiaries. Further confirming the separateness of each statutory beneficiary's claim from that of the survival action, South Carolina's federal district court has analyzed this issue in the damages context.[34] Boyle concluded wrongful death beneficiaries' claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. This analysis supports the contention that the wrongful death claimants have separate and distinct claims from that of the survival action.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss and Compel Arbitration, or Alternatively, to Compel Arbitration and Stay Proceedings, is DENIED.

AND IT IS SO ORDERED.

Signature to Follow

[34] Boyle v. U.S., 944 F.Supp.2d 577 (D.S.C. 2012).

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Greenville Common Pleas

Case Caption: Mozana Clinkscales , plaintiff, et al vs. Fundamental Clinical And Operational Services LLC , defendant, et al

Case Number: 2018CP2305088

Type: Order/Other

So Ordered

s/ Robin B. Stilwell 2158

Electronically signed on 2019-02-05 12:24:58 page 14 of 14

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

DIANE S. BOYLE, as Personal Representative of the Estate of John Francis Boyle, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Civil Action No. 9:09-939-SB **FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO DAMAGES**

This matter came before the Court for a non-jury trial on the Plaintiff's action brought against the United States of America pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671-80 (hereinafter referred to as "the FTCA").[1] Carl Jacobson and Jonathan Krell represented the Plaintiff at trial; and Lee Berlinsky represented the Defendant. On March 9, 2012, the Court issued its findings of fact and conclusions of law as to liability, and the Court incorporates herein those findings of fact and conclusions of law. On March 20, 2012, the Court held a hearing on the issue of damages.

In its March 9th findings of fact and conclusions of law, the Court found that the Plaintiff met her burden of proof to establish the Defendant's liability. Specifically, the Court found it more likely than not that the Beaufort Naval Hospital mis-filled John Francis Boyle's (hereinafter referred to as "Mr. Boyle" or "the decedent") 0.5-milligram Prograf[2]

[1] The Plaintiff filed her amended complaint on April 13, 2009, alleging that her husband died of Tacrolimus toxicity and kidney failure due to the negligent, careless, and reckless filling and dispensing of her husband's medication by employees at the Beaufort Naval Hospital Pharmacy. (Entry 1 at 2.)

[2] Following his transplant, Mr. Boyle was prescribed Tacrolimus (available under the brand name "Prograf"), which is an immunosuppressant medication that helps prevent



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prescription in December of 2005, and that instead of dispensing 180 0.5-milligram Prograf capsules, the Beaufort Naval Hospital negligently dispensed 180 5-milligram capsules of Prograf. (Entry 59 at 3, ¶ 11.) The Court also found from what it deemed to be the more credible evidence that Mr. Boyle's hospitalizations on February 2, 2006, February 19, 2006, and March 19, 2006, more likely than not occurred at least in part because Mr. Boyle was taking an improper daily dose of Prograf due to the December 2005 mis-fill. (Id. at 4, ¶ 13.) Therefore, the Court found that the Defendant breached the standard of care and that the breach proximately caused Mr. Boyle's Prograf toxicity, thereby contributing to his death. (Id. at 8, ¶9.)

Despite the foregoing, the Court also found that at some point between the December 2005 mis-fill and his final hospitalization, Mr. Boyle should have recognized that the bottle of 0.5-milligram Prograf capsules actually contained 5-milligram capsules, based on factors such as his familiarity with the medication and the differing characteristics of the dosages, including size, color, and markings. (Id. at 9, ¶11, 12.) Thus, in addition to finding that the Defendant was negligent, the Court also found that Mr. Boyle was negligent by failing to recognize the mis-fill at some point between December 2005 and his subsequent hospitalizations. (Id., ¶13.) Ultimately, the Court attributed twenty-five percent of the fault to Mr. Boyle. (Id.)

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a person's immune system from rejecting a transplanted organ. Prograf is available for oral administration as capsules in the following dosages: 0.5 milligram, 1 milligram, or 5 milligrams. The colors and sizes of 0.5-milligram capsules, 1-milligram capsules, and 5-milligram capsules are different, and they are distinguishable by sight. In addition, each capsule contains a marking identifying the dosage. Prograf is considered a narrow therapeutic index medication, which means there is a small margin of error in dosing and significant toxicity can result from a minor overdose.

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FINDINGS OF FACT[3]

1. Mr. Boyle was born on July 3, 1934, and he was seventy-one years old at the time of his death on April 28, 2006.

2. In the mid-nineties, Mr. Boyle began suffering from renal disease secondary to autosomal dominant polycystic kidney disease.

3. In November of 2000, Mr. Boyle received a kidney transplant, and his medical records indicate that he was mostly stable from the time of his transplant until February of 2006.

4. Mr. Boyle graduated from college in 1956 and went to work in the New York City Police Department, where he worked for thirty years. In addition, Mr. Boyle was in the New York National Guard and Army Reserve for thirty years.

5. Diane S. Boyle ("Diane") was born on December 17, 1935, and she met Mr. Boyle when she was eighteen or nineteen years old. They married when she was twenty-three years old, and together they had two children, Julie Boyle Mecca ("Julie") and John C. Boyle ("John").

6. At the time of Mr. Boyle's death, Diane and Mr. Boyle had been married for forty-seven years, and from the evidence presented, it appears that they had a very loving and happy relationship. Diane testified that Mr. Boyle was a great husband, the love of her life, her best friend, and her spiritual partner.

