

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Colleton County
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2021-CP-15-00657
Appellate Case No. 2022-001242

Jennifer Rahn,
as Personal Representative for the Estate of Robert Ramsey,
Respondent,

v.

Priority Home Care, LLC and
St. George Health Care, LLC, d/b/a St. George Healthcare Center,
Defendants,

Of which St. George Health Care, LLC, d/b/a
St. George Healthcare Center is the

Appellant.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	CIVIL ACTION NO.: 2021-CP-15-00657
	)	
Jennifer Rahn, as Personal	)	
Representative of the Estate of	)	
Robert Ramsey,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
Priority Home Care, LLC and St.	)	
George Health Care, LLC, d/b/a St.	)	
George Healthcare Center,	)	
	)	
Defendants.	)	

This matter came before the Court on May 19, 2022, on a Motion to Compel Arbitration filed by Defendant St. George Health Care, LLC d/b/a St. George Health Care Center pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. Present at the hearing and arguing on behalf of Defendant was Russell G. Hines. Appearing and arguing on behalf of Plaintiff was Lee D. Cope. After reviewing the submissions of the parties, the pleadings, and hearing the arguments of counsel, the Court denies Defendant's Motion to Compel Arbitration for the reasons set forth herein.

Plaintiff Jennifer Rahn as Personal Representative for the Estate of Robert Ramsey filed this action on November 4, 2021, in the Colleton County Court of Common Pleas after the decedent allegedly developed unstageable and necrotic pressure ulcers while in Defendant's care at its facility. Plaintiff has alleged

wrongful death and survival claims as a result of the care and treatment provided to Mr. Ramsey.

The basis of Defendant's Motion is that a valid and enforceable arbitration agreement exists between the parties. Defendant has argued that state and federal policy favors arbitration. The Supreme Court of the United States has provided commentary in a recent decision at odds with Defendant's position. "[A] court may not devise novel rules to favor arbitration over litigation The federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Morgan v. Sundance, Inc.*, No. 90-345, slip op. at 6 (U.S. May 23, 2022). Therefore, this Court is only required to place Defendant's Arbitration Agreement on equal footing with any other contract governed by state law.

The Arbitration Agreement relied upon by Defendant was signed by the decedent's daughter, Jennifer Rahn, at the time of his admission to Defendant's facility, and it appears that no valid power of attorney had been filed at that time with a register of deeds in South Carolina for Ms. Rahn to make healthcare or financial decisions on the decedent's behalf.¹ Plaintiff concedes that the decedent was suffering from dementia and did not have the capacity to sign the facility's Admission Agreement or Arbitration Agreement at the time he was admitted. Plaintiff does not contest that Plaintiff likely had authority to enter the Admission

¹ Plaintiff did submit some evidence that power of attorney documents had been executed by Mr. Ramsey naming Ms. Rahn as his attorney in fact, but these documents were never recorded. Plaintiff has argued that the documents were not effective in that they were never recorded as required by law, and Defendant has not opposed Plaintiff's position. The Court accepts Plaintiff's position as uncontested.

Agreement on Mr. Ramsey's behalf under the South Carolina Adult Health Care Consent Act, S.C. Code Ann. § 44-66-10 *et seq.*

Even if Ms. Rahn had authority under the Act to enter the Admission Agreement as an act in furtherance of the decedent's health care needs, it does not necessarily follow that she had authority to enter a separate Arbitration Agreement under the Act. Therefore, the Court must determine (1) if the Arbitration Agreement merged with and was a part of the Admission Agreement such that Plaintiff in her capacity as personal representative would be equitably estopped from denying the Arbitration Agreement's validity, and (2) if Ms. Rahn had actual or apparent authority to enter the Arbitration Agreement on behalf of the decedent. The answer to both inquiries is "no".

While a signed Arbitration Agreement exists in this case, it is not a valid, enforceable agreement for the simple reason that the decedent's daughter, Jennifer Rahn, did not have any authority to execute the Arbitration Agreement at the time it was entered by the parties. A family member may be authorized to make decisions concerning **health care** under the Adult Health Care Consent Act. S.C. Code Ann. § 44-66-30(A). In contrast, arbitration is a means of resolving a legal dispute outside of the typical civil litigation process – a definition unrelated to physical or mental condition. *See Black's Law Dictionary*, 125 (10th ed. 2014).

Therefore, the Act, even if it applied, only would have given Ms. Rahn authority to consent on behalf of the decedent to the provision of medical care, including placement in Defendant's facility, as well as authority to make certain

financial decisions on behalf of the decedent which he would be obligated to pay. This authority “extends primarily to traditional health care decisions, and only secondarily to the financial decisions necessitated by those decisions.” *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 353, 755 S.E.2d 450, 454 (2014). Most jurisdictions, including South Carolina, have ruled execution of an arbitration agreement is not a health care decision. *See Johnson v. Kindred Healthcare, Inc.*, 466 Mass. 779, 789-90, 2 N.E.3d 849, 857-58 (Mass. 2014) (collecting cases).

Defendant’s Arbitration Agreement is admittedly optional, and separate from its Admission Agreement, and contains no provision for medical, nursing, or health care services to be provided to residents, nor does it require any financial commitment to pay for such services. The agreement is separately titled “Facility – Resident/Representative Arbitration Agreement”, is paginated as “Page 1 of 1”, and contains its own signature lines. The agreement is signed by Ms. Rahn as “Resident/Representative.” Further, the Arbitration Agreement by its very language distinguishes between itself and the Admission Agreement, stating that the Arbitration Agreement will survive any “breach of this Agreement or the Admission Agreement.” While the Admission Agreement purports to incorporate admissions materials into itself “by reference herein”, when viewed alongside the other details of the agreements, it creates at best an ambiguity as to merger when taken in context of the totality of the circumstances, and “the law is clear that any ambiguity in such a clause is construed against the drafter”, i.e., Defendant. *See Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

In sum, the Act provides statutory authority for family members to make an incapacitated loved one's health care decisions but leaves the conferral of authority to arbitrate for powers of attorney or other legal instruments outlined in the probate code. As previously stated, no power of attorney was ever recorded as required by law. Regardless, Ms. Rahn in her individual capacity had no legal authority to sign the Arbitration Agreement in a representative capacity for the estate, and Defendant knew or should have known this fact, as she apparently did not present them with documentation demonstrating power of attorney or guardianship. Since Ms. Rahn lacked legal authority, the Arbitration Agreement is void and unenforceable.

Further, Plaintiff cannot be equitably estopped from denying enforcement of the Arbitration Agreement. "Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements." *Kelly v. Logan, Jolley & Smith*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Defendant has not and cannot meet its burden to establish these elements, primarily because Defendant cannot demonstrate that Mr. Ramsey's estate made any false representations as far as the subject power of attorney is concerned, because Plaintiff was acting in her individual capacity at the time she signed the Arbitration Agreement.

Since Plaintiff did not have authority to sign the Arbitration Agreement under the executed power of attorney or the Adult Health Care Consent Act, the fact that Plaintiff signed the Arbitration Agreement in her individual capacity and

is now a party to this action as a nonsignatory in her capacity as personal representative of the estate does not bind the estate to the Arbitration Agreement, at least as far as equitable estoppel is concerned. The Court of Appeals addressed this concept in *Thompson v. Pruitt Corp.*:

Respondent is attempting to use equitable estoppel against [the patient's] estate based on actions that [patient's daughter] took *in her individual capacity*. The fact that [the patient's daughter] is *now the personal representative for [the patient's] estate* is of no moment; we will not hold this circumstance against [the patient's] estate. Simply put, [the patient's] estate is the plaintiff in this case, and Respondent has alleged no conduct on the part of [the patient's] estate, that has affected Respondent's position. This, too, is a necessary element of an equitable estoppel defense.

Thompson, 416 S.C. 43, 61, 784 S.E.2d 679, 689 (Ct. App. 2016).

Equitable doctrines such as estoppel favor diligent parties who actively endeavor to protect their rights. A person cannot claim to have been misled and cannot rely on equitable estoppel if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001). In this case, Defendant had the ability to determine whether Plaintiff had authority to sign an arbitration agreement on Mr. Ramsey's behalf. It should be clear to health care entities such as Defendant that a daughter without a recorded general durable power of attorney at best only has authority to make healthcare decisions and does not have authority to waive other rights when a potential resident lacks capacity.

Defendant is a sophisticated business entity frequently interacting with residents and their families during the rehabilitation center admission process. Defendant is or should be familiar with the legal concepts of guardianship and powers-of-attorney. Defendant had the ability to ask Plaintiff whether she possessed an executed **and recorded** power-of-attorney. Since Defendant has not cited or provided any evidence on this element of equitable estoppel, Plaintiff is not equitably estopped from denying the Arbitration Agreement. Further, the Admission Agreement and Arbitration Agreement are separate contracts that do not merge. *See Hodge v. UniHealth Post-Acute Care of Bamberg LLC*, 422 S.C. 544, 561-63, 813 S.E.2d 292, 308 (Ct. App. 2018); *Thompson v. Pruitt Corp*, 416 S.C. 43, 50, 784 S.E.2d 679, 683 (Ct. App. 2016); *Coleman*, 407 S.C. at 352, 755 S.E.2d at 450.

Defendant's assertion that Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement seems to hinge on a direct benefits theory of estoppel, i.e., that since Mr. Ramsey benefited from the terms of the Admission Agreement, the personal representative of his estate should be estopped from denying the validity of the Arbitration Agreement. *See Wilson v. Willis*, 426 S.C. 326, 340, 827 S.E.2d 167, 175 (2019). Virtually all of the Circuit Court orders filed by Defendant in support of its Motion rely in some form or another on this theory. However, as the Supreme Court explained in *Wilson*, to successfully assert direct benefits estoppel, the arbitration agreement must be a clause within the larger admissions agreement, and the plaintiff must be seeking to assert causes of action

that arise from and are created by the contract. Here, as explained above and below, the Admission Agreement and optional Arbitration Agreement are separate documents that did not merge. Second, Plaintiff does not assert breach of contract, or a violation of contractual duties, and instead has brought her lawsuit under a negligence theory arising from common law duties. *See Wilson*, 426 S.C. at 342, 827 S.E.2d at 176. If anything, Plaintiff's claims are indirectly related to the Arbitration Agreement, as it was optional, ancillary to, and separate from the Admission Agreement. *See id.* (stating that under direct benefits estoppel a nonsignatory's claim must be directly, not just indirectly, based on the contract containing the arbitration agreement).

Additionally, Plaintiff did not have any authority independent of the Adult Health Care Consent Act or a power-of-attorney to enter the Arbitration Agreement. 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*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004). South Carolina law requires that to prove apparent authority, the defendant must show that the purported principal consciously or impliedly represented another to be his agent. *Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). For the reasons mentioned above, the Adult Health Care Consent Act did not bestow Plaintiff with the authority to enter the Arbitration Agreement. The simple fact that Plaintiff signed the agreements so that her father could be admitted to Defendant's facility and receive health care in no way indicates a manifestation of

authority by Mr. Ramsey to waive his right to a jury trial or agree to arbitration. Defendant has not provided any evidence that Mr. Ramsey ever manifested any form of assent to Defendant establishing Ms. Rahn as his agent, nor could he have in his condition at the time of admission due to his incapacity from dementia.