7. When Mr. Boyle was twenty-seven years old, Diane gave birth to a daughter,

[3] To the extent that the Court has made "findings of fact" that would be better expressed as "conclusions of law," and vice versa, each category is expressly incorporated into the other.

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Julie. According to Julie, it was a "great family." Julie lived under the same roof with her parents until she got married at age twenty-six. In addition, her father's line of work influenced her to go work for the Department of Probation and for the District Attorney's Office. Julie particularly enjoyed it when her father spent time with her and her three children. In all, it appears from the evidence presented that Julie had a close, loving relationship with her father.

8. When Mr. Boyle was thirty years old, Diane gave birth to a son, John. In addition to being his father's namesake, John followed his father's footsteps into the police academy and the national guard. From all accounts John and his father had a close relationship; they participated in joint athletic activities and enjoyed family vacations and outings. John lived at home until he entered the police academy at age twenty-one, and even after he moved out of the house, he continued to see his father at least twice a week. John had plans to eventually move to Hilton Head to spend more time with his parents. As with Julie, it appears from the evidence that John had a close, loving relationship with his father.

9. Mr. Boyle and his family lived in one home in New York until 1995 when he and his wife moved to Hilton Head, South Carolina.

10. Mr. Boyle was an active member of both his family and his community. He was involved with his church and he served as the financial secretary and chief recruiter for the Knights of Columbus.

11. At the time of his death, Mr. Boyle was receiving police retirement income from his employment with the New York City Police Department, military retirement income, and Social Security benefits. In 2005, the last full year before his death, Mr. Boyle received

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approximately $44,050.00 in police retirement income, approximately $16,096.00 in military retirement income, and $17,054.00 in Social Security benefits.

CONCLUSIONS OF LAW

1. This case involves claims based on the South Carolina statutes for a "survival right of action," S.C. Code Ann. § 15-5-90, and for "wrongful act causing death," S.C. Code Ann. § 15-51-10.

2. Section 15-5-90 of the South Carolina Code (sometimes referred to as the "survival statute") provides in pertinent part: "Causes of action for and in respect to . . . any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person . . . , any law or rule to the contrary not withstanding." S.C. Code Ann. § 15-5-90.

3. Thus, the "survival statute provides that a cause of action for injuries to a person shall survive the person's death, with damages recoverable by the legal representative of the deceased." Smalls v. South Carolina Dept. of Educ., 339 S.C. 208, 216, 528 S.E.2d 682, 686 (Ct. App. 2000).

4. In a survival action, the legal representative of the deceased may recover damages for the deceased's conscious pain and suffering and medical expenses. See Baker v. Sanders, 301 S.C. 170, 391 S.E.2d 229 (1990) (finding that the South Carolina Tort Claims Act does not preclude a survival action for conscious pain and suffering and medical expenses when an injured person later dies as a result of the tortious conduct).

5. In addition, pursuant to section 15-5-100 of the South Carolina Code, funeral expenses are recoverable in a survival action. S.C. Code Ann. § 15-5-100.

6. Next, section 15-51-10 (sometimes referred to as the "wrongful death

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statute") provides:

> Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the 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, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as made the killing in law a felony. . . .

S.C. Code Ann. § 15-51-10.

7. Section 15-51-20 outlines the beneficiaries of a wrongful death action, stating:

> 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 such, then 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.

Id. at § 15-51-20.

8. In a wrongful death action in South Carolina, the damages recoverable by the statutory beneficiaries of the decedent include (1) pecuniary loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship, and (6) deprivation of the use and comfort of the intestate's society. Knoke v. South Carolina Dep't. of Parks, Recreation & Tourism, 324 S.C. 136, 141, 478 S.E.2d 256, 258 (1996). "In a wrongful death case, the question of damages is not directed toward the value of the human life that was lost, but rather the damages sustained by the beneficiaries as a result of the death." Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d 713, 714 (Ct. App. 1989).

9. This case also involves application of the South Carolina Noneconomic Damage Awards Act of 2005. Specifically, section 15-32-220 provides:

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> (A) In an action on a medical malpractice claim when final judgment is rendered against a single health care provider, the limit of civil liability for noneconomic damages of the health care provider **is limited to an amount not to exceed three hundred fifty thousand dollars as for each claimant, regardless of the number of separate causes of action on which the claim is based,** except as provided in subsection (E).[4]

S.C. Code Ann. § 15-32-220(A) (emphasis added).

10. Here, the parties dispute how the Court should construe the term "claimant" in section 15-32-220(A). Specifically, the Plaintiff urges the Court to find four claimants in this case: (1) the estate of Mr. Boyle in the survival action; (2) Diane Boyle in the wrongful death action; (3) Julie Boyle Mecca in the wrongful death action; and (4) John C. Boyle in the wrongful death action. In contrast, the government argues that there is only one claimant in this case: the patient, Mr. Boyle.

11. Section 15-32-210(2) of the South Carolina Code (titled "Definitions") states that "**'[c]laimant' means the person suffering personal injury.**" Id. at § 15-32-210(2) (emphasis added).

12. Subsection (11) then defines "[p]ersonal injury" as the following: "injuries to the person **including, but not limited to, bodily injuries, mental distress or suffering, loss of wages, loss of service, loss of consortium, wrongful death, survival, and other noneconomic damages and actual economic damages.**" Id. at § 15-32-210(11) (emphasis added).

13. "Personal injury action" is defined as "an action for personal injury, including a wrongful death action pursuant to Sections 15-51-10 through 15-51-60 and a survival

[4] Subsection (F) includes a built-in inflation valve tied to the Consumer Price Index. See S.C. Code Ann. § 15-5-220(F). Taking into consideration this built-in inflation valve, the current maximum amount recoverable is $415,055.00.

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action pursuant to Section 15-5-90(12)." Id. at § 15-5-90(12).

14. Subsection (9) provides that "[n]oneconomic damages" means "nonpecuniary damages arising from pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, humiliation, other nonpecuniary damages, and any other theory of damages including, but not limited to, fear of loss, illness, or injury." Id. at § 15-32-210(9).

15. Although there is little guidance on how to construe the term "claimant" other than the statutory language itself, the Plaintiff provided the Court with a copy of an order issued on March 25, 2009, by South Carolina Circuit Court Judge John C. Hayes, III.[5] In his order, Judge Hayes discusses the Noneconomic Damages Awards Act of 2005 and states:

> The phrase "for each claimant" makes clear that the caps apply separately to each claimant. Therefore, if the caps apply separately for each claimant, it becomes necessary for a jury to award damages separately to each claimant.
>
> In addition, it is conceivable that a jury could determine that one claimant deserves a larger damage award than another claimant. For example, in a case where a mother and father are suing for the wrongful death of their child, a jury could award more damages to the mother than the father because the mother was more directly involved in the caring and support of each child.

Wilson v. Amisub of South Carolina, Inc., et al., Civil Action No. 06-CP-46-2891, Order dated March 25, 2009, Exhibit A at 4.

16. Ultimately, after a great deal of consideration, the Court agrees with the

[5] Because it is not entirely clear from the docket whether a copy of this order was formally filed with one of the Plaintiff's briefs or memoranda, the Court attaches a copy of the order hereto as Exhibit A.

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Plaintiff that this case involves four claimants rather than just one. Stated simply, the Court believes that the statutory language, including the definitions set forth above, requires such a finding. First, the statute makes clear that the number of causes of action is irrelevant. See S.C. Code Ann. § 15-32-220(A). Moreover, the statute caps damages for "each claimant" and not "the claimant." Id. Although claimant means "*the* person suffering personal injury," id. at § 15-32-210(2) (emphasis added), the definition of personal injury makes clear that not only does Mr. Boyle (or more accurately, his estate) qualify as a claimant pursuant to the survival statute, but also, Diane, Julie, and John each qualify as claimants pursuant to the wrongful death statute, as they each suffered personal injury, which is defined to include (and not limited to) "mental distress or suffering, loss of wages, loss of service, loss of consortium, wrongful death, survival, and other noneconomic damages and actual economic damages." Id. at § 15-32-210(11).

17. Having resolved the foregoing issue, the Court next determines the decedent's life expectancy. According to South Carolina Code Section 19-1-500, Mr. Boyle's life expectancy was an additional twelve years (12.01 years, in fact, which would have carried Mr. Boyle to age 83.82).

18. However, Dr. Michael P. Mayes, who personally treated Mr. Boyle from September 23, 2004, until January of 2006, testified that based on his medical history Mr. Boyle likely would have lived another eight to ten years if not for the apparent Prograf overdose.

19. In contrast, the government's expert witness in the field of nephrology and transplant medicine, Dr. Anil Chandraker, who did not treat Mr. Boyle, testified that Mr. Boyle likely would have lived another five years.

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20. After thoroughly considering the evidence and testimony presented, the Court finds itself more persuaded by Dr. Mayes' testimony than by Dr. Chandraker's, particularly in light of the fact that Dr. Mayes actually treated Mr. Boyle over a period of time. However, the Court notes that Dr. Chandraker presented compelling testimony regarding life expectancy studies of individuals with kidney transplants, and based in part on that information, the Court accepts the lower end of Dr. Mayes' suggested life expectancy rather than the middle or higher end. Therefore, the Court finds that Mr. Boyle had a life expectancy of eight years.

Damages in the Survival Action

21. After consideration, the Court finds that **Diane Boyle, the duly-appointed personal representative of the estate of Mr. Boyle, is entitled to $319,412.17 in economic damages in the survival action,** which consists of the following:

a. $3,952.10 for Mr. Boyle's hospitalization at the Hilton Head Regional Medical Center on February 2, 2006;

b. $37,410.83 for Mr. Boyle's hospitalization at the Hilton Head Regional Medical Center on February 19, 2006;

c. $22,305.40 for Mr. Boyle's hospitalization at the Hilton Head Regional Medical Center on March 19, 2006;

d. $202,131.34 for Mr. Boyle's hospitalization at Emory University Hospital;

e. $49,259.00 for Mr. Boyle's treatment at the Emory Clinic; and

f. $4,353.60 in funeral expenses;

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22. The estate of Mr. Boyle is entitled to recover for the non-economic damages suffered by Mr. Boyle between the time of the mis-fill on December 6, 2005, until the date of his death on April 28, 2006, to the extent that those non-economic damages are attributable to the mis-fill.