Defendant's assertion that Plaintiff held "inherent agency powers" to act on behalf of the decedent is unsupported by South Carolina law. South Carolina law is clear that an individual does not have inherent agency powers concerning health care, financial, and other affairs of their spouse, much less a father or other family member. *Hinson v. Roof*, 128 S.C. 470, 475, 122 S.E. 488, 490 (1924) ("The marriage relation of the parties . . . is not necessarily enough to establish the fact that the one is the agent of the other. There must be other proof."); S.C. Jur. *Agency* § 6 (1994) ("No presumption arises from the fact of the marital relationship, without more, that [a spouse] is the agent of [the other spouse].") (footnote omitted).

Lastly, it is doubtful that the scope of the Arbitration Agreement, even if it was valid, would cover wrongful death claims asserted on behalf of a decedent's statutory beneficiaries. That is because the wrongful death claim belongs solely to the wrongful death beneficiaries, and is brought only on their behalf by the personal representative of the estate. S.C. Code Ann. §§ 15-51-10 and -20; *Self v. Goodrich*, 300 S.C. 349, 351, 387 S.E.2d 713, 714 (Ct. App. 1989). The statutory beneficiaries are nonsignatories to the Arbitration and Admission Agreements, regardless of whether the Arbitration Agreement purports to include "any alleged tort, personal injury, negligence, or other claim" "arising out of or relating to Facility's Admission

Agreement.” Therefore, if the Arbitration Agreement were valid, the wrongful death beneficiaries would only be bound to its terms as third-party beneficiaries.

A third-party beneficiary may only be bound by an arbitration agreement if it is attempting to enforce the contract containing the arbitration agreement. *Thompson*, 426 S.C. at 57, 784 S.E.2d at 687. Here, the Arbitration Agreement is a standalone document not contained within the Admission Agreement, and the wrongful death beneficiaries are not attempting to enforce the Admission Agreement or Arbitration Agreement. Instead, they are seeking to recover under the wrongful death scheme for Defendant’s breach of common law duties arising from its care for Mr. Ramsey. Thus, even if the Arbitration Agreement is valid and enforceable, it would only reach the survival claim of the estate, and not any wrongful death claims brought on behalf of the statutory beneficiaries. This conclusion comports with the law of other state jurisdictions. *See FutureCare NorthPoint, LLC v. Peeler*, 143 A.3d 191, 209-10, 213 (Md. App. 2016); *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 494 n. 1 (Pa. 2016) (citing *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 660 (Pa. Super. 2013)); *Boler v. Sec. Health Care, LLC*, 336 P.3d 468, 477 (Okla. 2014); *Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc.*, 316 P.3d 607, 614 (Ariz. Ct. App. 2014); *Daniels v. Sunrise Sr. Living, Inc.*, 212 Cal. App. 4th 674, 151 Cal. Rptr. 3d 273 (2013); *Carter v. SSC Odin Operating Co, LLC*, 976 N.E.2d 344, 355-58 (Ill. 2012); *Ping v. Beverly Enters., Inc.*, 376 S.W.3d 581 (Ky. 2012); *Woodall v. Avalon Care Center-Federal Way, LLC*, 231 P.3d 1252 (Wash. App. 2010); *Lawrence v. Beverly*

Manor, 273 S.W.3d 525 (Mo. 2009); *Bybee v. Abdulla*, 189 P.3d 40 (Utah 2008); *Peters v. Columbus Steel Castings Co.*, 873 N.E.2d 1258, 1262 (Ohio 2007); *Chapman v. Cardiac Pacemakers, Inc.*, 673 P.2d 385 (Idaho 1983); *see also Strickholm v. Evangelical Lutheran Good Samaritan Soc’y*, Case No. 4:11-CV-00059-BLW, 2011 WL 2532395 (D. Idaho June 24, 2011). At best, even if the Arbitration Agreement was valid, it would only reach the estate’s survival claims. However, since it is not valid, it cannot compel arbitration of the wrongful death or survival claims in this action, and Defendant’s motion will be denied by the Court.

In the alternative, Defendant has requested that the Court grant additional discovery on the nature of Ms. Rahn’s agency relationship with her father. Here, the only relevant and necessary evidence for the Court to make its determination is already available for the Court’s review. Any further discovery with the goal of revisiting the arbitrability of this case would only serve to protract this litigation, waste judicial resources, and increase costs for both parties unnecessarily.

Based on the foregoing authorities and findings, the Court denies Defendant’s Motion to Compel Arbitration.

THEREFORE, it is ORDERED that the Defendant’s Motion to Compel Arbitration is DENIED.

IT IS SO ORDERED.

The Honorable Bentley Price
Chief Administrative Judge

Fourteenth Judicial Circuit

_____, 2022.
Charleston, South Carolina



Colleton Common Pleas

Case Caption: Jennifer Rahn , plaintiff, et al VS Priority Home Care Llc , defendant,
et al
Case Number: 2021CP1500657
Type: Order/Other

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

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STATE OF SOUTH CAROLINA

COUNTY OF COLLETON

Jennifer Rahn
As Personal Representative of the
Estate of Robert Ramsey,

Plaintiff,

vs.

Priority Home Care, LLC and St. George
Health Care, LLC, d/b/a St. George Healthcare
Center,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2021-CP-15-00657

**ORDER DENYING DEFENDANT'S
MOTION TO RECONSIDER**

The Defendant St. George Health Care, LLC d/b/a St. George Healthcare Center filed a motion asking this Court to reconsider its June 29, 2022 Order.

STANDARD OF REVIEW

Motions for reconsideration will not be granted absent “highly unusual circumstances.” U.S. ex rel. Becker v. Washington Savannah River Co., 305 F.3d 284, 290 (4th Cir. 2002) (stating that simple disagreements with the court’s ruling will not support Rule 59(e) relief).¹ Courts have recognized three circumstances in which a court should grant a Rule 59(e) motion: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). Importantly, a motion for reconsideration is not a vehicle to re-litigate previously raised issues or “to raise argument or present evidence that could have been presented prior to the entry of judgment.” Dash v. Mayweather, C/A No. 3:10-1036-JFA, 2010 U.S. Dist. LEXIS 95277, *2 (D.S.C. Sept. 13, 2010) (quoting Exxon Shipping Co. v.

¹ Rule 59 is substantially the same as the Federal Rule. See Elam v. S.C. Dep’t of Transp., 361 S.C. 9, 21, 602 S.E. 2d 772, 779 (2004) (“Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical.”).

Baker, 554 U.S. 471, n.5 (2008)). In other words, “[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.” Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). Nor does “[a] party’s mere disagreement with the court’s ruling . . . warrant a Rule 59(e) motion.” In re Pella Corp. Architect & Designer Series Windows Mktg., Sales Practices & Prods. Liab. Litig., 269 F.Supp. 3d 685, 691 (D.S.C. 2017); *see also* Lyons v. Fid. Nat’l Title Ins. Co., 415 S.C. 115, 135, 781 S.E.2d 126, 137 (Ct. App. 2015).

After consideration of the issues raised in Defendant’s motion, the Court hereby DENIES Defendant St. George Health Care, LLC d/b/a St. George Healthcare Center’s Motion for Reconsideration.

AND IT IS SO ORDERED.

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Colleton Common Pleas

Case Caption: Jennifer Rahn , plaintiff, et al VS Priority Home Care Llc , defendant,
et al
Case Number: 2021CP1500657
Type: Order/Other

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	CIVIL ACTION NO.: 2021-CP-15-
	)	
JENNIFER RAHN, AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF ROBERT RAMSEY	)	
	)	
	)	
	)	Summons
	)	<i>(Jury Trial Requested)</i>
v.	)	
	)	
PRIORITY HOME CARE, LLC and ST.	)	
GEORGE HEALTH CARE, LLC, D/B/A	)	
ST. GEORGE HEALTHCARE CENTER	)	
	)	
	)	

TO THE ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at P.O. Box 457, Hampton, SC 29924, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

-Signature Page to Follow-

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ATTORNEYS FOR THE PLAINTIFF

November 3, 2021.
Hampton, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	CIVIL ACTION NO.: 2021-CP-15-
	)	
JENNIFER RAHN, AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF ROBERT RAMSEY	)	
	)	
	)	Complaint
	)	<i>(Jury Trial Requested)</i>
v.	)	
	)	
PRIORITY HOME CARE, LLC, and ST.	)	
GEORGE HEALTH CARE, LLC, D/B/A	)	
ST. GEORGE HEALTHCARE CENTER	)	
	)	

COMES NOW the Plaintiff above named complaining of the Defendants allege and says as follows:

1. That the Plaintiff, JENNIFER RAHN, is a citizen and resident of Colleton County, State of South Carolina and brings this action as the Personal Representatives of the Estate of ROBERT RAMSEY, does hereby submit this Notice of Intent to File Suit and seek a jury trial pursuant S.C. Code Ann. §15-51-10, the Wrongful Death Act, and other applicable statutory and/or common law other applicable statutory and/or common law and seek a jury trial pursuant to the Survival Action of South Carolina, S.C. Code Ann. §15-5-90 *et seq.* on behalf of the Estate for conscious pain and suffering of the deceased for all damages authorized by said statute.

2. That upon information and belief, the Defendant Priority Home Care, LLC is an entity organized under the laws of South Carolina and provides services in Colleton County, South Carolina.

3. That upon information and belief, the Defendant St. George Health Care, LLC d/b/a St. George Healthcare Center is a Delaware corporation with its principal place of business in the

County of Dorchester, South Carolina. At the time of the acts complained of, St. George Healthcare Center was a skilled nursing home facility.

4. In 2016, Mr. Ramsey began receiving home health in his home from Priority Home Care.

5. On July 27, 2019, an employee of Defendant Priority Home Care was helping Mr. Ramsey to his wheel chair and he fell forward and fractured his left femur.

6. On August 9, 2019, Mr. Ramsey was admitted to Defendant St. George Healthcare. On admission he was non-ambulatory and total care. The skin assessment revealed a red blister to his inner ankle, skin tear to his left hip and buttock area, bruising to his right buttock that was purple and blanchable and redness to his sacrum and groin area.

7. On August 24, 2019, Mr. Ramsey's heel were noted to be necrotic.

8. On August 29, 2019, Mr. Ramsey's right sacral ulcer was unstageable.

9. On September 5, 2019, Mr. Ramsey presented to Colleton Medical Center and was diagnosed with polymicrobial infection of his heel wounds and bilateral hip wounds.

10. On September 18, 2019, Mr. Ramsey was admitted to PruittHealth Walterboro for continued skilled care.

11. The admission assessment showed that he had six wounds; right heel eschar, left heel eschar, left ankle open are with slough, left hip open are with slough, right inner angle open area and two open areas to his coccyx that were tunneling with slough.

12. Mr. Ramsey passed away on October 16, 2019.

FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence)

13. While in the Defendants' care, custody and control, Mr. Ramsey did suffer grave and severe injuries and humiliation at the facility as a direct and proximate result of the

following negligent, reckless, willful, careless, negligent per se and grossly negligent acts of the Defendants, combining and concurring:

- a. In failing to provide oversight of Mr. Ramsey's safety and dignity;
- b. In failing to exercise due care, including without limitation, failing to care for Mr. Ramsey;
- c. In failing to provide appropriate administrative oversight and management to assure Mr. Ramsey was appropriately cared for;
- d. In failing to realize Mr. Ramsey needed a higher level of medical care;
- e. In failing to conduct an assessment of Mr. Ramsey's change in condition;
- f. In failing to communicate with appropriate staff to advise of a potential need of a higher level of care;
- j. In failing to exercise reasonable care for the safety and well-being of Mr. Ramsey under the circumstances;
- k. In failing to implement appropriate pressure sore preventions;
- l. In failing to have sufficient and properly trained staff to care for its patients;
- m. In failing to have sufficient nursing and nursing assist time to provide the care that was needed for Mr. Ramsey;
- n. In failing to manage its revenue and income such that appropriate care may be rendered to Mr. Ramsey;

- o. In failing to implement appropriate fall prevention measures;
- p. In failing to implement an appropriate care plan;
- q. In failing to exercise that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances; and
- r. In such other particulars as the evidence may establish.