23. The Plaintiff presented evidence showing that, towards the end of Mr. Boyle's life, he suffered from diarrhea, acute renal failure, respiratory failure, volume overload, difficulty moving, and cellulitis, among other things. At one point, in a matter of three weeks, Mr. Boyle gained twenty-five to thirty pounds due to fluid retention. Mr. Boyle was hospitalized for a total of thirty-nine days between December 6, 2005, and April 28, 2006, and he was intubated and on a respirator for three weeks. Even after being taken off the intubator and put into hospice care, Mr. Boyle was on a morphine drip for twelve days. In all, the Court has no doubt that Mr. Boyle experienced a great deal of pain and suffering, for which the Court believes **the estate of Mr. Boyle is entitled to recover $250,000.00 in noneconomic damages in the survival action.**

Damages in the Wrongful Death Action

24. Diane Boyle, as a surviving spouse, and Julie and John, as surviving children, are the beneficiaries in the wrongful death action. The Court has carefully considered evidence in the record, including the testimony of the beneficiaries, and it is clear that they suffered a difficult loss.

25. With respect to the economic damages suffered by Diane Boyle, the Plaintiff presented the testimony and expert report of Dr. Oliver G. Wood, Jr., dated February 7, 2011. In this report, Dr. Wood used a life expectancy of nine years (the average of the

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eight-to-ten-year range testified to by Dr. Mayes) and came up with a total amount of economic loss of $501,148.00.

26. The Court has great respect for Dr. Wood's calculations; however, the Court is not fully convinced by these calculations for various reasons including the following. First, Dr. Wood relied on a life expectancy of nine years whereas this Court has found Mr. Boyle's life expectancy to be eight years. Second, Dr. Wood included a $12,000 variable supplement to Mr. Boyle's police retirement income as a yearly supplement without knowing whether the supplement was tied to market conditions or whether the supplement was to continue every year of Mr. Boyle's retirement. (See Entry 57 at 74-75.) Third, it is not clear whether the surviving spouse benefit that Diane Boyle receives ($11,076 per year as of the time of trial) comes from a collateral or a noncollateral source because the evidence does not indicate with any certainty whether or not Mr. Boyle's military pension was reduced actuarially to provide for the benefit.

I. **The Surviving Spouse's Damages**

27. Ultimately, having started by considering Dr. Wood's computation of $501,148.00, and having considered certain factors that negatively affect that computation (such as the Court's finding of a reduced life expectancy as well as the other concerns outlined in paragraph 25), the Court finds, based on all of the evidence presented, that **Diane Boyle is entitled to recover $375,000.00 in economic damages in the wrongful death action.**

28. Next, the Court finds that Diane, who has undoubtedly suffered a great loss, is entitled to **recover $400,000.00 in noneconomic damages in the wrongful death**

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action.

II. The Surviving Children's Damages

29. Next, the Court finds that Julie and John, the surviving children of Mr. Boyle who also have suffered from the loss of their father, are **each entitled to $200,000.00 in noneconomic damages in the wrongful death action.**

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that

(1) Diane Boyle, as the duly-appointed personal representative of the estate of Mr. Boyle, is entitled to $319,412.17 in economic damages and $250,000.00 in noneconomic damages in the survival action, to be reduced by twenty-five percent, which amounts to $239,559.13 in economic damages and $187,500.00 in noneconomic damages, together totaling **$427,059.13.**

(2) Diane Boyle, as the surviving spouse of Mr. Boyle, is entitled to$375,000.00 in economic damages and $400,000.00 in noneconomic damages in the wrongful death action, to be reduced by twenty-five percent, which amounts to $281,250.00 in economic damages and $300,000.00 in noneconomic damages, together totaling **$581,250.00.**

(3) Julie Boyle, as a surviving child of Mr. Boyle, is entitled to $200,000.00 in noneconomic damages in the wrongful death action, to be reduced by twenty-five percent, for a total of **$150,000.00.**

(4) John Boyle, as a surviving child of Mr. Boyle, is entitled to $200,000.00 in noneconomic damages in the wrongful death action, to be reduced by twenty-five percent,

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for a total of **$150,000.00.**

Altogether the total judgment in this case amounts to **$1,308,309.13.**

IT IS FURTHER ORDERED that the judgment shall bear the current statutory legal rate of interest from the date of the judgment until it is satisfied.

IT IS SO ORDERED.

The Honorable Sol Blatt, Jr.
Senior United States District Judge

August 6, 2012
Charleston, South Carolina

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EXHIBIT A

"Exhibit A"

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) C.A. No.: 06-CP-46-2891

Robin R. Wilson and Brice R. Wilson Individually and as Personal Representatives for the Estate of Sierra R. Wilson,

Plaintiffs,

vs.

Amisub of South Carolina, Inc., d/b/a Piedmont Healthcare System and Piedmont Medical Center, and James R. Granger, III, M.D.,

Defendants.

ORDER

FILED-RECEIVED
2009 MAR 25 PM 4: 32
YORK COUNTY, SC

This matter comes before the Court on five post-trial motions made by Defendant Amisub of South Carolina, Inc., d/b/a Piedmont Healthcare System and Piedmont Medical Center ("the Hospital"). This medical malpractice case was tried to verdict in front of the undersigned in York, South Carolina, during the February 9, 2009, Term of Common Pleas Court. Plaintiffs were awarded a total verdict in the amount of $4,405,000.00.[1] Plaintiffs were represented by Kenneth Suggs, Esq. and Gerald Jowers, Esq. Defendant Hospital was represented by William Gunn, Esq., and Defendant James R. Granger, III, M.D. ("Dr. Granger") was represented by Ashby Davis, Esq. and Collie Lehn, Esq. A hearing was heard on the motions in Union, South Carolina, by the undersigned on March 16, 2009. Plaintiff was represented by Kenneth Suggs, Esq., the Hospital was represented by William Gunn, Esq., and Ashby Davis, Esq. represented Dr. Granger. For the below reasons, the Court denies the Hospital's motions.