14. That as a direct and proximate result of the aforesaid negligent, reckless, willful, careless, negligent per se and grossly negligent acts of the Defendants, the deceased Plaintiff's beneficiaries have suffered grief, sorrow, mental anguish and all of the damages which accompany the loss of a loved one; the beneficiaries have suffered pecuniary loss, all to the Plaintiff's actual and punitive damages.

15. That as a direct and proximate result of the aforesaid negligent, reckless, willful, careless, negligent per se and grossly negligent acts of the Defendants, the deceased Plaintiff suffered grave and severe injuries prior to his death; he was hospitalized; he incurred medical expenses; he suffered conscious pain and suffering and mental anguish prior to his death; he suffered a loss of his dignity and individuality; he suffered a diminished quality of life prior to his death; his estate has incurred funeral expenses.

16. That by reason of the foregoing, the Plaintiff is informed and believes that she is entitled to judgment against the Defendants on behalf of the Estate of the deceased Plaintiff, for both actual and punitive damages; all of which damages were proximately caused by the Defendants' acts and/or omissions as are more fully set forth above, in an amount as may be set and determined by the trier of fact in this matter.

WHEREFORE, Plaintiff prays for judgment against the Defendants for actual damages,

together with punitive damages in an appropriate amount, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

BY: s/Lee D. Cope

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AND

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Walterboro, SC 29488

ATTORNEYS FOR THE PLAINTIFF

November 3, 2021
Hampton, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	CIVIL ACTION NO.: 2021-NI-15-
	)	
JENNIFER RAHN, AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF ROBERT RAMSEY	)	
	)	
	)	AFFIDAVIT OF MERIT OF
	)	LUANNE TRAHANT MSN, APRN, FNP-BC
v.	)	
	)	
PRIORITY HOME HEALTH, LLC, and	)	
ST. GEORGE HEALTH CARE, LLC,	)	
D/B/A ST. GEORGE HEALTHCARE	)	
CENTER	)	
	)	

The Affiant, Luanne Trahant, MSN, APRN, FNP-BC, having been duly sworn testifies as follows:

- 1) I am over 18, legally competent, and I make this affidavit based upon medical records provided to me as well as my background, education, training, and experience.
- 2) I am a registered nurse in Louisiana. I received my Bachelor of Science in Nursing from Northwestern State University in 1992 and a Master of Science in Nursing in 2005. I am a Board-Certified Family Nurse Practitioner. I have practiced in the field of which I give this opinion for at least three out of the last five years.
- 3) I have been provided with the medical records from PruittHealth Walterboro, St. George Healthcare, Colleton Medical Center and Priority Home Health pertaining to Robert Ramsey.
- 4) Mr. Ramsey was a patient of Priority Home Health for several years between 2016 and August 2019.
- 5) On July 27, 2019, an employee of Priority Home Health was helping Mr. Ramsey to his wheelchair. The aide noted that on the day of the fall because the wheelchair would not lock, she had to stand behind the wheelchair to prevent it from moving and was unable to assist Mr. Ramsey to scoot back in his chair. As a result of this, he leaned over trying to scoot back in the chair and fell forward resulting in the left femur fracture. EMS was notified and he was transferred to Colleton Medical Center.
- 6) On August 9, 2019, Mr. Ramsey was admitted to Defendant St. George Healthcare. On admission he was non-ambulatory and total care. The skin assessment revealed a red blister to his inner ankle, skin tear to his left hip and buttock area, bruising to his

right buttock that was purple and blanchable and redness to his sacrum and groin area.

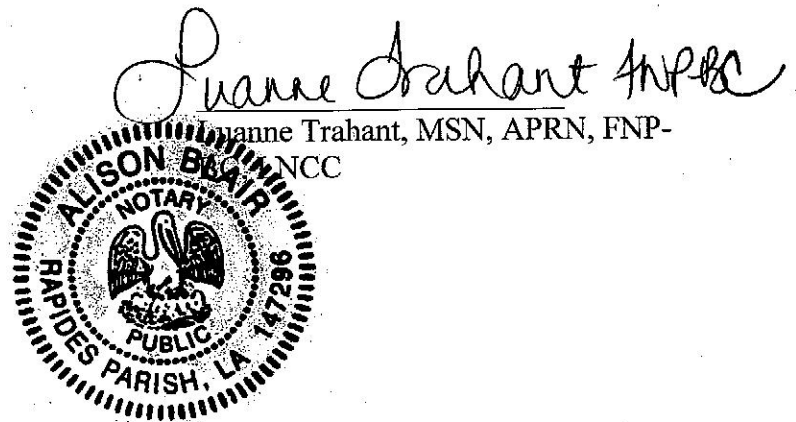
- 7) On August 19, 2019, heal wounds were documented by the PA that evaluated Mr. Ramsey, but the nursing notes do not mention any heal wounds or assessments of same until August 24, 2019, and the areas are noted to be necrotic. Nutritional intervention to heal his wounds was significantly delayed although his current body weight on August 27, 2019, was 163 which was an 11-pound weight loss in 2 weeks.
- 8) On September 3, 2019, a late entry was recorded indicating that Mr. Ramsey had an unstageable pressure injury to his sacrum that was noted on August 29, 2019, however, the records demonstrated that on August 24, 2019, a right sacral ulcer as noted and skin prep along with Santyl was applied.
- 9) Due to his family requesting his discharge, St. George discharged him home with his sisters on September 3, 2019. He was unable to be cared for at home and presented to Colleton medical Center on September 5, 2019. He was diagnosed with polymicrobial infection of his heel wounds and bilateral hip wounds. The left heel wound was so severe that amputation was recommended.
- 10) On September 18, 2019, Mr. Ramsey was discharged to Pruitt Health Walterboro for continued skilled care and wound care center evaluation was ordered.
- 11) The initial assessment shows that he had 6 wounds. Right heel eschar, left heel eschar, left ankle open area with slough, left hip open area with slough, right inner ankle open area and 2 open Ares to his coccyx that were tunneling with slough.
- 12) Mr. Ramsey was sent to the hospital on October 15, 2019 with what presents as more likely than not aspiration pneumonia and died on October 16, 2019
- 13) The Defendant Priority Home Health's employees failed to implement appropriate interventions while transferring Mr. Ramsey from his bed to wheelchair.
- 14) The Defendant St. George Healthcare's employees failed to properly assess Mr. Ramsey's skin, wounds, and nutritional status.
- 15) I reserve the right to alter, amend, add, or delete opinions as new information becomes available.

Sworn to and subscribed before me:

Alison Blair

Notary Public

Date: 07/07/2021



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
JENNIFER RAHN, AS PERSONAL	)	CASE NO. 2021-CP-15-00657
REPRESENTATIVE OF THE ESTATE	)	
OF ROBERT RAMSEY,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	DEFENDANT ST. GEORGE HEALTH
	)	CARE, LLC, D/B/A ST. GEORGE
PRIORITY HOME CARE, LLC, AND	)	HEALTHCARE CENTER'S ANSWER TO
ST. GEORGE HEALTH CARE, LLC,	)	PLAINTIFF'S COMPLAINT
D/B/A ST. GEORGE HEALTHCARE	)	
CENTER ,	)	
	)	
DEFENDANTS.	)	

TO: LEE COPE AND SCOTT HARVIN, ATTORNEYS FOR THE PLAINTIFF:

The Defendant St. George Health Care, LLC d/b/a St. George Healthcare Center (hereinafter "Facility" or "this Defendant"), by and through its undersigned counsel and subject to and without waiving any right to compel this matter to arbitration and without waiving its rights to have any and all claims dismissed and any defenses available, hereby responds to the allegations set forth in Plaintiff's Complaint as follows:

1. Any and all allegations set forth in Plaintiff's Complaint which are not specifically admitted, qualified, or otherwise explained or denied, are hereby expressly denied and strict proof is demanded thereof.

2. This Defendant is without knowledge or information sufficient to respond to the allegations set forth in Paragraph 1 of Plaintiff's Complaint regarding Ms. Rahn's residency, citizenship, or status as personal representative of the estate of Mr. Ramsey, and therefore denies the same and demands strict proof thereof. The remaining allegations in Paragraph 1 call for

legal conclusions and require no response. To the extent those allegations intend to allege liability against this Defendant, they are denied and strict proof is demanded thereof.

3. The allegations set forth in Paragraph 2 of Plaintiff's Complaint are directed at parties other than this Defendant and require no response.

4. Responding to the allegations set forth in Paragraph 3 of Plaintiff's Complaint, this Defendant admits those allegations insofar as they allege that this Defendant is a Delaware limited liability company which operates the skilled nursing facility at issue in Plaintiff's Complaint located in Dorchester County, South Carolina.

5. This Defendant is without knowledge or information sufficient to respond to the allegations set forth in Paragraphs 4 and 5 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

6. Responding to the allegations set forth in Paragraph 6, 7 and 8 of Plaintiff's Complaint, this Defendant admits that Mr. Ramsey was admitted to the Facility on August 9, 2019. Responding to the remaining allegations, this Defendant craves reference to Mr. Ramsey's medical records for their contents. Any and all allegations inconsistent with those records or intended to allege liability or damages against this Defendant are hereby denied and strict proof is demanded thereof.

7. This Defendant is without knowledge or information sufficient to respond to the allegations set forth in Paragraphs 9, 10, 11 and 12 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

8. This Defendant denies the allegations set forth in Paragraphs 13, 14, 15 and 16 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof. To the extent those allegations are directed at parties other than this Defendant, no response is required.

9. The Defendant denies the allegations set forth in Plaintiff's prayer for relief and judgment.

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

10. Pursuant to § 4 of the Federal Arbitration Act, this action must be stayed until the validity of the arbitration agreement entered into by the Plaintiff's decedent and the Facility is determined by this Court. The Defendant hereby provides notice that a Motion to Compel Arbitration and associated Motion to Dismiss or Stay is forthcoming.

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

11. Plaintiff's claim for punitive damages and an award of punitive damages would violate those clauses of the Constitution of the United States and of South Carolina related to privileges and immunities, due process and equal protection, and the Defendant would further assert the protections, defenses, and statutory rights set forth in S.C. Code Ann. § 15-32-510, 15-32-520, 15-32-530, and 15-32-540 *et. seq.*

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

12. Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action and fails to state a claim upon which relief can be granted against the Defendant and should be dismissed pursuant to South Carolina Rules of Civil Procedure 12(b)(6).

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

13. Plaintiff's right to a recovery in this matter, if any, is limited by and subject to the provisions of the South Carolina Noneconomic Damages Awards Act of 2005 which is codified

at S.C. Code Ann. §15-32-200 *et seq.*, which is pled as a limitation or partial bar to the Plaintiff's claims and alleged damages.

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

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

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

15. The Defendant affirmatively asserts the defense of intervening and superseding negligence of third parties not a party to this action.

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

16. The Defendant asserts that some, or all, of the standards, regulations, and statutes alleged by the Plaintiff do not create any standard of care applicable to Plaintiff's claims or private right of action in this matter.