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[1] The jury found Dr. Granger not liable. The Plaintiffs have moved this Court to declare the statutory cap on noneconomic damages unconstitutional. That motion is not addressed in this Order.

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Motion for New Trial Based on the Thirteenth Juror Doctrine

In Youmans ex rel. Elmore v. S.C. Dept. of Transp., 380 S.C. 263, 272, 670 S.E.2d 1, 5 (Ct. App. 2008), the Court of Appeals recently explained the purposes of the thirteenth juror doctrine:

> The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict. This ruling has also been termed granting a new trial upon the facts. The effect is the same as if the jury failed to reach a verdict. The judge as the thirteenth juror "hangs" the jury. (citing Folkens v. Hunt, 300 S.C. 251, 254-55, 387 S.E.2d 265, 267 (1990)).

The Youmans Court also made clear that "[t]he 'thirteenth juror' doctrine is not used when the trial judge has found the verdict was inadequate or unduly liberal and, therefore, is not a vehicle to grant a new trial *nisi additur*." Bailey v. Peacock, 318 S.C. 13, 14-15, 455 S.E.2d 690, 692 (1995). Youmans at 273.

This Court finds that the evidence presented at trial justifies the verdict and that the verdict is neither inconsistent nor a reflection of confusion by the jury. The interpretation and reporting of both the fetal monitor strips and the complete blood count (CBC) test formed the basis for Plaintiffs' theory of negligence. Plaintiffs' expert, Dr. Jeffery King, testified that the fetal monitor strips showed recurrent late decelerations, a sign, according to him, indicating placental insufficiency. While Defendants' witnesses and expert witnesses offered a different interpretation of the fetal monitor strips, it was for the jury to decide the weight and credibility to give to the differing testimony.

Similarly, it was for the jury to decide the weight and credibility to give to the testimony regarding the CBC test. Dr. Granger testified that he could not remember whether he had the CBC test results on November 16, 2003, but that this did not impact his treatment of Mrs. Wilson. Moreover, Dr. Granger's expert, Dr. Robert Arnett, testified that obstetricians may rely

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on the information given to them by nurses—in this case, the results from the fetal monitor and CBC tests—and that to do so is not a deviation from the standard of care. Based on this and other evidence and testimony offered at trial, the jury had enough evidence to reach a verdict against the Hospital but not against Dr. Granger and such a verdict is justified by the evidence and is not inconsistent or illogical.

Motion for New Trial Based on the Verdict Form

Under Rule 59(a), SCRCP, a "new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State. . .". The Hospital bases its first motion for new trial on the grounds that the Court erred in providing separate lines on the verdict form for Robin Wilson and Brice Wilson in the wrongful death cause of action. Instead, the Hospital argues the Court should have submitted a form with one line letting the probate court divide any verdict between the co-personal representatives.

Using separate lines on the verdict form complies with the South Carolina wrongful death statute and the statute regarding caps on noneconomic damages.[2] Section 15-51-40 of the wrongful death statute says that "the jury may give damages . . . as they may think proportioned to the injury resulting from the death to the parties respectively for whom and for whose benefit such action shall be brought." S.C. Code Ann. § 15-51-40 (Rev. 2005) (emphasis added). That the legislature chose to use the word "respectively" indicates its desire to separate the amount of damages according to each claimant. See Matter of Decker, 322 S.C. 215, 219, 471 S.E.2d 462,

[2] The statute regarding noneconomic damages, section 15-32-220, was enacted by 2005 Act No. 32, which says "this act takes effect July 1, 2005, for causes of action arising after July 1, 2005." Therefore, the caps do not apply to the damages awarded in Sierra Wilson's survival action because that action arose on November 18, 2003. Assuming for the moment that they are constitutional, the caps do apply to the wrongful death claim, which arose in February 2008; therefore, this Court must comply with the language in that section.

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463 (1995) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous....") (citation omitted).

In addition, the statute dealing with caps on noneconomic damages, section 15-32-220(a), says

> [i]n an action on a medical malpractice claim when final judgment is rendered against a single health care provider, the limit of civil liability for noneconomic damages of the health care provider is limited to an amount not to exceed three hundred fifty thousand dollars for each claimant, regardless of the number of separate causes of action on which the claim is based, except as provided in subsection (E).

S.C. Code Ann. § 15-32-220(a) (Supp. 2008) (emphasis added). The phrase "for each claimant" makes clear that the caps apply separately to each claimant. Therefore, if the caps apply separately for each claimant, it becomes necessary for a jury to award damages separately to each claimant.

In addition, it is conceivable that a jury could determine that one claimant deserves a larger damage award than another claimant. For example, in a case where a mother and father are suing for the wrongful death of their child, a jury could decide to award more damages to the mother than the father because the mother was more directly involved in the caring and support of the child. Such a possibility makes separate lines on a verdict form for each claimant appropriate and necessary.