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

17. The Defendant asserts that some of the injuries or damages sustained by the Plaintiff or Plaintiff's decedent, if any, were due to, caused and occasioned by a natural disease

process over which the Defendant had no control and, as such, the Defendant pleads such a natural disease process as a complete or partial bar to this action.

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

18. The Defendant hereby raises the doctrine of election of remedies as a defense to Plaintiff's claims.

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

19. Plaintiff, as personal representative, lacks standing to bring some or all of the claims and allegations asserted against the Defendant pursuant to S.C. Code Ann. § 15-5-90 and/or § 15-51-20 & 40.

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

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

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

21. The care and treatment provided to Plaintiff's decedent provided by the Defendant met the governing standard of care at all times.

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

22. The Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery and

thus reserves the right to amend its Answer to assert any such defenses. Furthermore, the Defendant hereby incorporates all defenses asserted by any co-defendants in this matter, if any, to the extent they are applicable.

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

23. The Defendant asserts that no act, omission, representation or fault, if any, of the Defendant was the cause in fact or legal cause of Plaintiff's damages, if any.

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

CLEMENT RIVERS, LLP

By: /s/ D. Jay Davis, Jr.
 D. Jay Davis, Jr.
 SC State Bar ID No.: 12084
 James D. Gandy, III
 SC State Bar No.: 11925
 T. Ashton Phillips, III
 SC State Bar No.: 104227
 P.O. Box 993, Charleston, SC 29402
 (843) 720-5406; jdavis@ycrlaw.com
 tgandy@ycrlaw.com; aphillips@ycrlaw.com
 Attorneys for the Defendant St. George Health
 Care, LLC d/b/a St. George Healthcare Center

Charleston, South Carolina
 Dated: Charleston 15, 2021

1 STATE OF SOUTH CAROLINA

2 COURT OF COMMON PLEAS

3 COUNTY OF COLLETON

4 2021-GS-15-00516

5 Gabriella Washington, et als.

6 Vs.

7 St. George Health Care, LLC., et als.

8

9 Webex

10 May 19, 2022

11 Before the Honorable Bentley Price

12 APPEARANCES

13 For the Defendant: Russell G. Hines

14

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16 Reported by: Webex (transcribed by Michael C. Watkins

17 Official Court Reporter)

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1 THE COURT: All right. So whose motion is this?

2 MR. HINES: Your Honor, I believe -- is it the
3 Gabrielle Washington case, is that what you're calling?

4 THE COURT: It is, yes, sir.

5 MR. HINES: If it may please the Court? Russ Hines
6 here for -- it might say Jay Davis from our office on your
7 roster, but here for the moving party, which is St. George
8 Healthcare, and this is our motion to compel arbitration.
9 Your Honor, the simplest way, I think, to look at this, we
10 have filed a memo and it is certainly is packed with plenty
11 of -- plenty of things in it, but what I want to focus on
12 Your Honor's attention is merger and the equitable estoppel.
13 And let me just give you a little background on the case,
14 it's a nursing home malpractice case. The resident is
15 Walter Washington, who is now deceased. The case is for --
16 it's a wrongful death and survival action brought by the
17 personal representative of Mr. Washington's estate, his
18 niece, Gabrielle Washington. Back in October of 2017 when
19 Mr. Washington was admitted to our facilities, a skilled
20 nursing facility, Gabrielle Washington signed for him -- she
21 handled the paperwork associated with his admission, and so
22 in doing so she signed for him an admission agreement and
23 she signed an arbitration agreement. And what we are trying
24 in this motion, or what we're asking Your Honor to do in
25 this motion is to compel arbitration on the basis of the

1 arbitration agreement that Ms. Washington signed for Mr.
2 Washington. And our argument is sort of a one-two punch.
3 The first one, Your Honor, to give you better roadmap here,
4 is the merger of the admission agreement and the arbitration
5 agreement, and I'll explain it later in a little more detail
6 why we argue in favor of that merger. If Your Honor goes
7 with me that far, the next concern or the argument is
8 equitable estoppel. And equitable estoppel, the argument
9 there, Your Honor, is based on some direct benefits
10 estoppel. And the basic idea of direct benefits estoppel is
11 that you can't have your cake and eat it too. You cannot
12 receive direct benefits on the basis of a contract that
13 includes an arbitration provision and then deny the
14 enforceability of that arbitration provision. So, Your
15 Honor, back to the original point about merger. The law of
16 South Carolina is you have multiple instruments that are
17 signed at the same time by the same parties for the same
18 purpose in the course of the same transaction, they are
19 presumed to merge and intended to be treated as one contract
20 unless there's evidence to the contrary intention. That
21 principle, Your Honor, is established, or it is recognized
22 in the case called Coleman versus Mariner (phonetically)
23 Healthcare which cites an older authority for that
24 principle, it's also recognized. The Coleman case was also
25 a case about moving to compel arbitration. What I would

1 mention about Coleman is, the main fight in Coleman had to
2 do with whether or not the South Carolina Adult Healthcare
3 Consent Act allowed a surrogate, in the case of Cullman
4 (phonetically) it was the sister of the resident, to agree
5 to arbitration on the resident's behalf. There's no
6 question in Coleman the Supreme Court said, no, it doesn't,
7 that statute does not provide authority to agree to
8 arbitration. We only bring that up, Your Honor, to say that
9 that whole principle has nothing to do with the argument
10 that I'm making today, we're not relying on the Adult
11 Healthcare Consent Act in any way. What Coleman did say in
12 addressing a separate argument, an argument that did not
13 rely upon the statute, is it confirmed that in certain
14 particulars the Coleman case is factually the same, or
15 substantially the same as this one. There are facts that
16 are particularly different and I distinguish the two.
17 What's the same about Coleman is you had a case where it was
18 a nursing home, an admission agreement, and an arbitration
19 agreement, and the argument was merger. And the Coleman
20 court said, yes, we recognize that that is the law, same
21 times, same parties, same place, same transaction, and yes,
22 that all checks, all of those boxes check, admission
23 agreement, arbitration agreement all at the same time,
24 parties, purpose, transaction. However, the Coleman court
25 said and went on and found that there was evidence to the

1 contrary in intention to the merger, and it did that on
2 particular facts in the case, the facts that are materially
3 different from the case that we have here. I make the point
4 also that we're talking about a fact specific analysis when
5 we're talking intention. In Coleman what they noted was
6 that the admission agreement had an entire agreement in it,
7 and in the entire agreement clause the admission agreement
8 made reference to the arbitration agreement as a separate
9 agreement, or separate contract, and the Coleman court found
10 that to be indicative of an intent to not merge the two.
11 The Coleman court also noted that the admission agreement --
12 excuse me, the arbitration agreement had a provision that
13 allowed it to be disclaimed for any reason within 30 days,
14 which the arbitration agreement did not have, and therefore
15 the idea was that they were -- there was an intention not to
16 merge them because the one could simply fall apart and, you
17 know, fall out by way of the disclaimer. We have a
18 materially different case here. In this case we have an
19 entire agreement clause in our admission agreement. That
20 clause, not only does it not reference the arbitration
21 agreement as a separate document, it indicates that there
22 are other admissions and materials that are incorporated
23 into it. And if Your Honor will bear with me to read just
24 shorty, just a short bit. The entire agreement clause here
25 reads: The undersigned further acknowledges that he or she,

1 he/she, has received and read the admission handbook and
2 other admissions materials and understands these documents
3 are made a part of this agreement by reference herein. So,
4 Your Honor, unlike Coleman we have a situation where you do
5 have in the entire agreement clause what -- Coleman used the
6 word separatedness. It talked about the ideas, it was
7 looking for evidence of separatedness, meaning intent to
8 maintain separation between the admission and the
9 arbitration agreement. Here we don't have that
10 separatedness just evidenced by the entire agreement. In
11 fact we have the opposite, we have other admissions
12 materials that aren't deemed to be a part of the agreement.
13 Now, in the arbitration agreement I'll note here there is --
14 this is language, it says: This agreement shall remain in
15 effect for all care rendered at facility which shall survive
16 any termination or breach of this agreement or the admission
17 agreement. It is argued sometimes that that is the same
18 thing as what Coleman encountered, it's not. In Coleman the
19 language that evidenced separation was in the entire
20 agreement clause of the contract, or of the admission
21 agreement. What I just read to you where it refers to
22 admission agreement and this agreement, this being the
23 arbitration agreement, is not in the entire agreement
24 clause. Furthermore, the very nature of the way arbitration
25 works is it's going to survive the termination or breach of

1 the agreement, and we cite this in our brief. It explains
2 how -- if you imagine it this way, Your Honor, the admission
3 agreement in this case is no longer. There is no admission,
4 obviously Mr. Washington is deceased, so the terms of the
5 admission agreement are not operative at this point. But
6 the terms of the arbitration agreement, of course, are
7 because it has to survive the termination of the other
8 agreement so that we can make this argument now to compel
9 arbitration. Because if it was no longer operable that
10 it -- there would be no basis to argue it, so that's just
11 the nature of arbitration agreements is that in order to
12 survive -- if Your Honor would indulge me for just one
13 moment.

14 (Break in proceedings.)

15 MR. HINES: Your Honor, you have to use the cases that
16 you have, but this is Hooters of America, Incorporated
17 versus Phillips, 39 F.Supp 2d, it's a South Carolina
18 District Court case 582. It says: Under South Carolina law
19 the duty to arbitrate under an arbitration clause survives
20 termination of the contract. My point about this is the
21 language that could be argued, or has been argued, to be
22 showing evidence of separatedness, number one, it's in the
23 arbitration and it's not in the entire agreement clause, so
24 it is materially different on that basis than Coleman. But
25 also what it is saying is simply what is the very nature of

1 arbitration which is to survive the termination of the
2 contract so that can be invoked by the form of a motion to
3 compel. And, again, the other point, we don't have the
4 disclaimer here, or the revocation provision up to 30 days.
5 So, Your Honor, that's my -- there's more to this and we
6 have set it forth in our materials, but in the interest of
7 the Court's time I will just underscore the point, we argue
8 for merger of admission and arbitration agreement. The
9 Coleman case recognizes that's a possible, it's a viable
10 theory, it recognizes that we have all of the ingredients
11 for merger in terms of same time, parties, place -- the same
12 time, parties, purpose, and transaction. Where Coleman
13 ended up --

14 THE COURT: Are you wanting me also to compel them to
15 participate in the arbitration or are you just asking for an
16 order to merge?

17 MR. HINES: No. This -- the merger is part one of a
18 two part argument, Your Honor. Because once --

19 THE COURT: I understand. But are you asking me to
20 compel them to go to arbitration?

21 MR. HINES: Yes, to compel the claims against the
22 facility to arbitration.

23 THE COURT: Okay. Well, I don't do that so I don't
24 want to waste your time. If you want a brief in the record
25 obviously we will incorporate your memorandums in support of

1 your motion to compel. But, I mean, the Court of Appeals
2 has made it very clear they want all of these justiciable
3 issues to be tried in the trial courts, and that the
4 archaic, you know, arbitration that they once thought was a
5 good idea at this point in time is not, so I am not going to
6 order anyone to arbitration. If they have a justiciable
7 claim it will be tried in the trial courts. Anything
8 further?

9 MR. HINES: Your Honor, just for the record a few
10 points, because I think -- in case there's any part of your
11 ruling that would include the idea that the wrongful
12 death component of this claim could not be compelled to
13 arbitration because it's different, meaning that it's a
14 claim that is for the benefit of the statute toward
15 beneficiaries, this is just me out of abundance of caution
16 wanting to note my -- just that would be -- that's not a --

17 THE COURT: A justiciable claim that needs to be tried
18 in trial courts, that's my ruling.

19 MR. HINES: Thank you, Your Honor. But to the extent
20 your ruling is going to include that, I just want to make
21 sure I've argued against it. I don't know if it will. I'm
22 talking about the wrongful death component, Your Honor. If
23 it is just a flight denial as you indicated I just wouldn't
24 want there to be an order that says we also deny -- I also
25 deny this on the basis that you can't compel a wrongful

1 death claim --

2 THE COURT: It won't. That will not be included.

3 MR. HINES: Thank you, Your Honor.

4 THE COURT: You're more than welcome.

5 (End of the hearing.)

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STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF COLLETON	)	2021-CP-15-00657
	)	
	)	
	)	
	)	
RAHN, AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF ROBERT RAMSEY,	)	
PLAINTIFF,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
PRIORITY HOME CARE, LLC, AND	)	
ST. GEORGE HEALTH CARE, LLC,	)	
D/B/D/ ST. GEORGE HEALTHCARE	)	
CENTER,	)	
DEFENDANTS.	)	
_____	)	

May 19, 2022
Via WebEx

B E F O R E:

THE HONORABLE BENTLEY PRICE, JUDGE.

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

LEE D. COPE, ESQ.
Attorney for the Plaintiff

RUSSELL G. HINES, ESQ.
Attorney for the Defendant

Proceedings Recorded by DCRP
Transcribed by Penny M. Johnson

I N D E X

(There were no witnesses called.)

E X H I B I T S

(There were no exhibits submitted.)

P R O C E E D I N G S

1
2 MR. COPE: Judge, as I mentioned to you, we have the
3 exact same issues --

4 THE COURT: Number 33?

5 MR. COPE: Yes, sir, that's right, number 33 on the
6 roster. That is the Rahn case.

7 MR. HINES: And, Your Honor, for interest in time, I'd
8 be happy for us to put something quickly on -- we don't need
9 to do the same thing again. I'd like to make sure my record
10 is protected.

11 THE COURT: Why don't you just file a memorandum in
12 support of your motion because, obviously, my ruling is
13 going to be identical.

14 MR. HINES: So --

15 THE COURT: And I'll just incorporate that into the
16 record.

17 MR. COPE: And, Judge, this is for you to have a part
18 of the record. These are two cases that I believe Mr. Hines
19 argued and we got orders on. I'm not involved in one of the
20 cases. I am involved in the other case. Judge Dennis ruled
21 on these exact same issues. We got the ruling about a week
22 ago. It's just the exact same arguments he made, the same
23 brief he filed in those two cases.

24 THE COURT: Because Judge Dennis was sitting next to me
25 when we warned and cautioned to allow people to continue go

1 to arbitration.

2 MR. COPE: Can I hand these up to Your Honor?

3 THE COURT: Sure. He wasn't sitting next to me, he was
4 sitting at the table next to me when we were warned by the
5 Supreme Court to continue.

6 MR. COPE: I will prepare orders for you.

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CERTIFICATE OF TRANSCRIBER

I, PENNY M. JOHNSON, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording and supporting information; and that I am neither counsel for, related to, nor employed by any of the parties to this case, and I have no interest, financial or otherwise, in its outcome.

November 2, 2022

Penny M. Johnson
Penny M. Johnson
Court Reporter III

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
JENNIFER RAHN, AS PERSONAL	)	CASE NO. 2021-CP-15-00657
REPRESENTATIVE OF THE ESTATE	)	
OF ROBERT RAMSEY,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	ST. GEORGE HEALTH CARE, LLC D/B/A
	)	ST. GEORGE HEALTHCARE CENTER'S
PRIORITY HOME CARE, LLC, AND	)	MOTION TO COMPEL ARBITRATION
ST. GEORGE HEALTH CARE, LLC,	)	
D/B/A ST. GEORGE HEALTHCARE	)	
CENTER ,	)	
	)	
DEFENDANTS.	)	
	)	

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF:

The Defendant, St. George Health Care, LLC d/b/a St. George Healthcare Center (hereinafter referred to as “this Defendant” or “the Facility”), will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order dismissing this action pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure and compelling this matter to arbitration, or, alternatively, staying the action pending arbitration pursuant to the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, et seq.

Plaintiff has sued this Defendant for negligence and gross negligence and wrongful death pursuant to her mother’s residency at the Facility. However, prior to being admitted to the Facility, Plaintiff entered into an Arbitration Agreement with the Facility. (See Arbitration Agreement attached as **Exhibit A**). The Arbitration Agreement was signed on behalf of Robert Ramsey by Jennifer Rahn - his daughter and power of attorney. See Ex. A. Ms. Rahn identified herself as Robert Ramsey’s “Durable Power of Attorney for Health Care/Legal

Guardian/Responsible Party” in the Arbitration Agreement. Id. Indeed, Mr. Ramsey had previously executed a valid Power of Attorney that appointed Ms. Rahn, as his POA. (See Power of Attorney attached as **Exhibit B**).

The parties to the Arbitration Agreement agreed that the South Carolina Uniform Arbitration Act would not apply; rather, arbitration would be governed by the Federal Arbitration Act (“FAA”), because the services and reimbursement thereof to be provided to Mr. Ramsey upon his admission to the facility involved interstate commerce. In accordance with the terms of this agreement, the Defendant respectfully requests that this matter be compelled to arbitration. Alternatively, this Defendant requests that these proceedings be stayed pending the outcome of arbitration pursuant to Section 3 of the FAA.

Defendant respectfully requests that this Honorable Court specifically stay any further requirement to file any responsive pleading as well as any requirement to respond to any other motions or discovery filed or served by Plaintiff while the current motion is pending.

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

[signature line on following page]

CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

James D. Gandy, III

SC State Bar ID No.: 11925

P.O. Box 993, Charleston, SC 29402

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

tgandy@ycrlaw.com; aphilips@ycrlaw.com

Attorneys for the St. George Health Care, LLC d/b/a

St. George Healthcare Center

Charleston, South Carolina

Dated: March 7, 2022

PLEASE READ CAREFULLY

FACILITY - RESIDENT/REPRESENTATIVE
ARBITRATION AGREEMENT

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

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

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

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

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

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

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

X Robert Ramsey
Resident/Representative Signature

8-9-9
Date

Robert Ramsey
Printed Name of Resident/Representative

[Signature]
Authorized Agent of Facility

8-9-9
Date

[Signature]
Printed Name & Title

DEFENDANT'S
EXHIBIT

A

Original: Business File • Photocopy: Resident/Representative

SOUTH CAROLINA HEALTH CARE POWER OF ATTORNEY

DEFENDANT'S
EXHIBIT

B

INFORMATION ABOUT THIS DOCUMENT

THIS IS AN IMPORTANT LEGAL DOCUMENT. BEFORE SIGNING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS:

1. THIS DOCUMENT GIVES THE PERSON YOU NAME AS YOUR AGENT THE POWER TO MAKE HEALTH CARE DECISIONS FOR YOU IF YOU CANNOT MAKE THE DECISION FOR YOURSELF. THIS POWER INCLUDES THE POWER TO MAKE DECISIONS ABOUT LIFE-SUSTAINING TREATMENT. UNLESS YOU STATE OTHERWISE, YOUR AGENT WILL HAVE THE SAME AUTHORITY TO MAKE DECISIONS ABOUT YOUR HEALTH CARE AS YOU WOULD HAVE.
2. THIS POWER IS SUBJECT TO ANY LIMITATIONS OR STATEMENTS OF YOUR DESIRES THAT YOU INCLUDE IN THIS DOCUMENT. YOU MAY STATE IN THIS DOCUMENT ANY TREATMENT YOU DO NOT DESIRE OR TREATMENT YOU WANT TO BE SURE YOU RECEIVE. YOUR AGENT WILL BE OBLIGATED TO FOLLOW YOUR INSTRUCTIONS WHEN MAKING DECISIONS ON YOUR BEHALF. YOU MAY ATTACH ADDITIONAL PAGES IF YOU NEED MORE SPACE TO COMPLETE THE STATEMENT.
3. AFTER YOU HAVE SIGNED THIS DOCUMENT, YOU HAVE THE RIGHT TO MAKE HEALTH CARE DECISIONS FOR YOURSELF IF YOU ARE MENTALLY COMPETENT TO DO SO. AFTER YOU HAVE SIGNED THIS DOCUMENT, NO TREATMENT MAY BE GIVEN TO YOU OR STOPPED OVER YOUR OBJECTION IF YOU ARE MENTALLY COMPETENT TO MAKE THAT DECISION.
4. YOU HAVE THE RIGHT TO REVOKE THIS DOCUMENT, AND TERMINATE YOUR AGENT'S AUTHORITY, BY INFORMING EITHER YOUR AGENT OR YOUR HEALTH CARE PROVIDER ORALLY OR IN WRITING.
5. IF THERE IS ANYTHING IN THIS DOCUMENT THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A SOCIAL WORKER, LAWYER, OR OTHER PERSON TO EXPLAIN IT TO YOU.
6. THIS POWER OF ATTORNEY WILL NOT BE VALID UNLESS TWO PERSONS SIGN AS WITNESSES. EACH OF THESE PERSONS MUST EITHER WITNESS YOUR SIGNING OF THE POWER OF ATTORNEY OR WITNESS YOUR ACKNOWLEDGMENT THAT THE SIGNATURE ON THE POWER OF ATTORNEY IS YOURS.

THE FOLLOWING PERSONS MAY NOT ACT AS WITNESSES:

- A. YOUR SPOUSE, YOUR CHILDREN, GRANDCHILDREN, AND OTHER LINEAL DESCENDANTS; YOUR PARENTS, GRANDPARENTS, AND OTHER LINEAL ANCESTORS; YOUR SIBLINGS AND THEIR LINEAL DESCENDANTS; OR A SPOUSE OF ANY OF THESE PERSONS.
- B. A PERSON WHO IS DIRECTLY FINANCIALLY RESPONSIBLE FOR YOUR MEDICAL CARE.
- C. A PERSON WHO IS NAMED IN YOUR WILL, OR, IF YOU HAVE NO WILL, WHO WOULD INHERIT YOUR PROPERTY BY INTESTATE SUCCESSION.

- D. A BENEFICIARY OF A LIFE INSURANCE POLICY ON YOUR LIFE.
- E. THE PERSONS NAMED IN THE HEALTH CARE POWER OF ATTORNEY AS YOUR AGENT OR SUCCESSOR AGENT.
- F. YOUR PHYSICIAN OR AN EMPLOYEE OF YOUR PHYSICIAN.
- G. ANY PERSON WHO WOULD HAVE A CLAIM AGAINST ANY PORTION OF YOUR ESTATE (PERSONS TO WHOM YOU OWE MONEY).

IF YOU ARE A PATIENT IN A HEALTH FACILITY, NO MORE THAN ONE WITNESS MAY BE AN EMPLOYEE OF THAT FACILITY.