Motion for New Trial Based on the Court's Note to the Jury

The Hospital also argues the Court should grant a new trial because the Court erred in its response to a request from the jury to rehear the testimony of Nurse Lisa Reynolds and, instead, wrote a note to the jury answering its question.[3] In support of its argument, the Hospital cites

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[3] The jury's question was "[m]ay we hear Ms. Reynolds' testimony of what she reported to the doctor about the NST/CST results?" The Court's response was "[w]e have examined the testimony of Ms. Reynolds and she testified that she could not recall what she reported to Dr. Granger."

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Article V, § 21 of the South Carolina Constitution, which says that "[j]udges shall not charge juries in respect to matters of fact, but shall declare the law."

This Court does not believe its handling of the jury's question regarding Nurse Reynolds' testimony constitutes grounds for a new trial. The Court gave a completely accurate response to the question asked and only responded to the question asked. More importantly, the Court's response did not comment on the facts but, rather, simply stated what Nurse Reynolds had said. It would have been unfair to the Plaintiff to direct the jury to other testimony because such an emphasis from the Court might have been misconstrued by the jury.

Article V, § 21 of the Constitution deals with jury charges not responses to jury questions. If this Court were to apply Article V, § 21 as narrowly as the Hospital seems to want, then a judge would not be allowed to comment on a question from the jury requesting pens and paper because such a comment would not deal with the law. Such a result is neither required nor contemplated under our Constitution.

The undersigned has adopted the philosophy/practice of responding to jury questions with specificity. That is, the jury poses a question, the Court answers that question. For the Court to broaden the jury's inquiry would, in the undersigned's opinion, interject the trial judge into the jury's analysis and deliberations. The Court would in essence be saying "well, you asked this, but don't you think your should consider this other thing also?" The undersigned believes to broaden the answer to a question beyond the question itself places the judge in the jury room as a thirteenth juror.

Finally, this Court's ruling on the jury's note must be considered in light of Rule 61, SCRCP. Rule 61 says that ". . . no error or defect in any ruling or order or anything done or omitted by the court . . . is ground for granting a new trial . . . unless refusal to take such action

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appears to the court inconsistent with substantial justice." Rule 61, SCRCP. Writing a completely accurate response to a jury's question is not inconsistent with substantial justice and did not prejudice the Hospital.

Motion for New Trial or in the Alternative New Trial *Nisi*
(Excessive Verdict)

The Hospital makes its last motion for new trial on the grounds that the total verdict of $4,405,000.00 was excessive and based upon arbitrariness, capriciousness, passion, prejudice, or other considerations not found in the evidence. The Court disagrees.

"A new trial absolute should be granted only if the verdict is so grossly excessive that it shocks the conscience of the court and clearly indicates the amount of the verdict was the result of caprice, passion, prejudice, partiality, corruption, or other improper motive" Knoke v. S.C. Dept. of Parks, Recreation, and Tourism, 324 S.C. 136, 141, 478 S.E.2d 256, 258 (1996) (citations omitted). "[T]he circuit court alone has the power to grant a new trial *nisi* when it finds the amount of the verdict to be merely inadequate or excessive. McCourt by and Through McCourt v. Abernathy, 318 S.C. 301, 308, 457 S.E.2d 603, 607 (1995). "Compelling reasons, however, must be given to justify invading the jury's province in this manner." Bailey v. Peacock, 318 S.C. 13, 14, 455 S.E.2d 690, 691, (1995)." RRR, Inc. v. Toggas, 378 S.C. 174, 183, 662 S.E.2d 438, 442-43 (Ct. App. 2008).

The verdict in this case does not shock the conscience of the Court, and the verdict is not excessive. The decedent, Sierra Wilson, lived with substantial pain and suffering that supports a verdict in her survival action of $2,405,000.00 for her medical expenses and pain and suffering. Part of her pain and suffering included the seizures she experienced when she was only six hours old; kidney failure; the numerous operations she had; and the fact that she suffered from cerebral palsy. While the Defendants may disagree as to the cause and culpability of these problems, the

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jury returned a verdict against the Hospital and the Court must analyze the reasonableness and excessiveness of the verdict in light of the jury's determination of negligence.

Similarly, the jury's award of $1,000,000.00 each to Robin and Brice Wilson in their wrongful death action is not excessive and does not shock the conscience of the court. The jury's award was reasonable based on the evidence and testimony presented at trial regarding Robin and Brice's pain and suffering, including the fact that Sierra is the only child that Robin and Brice will be capable of having together since Robin was sterilized when Sierra was born.

Motion to Alter or Amend the Judgment by Reducing the Verdict

Pursuant to Rule 59(e), SCRCP, the Hospital moves the court to alter or amend the judgment by reducing the verdict. This issue is affected by the Court's ruling on Plaintiffs' motion regarding the constitutionality of the statutory caps on non-economic damages in medical malpractice causes of action. Based on the Order issued by this Court this date, the Court finds the statutory caps constitutional and reduces the verdict in accordance with § 15-32-220(A)-(F).

The caps require reducing each of the Wilson's award to $350,000.00 and then increasing or decreasing that amount based on the Consumer Price Index formula set forth in § 15-32-220(F). The Chief Economist at the State of South Carolina Board of Economic Advisors has informed the parties that applying subsection (F) increases the caps to $386,650.00. Therefore, Robin Wilson's wrongful death verdict is reduced to $386,650.00 and Brice Wilson's wrongful death verdict is reduced to $386,650.00.

Wherefore, the Hospital's Motion for New Trial Based on the Thirteenth Juror Doctrine is DENIED; the Hospital's Motions for New Trial Based on the Verdict Form and the Court's Note to the Jury are DENIED; the Hospital's Motion for New Trial or in the Alternative New

#23

Trial *Nisi* is DENIED; and the Hospital's Motion to Alter or Amend the Judgment by Reducing the Verdict is GRANTED.

IT IS SO ORDERED.

John C. Hayes, III
Presiding Judge

March 25th, 2009
York, South Carolina

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
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Robin R. Wilson and Brice R. Wilson Individually and as Personal Representatives for the Estate of Sierra R. Wilson,

Plaintiffs,

vs.

Amisub of South Carolina, Inc., d/b/a Piedmont Healthcare System and Piedmont Medical Center, and James R. Granger, III, M.D.,

Defendants.

ORDER

FILED-RECEIVED
2009 MAR 25 PM 4: 32
CLERK OF COURT
C.C.C.P. & G.S.
YORK COUNTY, SC

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[1] The jury found Dr. Granger not liable. The Plaintiffs have moved this Court to declare the statutory cap on noneconomic damages unconstitutional. That motion is not addressed in this Order.

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PLAINTIFF'S EXHIBIT
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This Court finds that the evidence presented at trial justifies the verdict and that the verdict is neither inconsistent nor a reflection of confusion by the jury. The interpretation and reporting of both the fetal monitor strips and the complete blood count (CBC) test formed the basis for Plaintiffs' theory of negligence. Plaintiffs' expert, Dr. Jeffery King, testified that the fetal monitor strips showed recurrent late decelerations, a sign, according to him, indicating placental insufficiency. While Defendants' witnesses and expert witnesses offered a different interpretation of the fetal monitor strips, it was for the jury to decide the weight and credibility to give to the differing testimony.

Similarly, it was for the jury to decide the weight and credibility to give to the testimony regarding the CBC test. Dr. Granger testified that he could not remember whether he had the CBC test results on November 16, 2003, but that this did not impact his treatment of Mrs. Wilson. Moreover, Dr. Granger's expert, Dr. Robert Arnott, testified that obstetricians may rely

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[2] The statute regarding noneconomic damages, section 15-32-220, was enacted by 2005 Act No. 32, which says "this act takes effect July 1, 2005, for causes of action arising after July 1, 2005." Therefore, the caps do not apply to the damages awarded in Sierra Wilson's survival action because that action arose on November 18, 2003. Assuming for the moment that they are constitutional, the caps do apply to the wrongful death claim, which arose in February 2008; therefore, this Court must comply with the language in that section.

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[3] The jury's question was "[m]ay we hear Ms. Reynolds' testimony of what she reported to the doctor about the NST/CST results?" The Court's response was "[w]e have examined the testimony of Ms. Reynolds and she testified that she could not recall what she reported to Dr. Granger."

Article V, § 21 of the South Carolina Constitution, which says that "[j]udges shall not charge juries in respect to matters of fact, but shall declare the law."

This Court does not believe its handling of the jury's question regarding Nurse Reynolds' testimony constitutes grounds for a new trial. The Court gave a completely accurate response to the question asked and only responded to the question asked. More importantly, the Court's response did not comment on the facts but, rather, simply stated what Nurse Reynolds had said. It would have been unfair to the Plaintiff to direct the jury to other testimony because such an emphasis from the Court might have been misconstrued by the jury.

Article V, § 21 of the Constitution deals with jury charges not responses to jury questions. If this Court were to apply Article V, § 21 as narrowly as the Hospital seems to want, then a judge would not be allowed to comment on a question from the jury requesting pens and paper because such a comment would not deal with the law. Such a result is neither required nor contemplated under our Constitution.

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Finally, this Court's ruling on the jury's note must be considered in light of Rule 61, SCRCP. Rule 61 says that ". . . no error or defect in any ruling or order or anything done or omitted by the court . . . is ground for granting a new trial . . . unless refusal to take such action

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appears to the court inconsistent with substantial justice." Rule 61, SCRCP. Writing a completely accurate response to a jury's question is not inconsistent with substantial justice and did not prejudice the Hospital.

Motion for New Trial or in the Alternative New Trial *Nisi*
(Excessive Verdict)

The Hospital makes its last motion for new trial on the grounds that the total verdict of $4,405,000.00 was excessive and based upon arbitrariness, capriciousness, passion, prejudice, or other considerations not found in the evidence. The Court disagrees.

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The verdict in this case does not shock the conscience of the Court, and the verdict is not excessive. The decedent, Sierra Wilson, lived with substantial pain and suffering that supports a verdict in her survival action of $2,405,000.00 for her medical expenses and pain and suffering. Part of her pain and suffering included the seizures she experienced when she was only six hours old; kidney failure; the numerous operations she had; and the fact that she suffered from cerebral palsy. While the Defendants may disagree as to the cause and culpability of these problems, the

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jury returned a verdict against the Hospital and the Court must analyze the reasonableness and excessiveness of the verdict in light of the jury's determination of negligence.