- 7. YOUR AGENT MUST BE A PERSON WHO IS 18 YEARS OLD OR OLDER AND OF SOUND MIND. IT MAY NOT BE YOUR DOCTOR OR ANY OTHER HEALTH CARE PROVIDER THAT IS NOW PROVIDING YOU WITH TREATMENT; OR AN EMPLOYEE OF YOUR DOCTOR OR PROVIDER; OR A SPOUSE OF THE DOCTOR, PROVIDER, OR EMPLOYEE; UNLESS THE PERSON IS A RELATIVE OF YOURS.
- 8. YOU SHOULD INFORM THE PERSON THAT YOU WANT HIM OR HER TO BE YOUR HEALTH CARE AGENT. YOU SHOULD DISCUSS THIS DOCUMENT WITH YOUR AGENT AND YOUR PHYSICIAN AND GIVE EACH A SIGNED COPY. IF YOU ARE IN A HEALTH CARE FACILITY OR A NURSING CARE FACILITY, A COPY OF THIS DOCUMENT SHOULD BE INCLUDED IN YOUR MEDICAL RECORD.

SOUTH CAROLINA HEALTH CARE POWER OF ATTORNEY

1. DESIGNATION OF HEALTH CARE AGENT

I, Robert Ramsey, hereby appoint:
(Principal)

(Agent's Name) Jennifer Rahn

(Agent's Address) REDACTED

Telephone: home: REDACTED work: N/A mobile: REDACTED

as my agent to make health care decisions for me as authorized in this document.

Successor Agent: If an agent named by me dies, becomes legally disabled, resigns, refuses to act, becomes unavailable, or if an agent who is my spouse is divorced or separated from me, I name the following as successors to my agent, each to act alone and successively, in the order named:

a. First Alternate Agent: Keirsten C. Rahn

Address: REDACTED

Telephone: home: N/A work: REDACTED mobile: REDACTED

b. Second Alternate Agent:

Address: _____

Telephone: home: _____ work: _____ mobile: _____

Unavailability of Agent(s): If at any relevant time the agent or successor agents named here are unable or unwilling to make decisions concerning my health care, and those decisions are to be made by a guardian, by the Probate Court, or by a surrogate pursuant to the Adult Health Care Consent Act, it is my intention that the guardian, Probate Court, or surrogate make those decisions in accordance with my directions as stated in this document.

2. EFFECTIVE DATE AND DURABILITY

By this document I intend to create a durable power of attorney effective upon, and only during, any period of mental incompetence, except as provided in Paragraph 3 below.

3. HIPAA AUTHORIZATION

When considering or making health care decisions for me, all individually identifiable health information and medical records shall be released without restriction to my health care agent(s) and/or my alternate health care agent(s) named above including, but not limited to, (i) diagnostic, treatment, other health care, and related insurance and financial records and information associated with any past, present, or future physical or mental health condition including, but not limited to, diagnosis or treatment of HIV/AIDS, sexually transmitted disease(s), mental illness, and/or drug or alcohol abuse and (ii) any written opinion relating to my health that such health care agent(s) and/or alternate health care agent(s) may have requested. Without limiting the generality of the foregoing, this release authority applies to all health information and medical records governed by the Health Information Portability and

Accountability Act of 1996 (HIPAA), 42 USC 1320d and 45 CFR 160-164; is effective whether or not I am mentally competent; has no expiration date; and shall terminate only in the event that I revoke the authority in writing and deliver it to my health care provider.

4. AGENT'S POWERS

I grant to my agent full authority to make decisions for me regarding my health care. In exercising this authority, my agent shall follow my desires as stated in this document or otherwise expressed by me or known to my agent. In making any decision, my agent shall attempt to discuss the proposed decision with me to determine my desires if I am able to communicate in any way. If my agent cannot determine the choice I would want made, then my agent shall make a choice for me based upon what my agent believes to be in my best interests. My agent's authority to interpret my desires is intended to be as broad as possible, except for any limitations I may state below.

Accordingly, unless specifically limited by the provisions specified below, my agent is authorized as follows:

- A. To consent, refuse, or withdraw consent to any and all types of medical care, treatment, surgical procedures, diagnostic procedures, medication, and the use of mechanical or other procedures that affect any bodily function, including, but not limited to, artificial respiration, nutritional support and hydration, and cardiopulmonary resuscitation;
- B. To authorize, or refuse to authorize, any medication or procedure intended to relieve pain, even though such use may lead to physical damage, addiction, or hasten the moment of, but not intentionally cause, my death;
- C. To authorize my admission to or discharge, even against medical advice, from any hospital, nursing care facility, or similar facility or service;
- D. To take any other action necessary to making, documenting, and assuring implementation of decisions concerning my health care, including, but not limited to, granting any waiver or release from liability required by any hospital, physician, nursing care provider, or other health care provider; signing any documents relating to refusals of treatment or the leaving of a facility against medical advice, and pursuing any legal action in my name, and at the expense of my estate to force compliance with my wishes as determined by my agent, or to seek actual or punitive damages for the failure to comply.
- E. The powers granted above do not include the following powers or are subject to the following rules or limitations:

5. ORGAN DONATION (INITIAL ONLY ONE)

My agent may RA ☒; may not ☐ consent to the donation of all or any of my tissue or organs for purposes of transplantation.

6. EFFECT ON DECLARATION OF A DESIRE FOR A NATURAL DEATH (LIVING WILL)

I understand that if I have a valid Declaration of a Desire for a Natural Death, the instructions contained in the Declaration will be given effect in any situation to which they are applicable. My agent will have authority to make decisions concerning my health care only in situations to which the Declaration does

not apply.

7. STATEMENT OF DESIRES CONCERNING LIFE-SUSTAINING TREATMENT

With respect to any Life-Sustaining Treatment, I direct the following:

(INITIAL ONLY ONE OF THE FOLLOWING 3 PARAGRAPHS)

(1) RR GRANT OF DISCRETION TO AGENT. I do not want my life to be prolonged nor do I want life-sustaining treatment to be provided or continued if my agent believes the burdens of the treatment outweigh the expected benefits. I want my agent to consider the relief of suffering, my personal beliefs, the expense involved and the quality as well as the possible extension of my life in making decisions concerning life-sustaining treatment.

OR

(2) ____ DIRECTIVE TO WITHHOLD OR WITHDRAW TREATMENT. I do not want my life to be prolonged and I do not want life-sustaining treatment:

a. if I have a condition that is incurable or irreversible and, without the administration of life-sustaining procedures, expected to result in death within a relatively short period of time; or

b. if I am in a state of permanent unconsciousness.

OR

(3) ____ DIRECTIVE FOR MAXIMUM TREATMENT. I want my life to be prolonged to the greatest extent possible, within the standards of accepted medical practice, without regard to my condition, the chances I have for recovery, or the cost of the procedures.

8. STATEMENT OF DESIRES REGARDING TUBE FEEDING

With respect to Nutrition and Hydration provided by means of a nasogastric tube or tube into the stomach, intestines, or veins, I wish to make clear that in situations where life-sustaining treatment is being withheld or withdrawn pursuant to Item 7, (INITIAL ONLY ONE OF THE FOLLOWING THREE PARAGRAPHS):

(a) RR GRANT OF DISCRETION TO AGENT. I do not want my life to be prolonged by tube feeding if my agent believes the burdens of tube feeding outweigh the expected benefits. I want my agent to consider the relief of suffering, my personal beliefs, the expense involved, and the quality as well as the possible extension of my life in making this decision.

OR

(b) ____ DIRECTIVE TO WITHHOLD OR WITHDRAW TUBE FEEDING. I do not want my life prolonged by tube feeding.

OR

(c) ____ DIRECTIVE FOR PROVISION OF TUBE FEEDING. I want tube feeding to be provided within the standards of accepted medical practice, without regard to my condition, the chances I have for recovery, or the cost of the procedure, and without regard to whether other forms of life-sustaining treatment are being withheld or withdrawn.

IF YOU DO NOT INITIAL ANY OF THE STATEMENTS IN ITEM 8, YOUR AGENT WILL NOT

HAVE AUTHORITY TO DIRECT THAT NUTRITION AND HYDRATION NECESSARY FOR COMFORT CARE OR ALLEVIATION OF PAIN BE WITHDRAWN.

9. ADMINISTRATIVE PROVISIONS

A. I revoke any prior Health Care Power of Attorney and any provisions relating to health care of any other prior power of attorney.

B. This power of attorney is intended to be valid in any jurisdiction in which it is presented.

BY SIGNING HERE I INDICATE THAT I UNDERSTAND THE CONTENTS OF THIS DOCUMENT AND THE EFFECT OF THIS GRANT OF POWERS TO MY AGENT.

I sign my name to this Health Care Power of Attorney on

this 25 day of August, 20 11. My current home address is

REDACTED

Principal's Signature: Robert Ramsey

Print Name of Principal: Robert Ramsey

I declare, on the basis of information and belief, that the person who signed or acknowledged this document (the principal) is personally known to me, that he/she signed or acknowledged this Health Care Power of Attorney in my presence, and that he/she appears to be of sound mind and under no duress, fraud, or undue influence. I am not related to the principal by blood, marriage, or adoption, either as a spouse, a lineal ancestor, descendant of the parents of the principal, or spouse of any of them. I am not directly financially responsible for the principal's medical care. I am not entitled to any portion of the principal's estate upon his decease, whether under any will or as an heir by intestate succession, nor am I the beneficiary of an insurance policy on the principal's life, nor do I have a claim against the principal's estate as of this time. I am not the principal's attending physician, nor an employee of the attending physician. No more than one witness is an employee of a health facility in which the principal is a patient. I am not appointed as Health Care Agent or Successor Health Care Agent by this document.

Witness No. 1

Signature: [Signature]

Date: 8/25/16

Print Name: Thurston Hiers

Telephone: REDACTED

Address: REDACTED

Witness No. 2

Signature: [Signature]

Date: 8/25/16

Print Name: Donna Steel

Telephone: REDACTED

Address: REDACTED

(This portion of the document is optional and is not required to create a valid health care power of attorney.)

STATE OF SOUTH CAROLINA

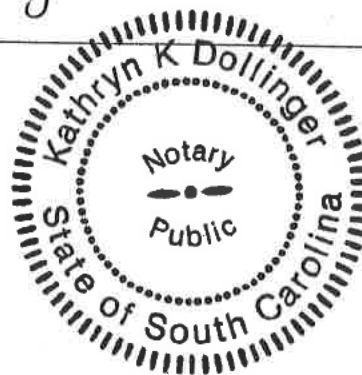
COUNTY OF Colleton

The foregoing instrument was acknowledged before me by Principal on August 25,
20 16.

Notary Public for South Carolina

My Commission Expires:

Kathryn K Dollinger
May 5, 2025



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
JENNIFER RAHN, AS PERSONAL	)	CASE NO. 2021-CP-15-00657
REPRESENTATIVE OF THE ESTATE	)	
OF ROBERT RAMSEY,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	DEFENDANT’S MEMORANDUM IN
	)	SUPPORT OF MOTION TO DISMISS
PRIORITY HOME CARE, LLC, AND	)	PLAINTIFF’S COMPLAINT, COMPEL
ST. GEORGE HEALTH CARE, LLC,	)	ARBITRATION AND STAY STATE
D/B/A ST. GEORGE HEALTHCARE	)	COURT PROCEEDINGS
CENTER ,	)	
	)	
DEFENDANTS.	)	
	)	

COMES NOW Defendant St. George Health Care, LLC d/b/a St. George Healthcare Center (the “Facility”), by and through its undersigned counsel, and submits this Memorandum in Support of its Motions to Dismiss Plaintiff’s Complaint, Compel Arbitration, and Stay State Court Proceedings, pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (“FAA”).

INTRODUCTION

In this nursing home malpractice action, Plaintiff, Jennifer Rahn, as personal representative of her late-father, Robert Ramsey, has sued for damages based on allegations that solely arise out of and concern Mr. Ramsey’s residency at the Facility. However, in conjunction with Mr. Ramsey’s admission to the Facility, Ms. Rahn, acting on behalf of Mr. Ramsey, executed not only an Admission Agreement but also an Arbitration Agreement that covers all claims asserted against the Facility in this lawsuit and requires that those claims proceed in arbitration, not litigation. See **Exhibit 1** – Admission Agreement; See **Exhibit 2** - Arbitration Agreement.

When she executed the Admission Agreement and the Arbitration Agreement, Ms. Rahn expressly represented to the Facility that she was duly authorized to act on Mr. Ramsey's behalf. And from then on (i.e. through the end of his residency at the Facility), Mr. Ramsey received and accepted the direct benefits of his admission, with no complaint being raised about the actions Ms. Rahn took on his behalf prior to Plaintiff's opposition to the Facility's present efforts to enforce the Arbitration Agreement.

As discussed further herein, the Arbitration Agreement is enforceable—or, alternatively, under the circumstances, Plaintiff should be estopped to deny its enforceability—it covers the entirety of Plaintiff's claims against Defendants, and it requires that those claims proceed in arbitration, not litigation. Accordingly, the Facility respectfully requests that the Court compel Plaintiff's claims to arbitration.

BACKGROUND

With the help of his daughter, Ms. Rahn, Mr. Ramsey was admitted to the Facility on August 9, 2019. Ms. Rahn handled the paperwork in conjunction with Mr. Ramsey's admission, and in so doing, Ms. Rahn executed an Admission Agreement and an Arbitration Agreement on Mr. Ramsey's behalf, both of which were duly countersigned by the Facility's representative. See **Exhibit 1 – Admission Agreement**; **Exhibit 2 – Arbitration Agreement**; see also **Exhibit 3 - Other Written Consents**.

Accordingly, Mr. Ramsey was admitted to the Facility, and he received and accepted the benefits of the Admission Agreement, which included the Facility furnishing him a room, providing routine meals, and rendering nursing, personal, and custodial care. Notably, Plaintiff does not assert that the Admission Agreement is invalid or that Ms. Rahn lacked authority to execute it for Mr. Ramsey. The only document that Plaintiff now disputes she had authority to sign is the Arbitration

Agreement—which is in direct contradiction to the representation she made to the Facility when she signed it.

Ms. Rahn explicitly represented that she was authorized to admit Mr. Ramsey to the Facility and execute the documents she executed on his behalf. The very first provision of the Admission Agreement states that *all information provided to the Facility* is truthful and correct, including, of course, Ms. Rahn’s authority to bind Mr. Ramsey. See Ex. 1. Ms. Rahn signed the Admission Agreement on behalf of Mr. Ramsey as his “Representative,” as defined therein.

In pertinent part, the Arbitration Agreement provides as follows:

It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility’s Admission Agreement, or breach thereof, or relating in any way to Resident’s stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively “Disputes”), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules. See Ex. 2.

The Arbitration Agreement further provides:

The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law. See Ex. 2.

Regarding Ms. Rahn’s authority to sign on behalf of her father, the Arbitration Agreement states:

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

the Resident as well as the Representative. See Ex. 2 (emphasis added).

The Arbitration Agreement was executed by Ms. Rahn as “Representative” of Mr. Ramsey, and countersigned by the Admissions Director for the Facility.

ARGUMENT

I. BOTH STATE AND FEDERAL POLICY FAVORS ARBITRATION.

As a general matter, there is a strong presumption in favor of the validity of arbitration agreements because of strong policy considerations favoring arbitration. O’Neil v. Hilton Head Hosp., 115 F.3d 272, 273 (4th Cir. 1997). Indeed, both federal and state policy favors arbitrating disputes. Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995) (“The policy of the United States and this State is to favor arbitration of disputes.”). “This preference for arbitration has manifested itself in legislation and judicial decisions supporting the expeditious appeal of decisions denying an application to compel arbitration.” Towles v. United HealthCare Corp., 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999). Therefore, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” Id. at 41, 524 S.E.2d at 846 (internal quotations and citations omitted). Further, arbitration agreements are presumed valid, and “[t]he 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, 91 (2000).

II. THE FAA GOVERNS THE ARBITRATION AGREEMENT.

The Arbitration Agreement, by its terms and by law, is governed by the FAA. For one reason, the Arbitration Agreement expressly states that the FAA applies:

The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the [FAA], notwithstanding any contrary provision of this Agreement or contrary state law.

See Ex. 2. This must be enforced like any other contract term. Damico v. Lennar Carolinas, LLC, 430 S.C. 188, 196, 844 S.E.2d 66, 70 (Ct. App. 2020) (“We first consider whether the FAA applies. We hold it does, for two reasons. First, the [subject contract] provides the parties ‘specifically agree that this transaction involves interstate commerce.’ We must enforce this agreement like any other contract term.”) (citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363–64 (2001) (finding the FAA applied because the parties had agreed the subject contract involved interstate commerce)).

Moreover, and in any event, the FAA applies “to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.” Munoz, 343 S.C. at 538, 542 S.E.2d at 363; see also Allied–Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress’s power under the Commerce Clause). The Supreme Court of South Carolina has expressly held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014).

III. THE FAA REQUIRES ARBITRATION AGREEMENTS TO BE PLACED ON EQUAL FOOTING WITH ALL OTHER CONTRACTS UNDER SOUTH CAROLINA LAW.

“[T]he basic purpose of the [FAA] is to overcome courts’ refusals to enforce agreements to arbitrate”¹ and “ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement.” Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). To that end, the FAA provides that an arbitration agreement is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. “By its terms, the [FAA] leaves no place for the exercise of discretion by a . . . court, but instead mandates that . . . courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985) (emphasis added); see also 9 U.S.C. § 4 (“The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.”) (emphasis added).

While a court may invalidate an arbitration agreement based on “generally applicable contract defenses,” it may not do so based on legal rules that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” Kindred Nursing Centers Ltd. P’ship v. Clark, 137 S. Ct. 1421, 1423 (2017) (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011)). Under the FAA, “courts must place arbitration agreements on equal footing with other contracts . . .” Concepcion at 339 (emphasis added); see also Allied–Bruce, 513 U.S. at 281 (“States may regulate contracts, including arbitration clauses,

¹ Allied–Bruce, 513 U.S. at 270.

under general contract law principles and they may invalidate an arbitration clause ‘upon such grounds as exist at law or in equity for the revocation of any contract.’ What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal ‘footing,’ directly contrary to the Act’s language and Congress’ intent.”) (emphasis added) (internal citations omitted).²

IV. THE ARBITRATION AGREEMENT IS VALID ON ITS FACE.

The Arbitration Agreement is valid on its face: there is nothing within the four corners of the document itself that calls its validity into question.

A. It is not deficient as a matter of form.

The Arbitration Agreement is duly completed and executed, bearing Ms. Rahn’s signature on behalf of Mr. Ramsey, along with Ms. Rahn’s express representation of her authority to sign for Mr. Ramsey,³ and it likewise bears the signature of the Facility’s representative.

B. It is duly supported by consideration.

² To be clear, what the FAA requires is for arbitration agreements to be placed on *at least* equal footing with all other contracts under state law. As explained above, both state and federal policy *favours* arbitration. The FAA prohibits arbitration agreements from being singled out for *disfavored* treatment relative to other contracts, but it does not prohibit the *favoured* treatment of arbitration agreements relative to other contracts.

³ In this regard, it should be noted that, by virtue of her signature, Ms. Rahn is “presumed to have read, understood, and assented to [the] terms” of the Arbitration Agreement, Gibson v. Epting, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) (“[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms.”), including, of course, the express representation therein of her authority to act on Mr. Ramsey’s behalf. Moreover, there is an implied covenant of good faith and fair dealing in every contract, Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (“There exists in every contract an implied covenant of good faith and fair dealing.”), and Ms. Rahn is no less bound by this covenant than the Facility.

The Arbitration Agreement is duly supported by consideration, containing, as it does, the parties' mutual promises to arbitrate. O'Neil, 115 F.3d at 275 ("A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement.") (citing Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 304, 468 S.E.2d 292, 300 (1996) ("[T]he exchange of promises qualified as consideration."); see also Evatt v. Campbell, 234 S.C. 1, 8, 106 S.E.2d 447, 451 (1959) ("Mutual promises also constitute a good consideration.").

C. It does not omit, or fail to sufficiently state, any material term.

The Arbitration Agreement sets forth the parties' mutual concurrent promises to submit a defined scope of disputes to binding arbitration. It provides that the arbitration will be before an arbitrator who is either agreed upon by the parties themselves or selected by the Court,⁴ in a proceeding to be conducted pursuant to the South Carolina ADR Rules,⁵ which will result in a decision that is enforceable in a court of competent jurisdiction. No more is required. *York*, 406

⁴ To be clear, if the Court is called upon to select the arbitrator, in doing so, it will not be "writing in" a missing term of the Arbitration Agreement but rather enforcing the terms already set forth therein. And in any event, "the lack of a specified arbiter is not an omission of a material term." York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 82, 749 S.E.2d 139, 147 (Ct. App. 2013); see also FAA § 5 (providing a fallback mechanism for arbitrator selection "if for any other reason there shall be a lapse in the naming of an arbitrator . . . or in filling a vacancy . . .": "If in the [arbitration] agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.").

⁵ Rule 12 of the SC ADR Rules includes substantive evidentiary and procedural provisions, and by it plain language provides that parties may agree to apply them in binding arbitration, as is the case here. See Rule 12(a), SCADR ("Arbitrations selected by the parties under these rules are deemed non-binding arbitrations *unless otherwise expressly agreed by the parties.*") (emphasis added); see also Rule 13(a), SCADR ("The arbitrator shall at all times be authorized to control the hearing and the procedures to be followed.").

S.C. at 83, 749 S.E.2d at 147 (explaining that matters like discovery rules, cost allocations, or arbitration initiation procedures are not material terms but rather “‘ancillary logistical’ ones” that are “not required within an arbitration agreement”) (citing Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 131–32, 678 S.E.2d 438, 439 (2009)). And to require more simply because an arbitration agreement is in issue would violate the FAA’s requirement that arbitration agreements be placed on equal footing with all other contracts. Concepcion, 563 U.S. at 339.

D. It is not unconscionable.

The Arbitration Agreement is not unconscionable. For an agreement to be deemed unconscionable, there must be both (1) an absence of meaningful choice on the part of one party due to one-sided contract provisions and (2) terms that are so oppressive 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, 25, 644 S.E.2d 663, 668 (2007). Neither is the case here.

The party alleging that the enforcement of a contract would be unconscionable bears the burden of proving both prongs of the definition. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000); accord Marzulli v. Tenet S.C., Inc., No. 2015-002363, 2018 WL 1531507, at *3 (S.C. Ct. App. Mar. 28, 2018). In this case, Plaintiff bears that burden. “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.” Simpson, 373 S.C. 14, 25, 644 S.E.2d 663, 669. “Meaningful choice” refers specifically to the bargaining process involved in entering into the Arbitration Agreement. The Arbitration Agreement clearly articulates that the resident entering into the Agreement is fully aware of his or her healthcare options and other potential providers of nursing home facilities. The Agreement states:

It is understood by Resident/Representative that he/she is not required to use the aforesaid Health Care Center for Resident's healthcare needs and that there are

numerous other health care providers in the State where Health Care Center is located that are qualified to provide such care to Resident. (See Ex. 2, ¶ 2.)