Similarly, the jury's award of $1,000,000.00 each to Robin and Brice Wilson in their wrongful death action is not excessive and does not shock the conscience of the court. The jury's award was reasonable based on the evidence and testimony presented at trial regarding Robin and Brice's pain and suffering, including the fact that Sierra is the only child that Robin and Brice will be capable of having together since Robin was sterilized when Sierra was born.

Motion to Alter or Amend the Judgment by Reducing the Verdict

Pursuant to Rule 59(e), SCRCP, the Hospital moves the court to alter or amend the judgment by reducing the verdict. This issue is affected by the Court's ruling on Plaintiffs' motion regarding the constitutionality of the statutory caps on non-economic damages in medical malpractice causes of action. Based on the Order issued by this Court this date, the Court finds the statutory caps constitutional and reduces the verdict in accordance with § 15-32-220(A)-(F).

The caps require reducing each of the Wilson's award to $350,000.00 and then increasing or decreasing that amount based on the Consumer Price Index formula set forth in § 15-32-220(F). The Chief Economist at the State of South Carolina Board of Economic Advisors has informed the parties that applying subsection (F) increases the caps to $386,650.00. Therefore, Robin Wilson's wrongful death verdict is reduced to $386,650.00 and Brice Wilson's wrongful death verdict is reduced to $386,650.00.

Wherefore, the Hospital's Motion for New Trial Based on the Thirteenth Juror Doctrine is DENIED; the Hospital's Motions for New Trial Based on the Verdict Form and the Court's Note to the Jury are DENIED; the Hospital's Motion for New Trial or in the Alternative New

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Trial *Nisi* is DENIED; and the Hospital's Motion to Alter or Amend the Judgment by Reducing the Verdict is GRANTED.

IT IS SO ORDERED.

John C. Hayes, III
Presiding Judge

March 25th, 2009
York, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKEMS COUNTY
Court of Common Pleas

G.D. Morgan, Jr. Circuit Court Judge

Case No. 2021-CP-39-01127
Case No. 2021-CP-39-01128

Deonda Weldon, Individually and as Personal Representative of the Estate of Earline Cooley, …….. Appellant,

v.

Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square, Dominion Senior Living, LLC, Dominion Clemson, II, LLC, Dominion Management Group, LLC, and Dominion Group, LLC …… Respondents.

NOTICE OF APPEAL

Appellant Deonda Weldon, Individually and as Personal Representative of the Estate of Earline Cooley, appeals from an order of the Honorable G.D. Morgan, Jr. on January 3, 2023, dismissing Appellant's suit.[1]

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[1] The circuit court's order dismissed all of Appellant's claims. Order at 1 (stating that the court "ORDERS that this matter be dismissed . . ."); Id. at 22 ("this matter is **DISMISSED**") (emphasis in original). Accordingly, the order is immediately appealable pursuant to statute as recognized by this Court's precedent. S.C. Code Ann. § 14-3-330(2) (conferring appellate jurisdiction for any order that "discontinues the action"); see also Huskins v. Mungo Homes, LLC, ___ S.E.2d ___, 2022 WL 1760628, * 3 (S.C. Ct. App. June 1, 2022) (citing Widener v. Fort Mill Ford, 381 S.C. 522, 524, 674 S.E.2d 172, 173-74 (Ct. App. 2009) ("an order dismissing

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Respectfully submitted,

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January 10, 2023
Rock Hill, SC

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the actions without prejudice and ordering arbitration was immediately appealable" pursuant to section 14-3-330(2))). Like Huskins (and in contrast to Widener), the contested order addresses the substantive enforceability of a disputed arbitration provision, and the Court should address Appellants' arguments against arbitration on their merits. Huskins, 2022 WL 1760628 at * 3 (citing Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., 355 S.C. 605, 611, 586 S.E.2d 581, 584-85 (2003)).

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SC Court of Appeals

APPEAL FROM PICKEMS COUNTY
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G.D. Morgan, Jr. Circuit Court Judge

Case No. 2021-CP-39-01127
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Deonda Weldon, Individually and as Personal Representative of the Estate of Earline Cooley, …….. Appellant,

v.

Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square, Dominion Senior Living, LLC, Dominion Clemson, II, LLC, Dominion Management Group, LLC, and Dominion Group, LLC …… Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on January 10, 2023, he served Respondents' counsel with the Notice of Appeal at the email addresses listed below pursuant to Rule 262(c)(3), SCACR and Section (d)(1) of the South Carolina's Supreme Court's August 25, 2021 order (Order No. 2021-08-25-02):

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/s/ Jordan C. Calloway
Attorney for Respondent

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Nov 17 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

G.D. Morgan, Jr. Circuit Court Judge

Appellate Case No. 2023-000033

Deonda Weldon, Individually and as Personal Representative of the Estate of Earline Cooley, …….. Appellant,

v.

Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square, Dominion Senior Living, LLC, Dominion Clemson, II, LLC, Dominion Management Group, LLC, and Dominion Group, LLC …… Respondents.

CERTIFICATE OF COUNSEL

Pursuant to Rule 211(a), SCACR, Appellant's counsel certifies that Appellant's Brief and the Reply Brief comply with Rule 211(b), SCACR.

Additionally, pursuant to Rule 211(g), SCACR, Appellant's counsel certifies that the Record on Appeal contains all material proposed to be included by the parties and not any other material.

Respectfully submitted,

/s/ Jordan C. Calloway

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November 17, 2023
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