Furthermore, on that same signature page, the Arbitration Agreement states clearly in bold lettering in a separate heading: “**I understand and agree that I am giving up and waiving my right to a jury trial.**” (See Ex. 2, ¶ 6.)

By signing the Arbitration Agreement and Admission Agreement, Ms. Rahn, acting on behalf of Mr. Ramsey, represented that she understood and assented to their terms. Gibson, 426 S.C. at 352, 827 S.E.2d at 181. Indeed, she was given the option of entering into the Arbitration Agreement – *or not* – and she freely and voluntarily made the decision to proceed. The Arbitration Agreement by its plain language was not a precondition of admission to the Facility and simply could not have been an adhesion or “take it or leave it” contract. Ms. Rahn had the option not to enter into the Arbitration Agreement on behalf of her uncle, yet she voluntarily did so, voluntarily did not retract her agreement thereto, and her uncle stayed at the Facility and received skilled nursing care after admission.

The fact that the Facility is a commercial entity is also not sufficient grounds, standing alone, to prove the absence of a “meaningful choice.” While disparity in bargaining power and relative sophistication are factors to be considered under Simpson, the fact that the Facility unilaterally drafted this agreement and presented it to Mr. Ramsey’s representative for consideration cannot justify a finding of unconscionability. See Munoz v. Green Tree Financial Corp., 343 S.C. 531, 542 S.E.2d 360, 365 n. 5 (2001) (“[I]nequality of bargaining power alone will not invalidate an arbitration agreement.”).

The Facility gave Mr. Ramsey the option of entering into the Arbitration Agreement and, acting on his behalf, Ms. Rahn made the decision to proceed. She did not have to accept this offer nor has there been any allegation or evidence that the Facility coerced Ms. Rahn into signing.

Nonetheless, even if Plaintiff could demonstrate that there was an absence of meaningful choice, a finding of unconscionability would still not be warranted in the present case, as Plaintiff must still show that the “terms [of the agreement] are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” Simpson, 373 S.C. at 25, 644 S.E.2d at 669.

The Arbitration Agreement simply binds the parties (both sides) to submit to arbitration. Not only is this not oppressive, “both state and federal policy favor arbitration of disputes.” Simpson, 373 S.C. at 24, 644 S.E.2d at 668.⁶ And there is nothing about the Arbitration Agreement

⁶ In this regard, the Facility is compelled to address language in our Supreme Court’s decision in Palmetto Construction Group, LLC v. Restoration Specialists, LLC, 432 S.C. 633, 856 S.E.2d 150 (2021), that “statements [in our appellate jurisprudence] that the law ‘favors’ arbitration”—which are numerous, e.g., Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc., 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016) (“The policy of the United States and of South Carolina is to favor arbitration of disputes.”); Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (same); Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 455, 730 S.E.2d 312, 316 (2012) (“There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration.”) (quoting Towles v. United HealthCare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999))—“mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions” and that “[t]here is . . . no public policy—federal or state—‘favoring’ arbitration.” Palmetto Construction Group, 432 S.C. at 636, 639, 856 S.E.2d at 152, 153. Candidly, it is impossible to square this language in Palmetto Construction Group with language in other Supreme Court decisions, for instance, the language in Zabinski (which the Court thereafter echoed in Parsons) that “[t]he policy of the United States and South Carolina is to *favor arbitration of disputes*.” 346 S.C. at 596, 553 S.E.2d at 118 (emphasis added). More than just recognizing that contractual provisions to arbitrate must be respected and enforced in the same way as other contractual provisions, this plain language expressly recognizes the existence of a public policy—federal and state—that “favor[s] arbitration *as a method of dispute resolution*.” Moreover, the Zabinski Court instructs that “[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration;” that, “unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered;” and that “[a] motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute.” *Id.* at 597, 553 S.E.2d at 118–19. These rules do not merely ensure that contractual provisions to arbitrate are respected and enforced in the same way as other contractual provisions: They affirmatively tip the scales in favor of arbitration. Indeed, citing our Supreme Court’s decision in Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 747 S.E.2d 461 (2013), our Court of Appeals has

that suggests it is not geared towards achieving an unbiased decision by a neutral decision-maker. Id. at 25, 644 S.E.2d at 668 (“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.”).

Under the terms of the Arbitration Agreement, the parties are to select a third party arbitrator *jointly* “from a panel having experience and knowledge of the health care industry.” (See **Ex. 2.**) If the parties are unable to agree upon such an arbitrator, the agreement vests the Court with authority to make a selection. The selected neutral arbitrator is vested with authority to hear the case and make a decision which is “binding on all parties.” As a result, it can only be said that the Arbitration Agreement allows for complete mutuality of remedies. Neither party is given an advantage by its terms.

And, out of an abundance of caution, it cannot be said that there is any incongruity between the arbitration process and the discovery needs in nursing home malpractice cases. First off, this would amount to a wholesale attack on the enforceability of arbitration agreements in the nursing home malpractice context, which violates the FAA. See Concepcion, 563 U.S. at 339 (instructing that arbitration agreements must be placed on equal footing with other contracts and that, while a court may set aside arbitration agreements by state-law defenses that govern the validity, revocability, and enforceability of contracts generally, it may not do so “by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue”).

expressly recognized that “[d]ue to the strong South Carolina and federal policy favoring arbitration, arbitration agreements are *presumed valid*.” Doe v. TCSC, LLC, 430 S.C. 602, 607, 846 S.E.2d 874, 877 (Ct. App. 2020) (emphasis added) (citing Cape Romain Contractors, 405 S.C. at 125, 747 S.E.2d at 466)).

Moreover, there is in fact no cause for any such concern. Again, the Arbitration Agreement calls for arbitration to be conducted under the South Carolina ADR Rules, the South Carolina ADR Rules are required (“shall”) to be “construed to secure the just, speedy, inexpensive and collaborative resolution” of disputes, and an arbitration proceeding that amounts to a trial by ambush and/or would be unduly burdensome in terms of expense would not be consistent with the South Carolina ADR Rules. Coupled with the mandate that they be “construed to secure the just, speedy, inexpensive and collaborative resolution,” the South Carolina ADR Rules—see, e.g., Rule 11(c) (“The parties and their representatives shall cooperate with the arbitrator.”); Rule 12(b)(3) (“The arbitrator shall have the authority of a trial judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all contempt matters to the Chief Judge for Administrative Purposes.”); Rule 13(a) (“The arbitrator shall at all times be authorized to control the hearing and the procedures to be followed.”); Rule 13(b) (“The arbitrator shall define and describe the following to the parties: . . . (2) The duties and responsibilities of the arbitrator and the parties; and (3) The cost of the arbitration hearing.”)—provide all the tools necessary for the proceedings, including discovery therein, to be conducted in a way that affords Plaintiff a substantively and procedurally fair and meaningful opportunity to present her case in arbitration, with no more limitation thereon than that which is inherent in the arbitration process generally as an alternative to litigation, an alternative, which, again, “both state and federal policy favor” Simpson, 373 S.C. at 24, 644 S.E.2d at 668.

Lastly, the United States District Court for the District of South Carolina and trial courts around South Carolina have repeatedly upheld the validity of arbitration agreements nearly identical to the one at issue in this matter. In evaluating these arbitration agreements in the context of nursing home admissions, federal courts in South Carolina have all agreed that these agreements

are not unconscionable. McCutcheon, *supra*, at *3; THI of S.C. at Columbia, LLC v. Wiggins, C/A No. 3:11-888-CMC, 2011 WL 4089435, at *6 (D.S.C. Sept. 13, 2011) (Currie, J.); Benson v. THI of S.C. at Charleston, LLC, No. C.A. No. 7:11-CV-2613-HMH (D.S.C. Nov. 30, 2011) (attached hereto as **Exhibit 10**). Along similar lines, any holding that the Arbitration Agreement at issue is unconscionable simply because it was executed in the context of an admission to the skilled nursing facility would be in violation of the clear precedent under *Kindred* and the FAA, which instruct that arbitration agreements must be placed on equal footing with all other types of contracts. Accordingly, any argument by Plaintiff that the Arbitration Agreement is unconscionable is unfounded and must be rejected.

V. PLAINTIFF’S CLAIMS ARE WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT.

Without question, Plaintiff’s claims against Defendants are within the scope of the Arbitration Agreement. In pertinent part, the Arbitration Agreement reads as follows:

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

This plain language clearly embraces the subject matter of Plaintiff’s claims. And even if there were “any doubts concerning the scope of arbitrable issues[,] [they] should be resolved in favor of arbitration” Towles, 338 S.C. at 41, 524 S.E.2d at 846; *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001) (“[U]nless the court can say with positive

assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.”).

VI. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE, OR, ALTERNATIVELY, PLAINTIFF SHOULD BE ESTOPPED TO DENY ITS ENFORCEABILITY.

A. Plaintiff’s Attestation of Authority in the Arbitration Agreement Binds Plaintiff to the Arbitration Agreement as it is a Facially Valid Contract.

Ms. Rahn represented herself to staff and admissions personnel at the Facility as her father’s representative, with the authority to sign documents on his behalf, make decisions on his behalf and bind Mr. Ramsey and herself pursuant to those documents. Indeed, immediately above Plaintiff’s signature on the Arbitration Agreement, Plaintiff attests in bold font:

By his/her signature below, **the executing party represents that he/she has the authority to sign on Resident’s behalf so as to bind the Resident as well as the Representative.** (See Ex. 2)(emphasis added).

Ms. Rahn indisputably represented to the Facility that she had authority to act on behalf of her father in executing the Arbitration Agreement. It was clearly Plaintiff’s intention to bind both her father, Mr. Ramsey, and herself on the face of the Arbitration Agreement according to its plain language.

Notably, the Court faced facts similar to the ones at bar in Macie Price v. THI of South Carolina at Magnolia Manor Inman, LLC et. al, 2018-CP-42-01054 (S.C. Com. Pls. August 7, 2018) (*See Price* Order Granting Defendant’s Motion to Compel Arbitration, attached hereto as **Exhibit 5**) and in Josephine Spears v. Rehab Center of Cheraw, LLC et al, 2019-CP-13-00308 (January 10, 2020) (*See Spears* Order Granting Defendant’s Motion to Compel Arbitration, attached hereto as **Exhibit 6**). In both of these cases, the plaintiff was the wife of a skilled nursing home resident at a skilled nursing facility in South Carolina. Further, the applicable resident’s wife

executed a number of documents on her husband's behalf upon the latter's admission to the facility, including an admissions agreement and arbitration agreement similar to the ones in the case at bar. (See Ex. 5, p. 2-3; see Ex. 6, p. 1). In both Price and Spears, despite each wife's representation to the respective skilled nursing facility that she had authority to enter into the arbitration agreement on behalf of her husband, after the defendant skilled nursing facility moved to compel arbitration, each wife subsequently filed an affidavit refuting that she actually had authority in opposition to the defendant's motion to compel arbitration. **However, in both Price and Spears this Court found that the signatory plaintiff's attestation of authority in the arbitration agreement bound plaintiff to its terms.** The circumstances are no different in the instant matter before the Court.

Specifically, this Court determined in Price that "the terms of the Arbitration Agreement clearly apply to the instant dispute[.]" because was it clearly the intent of the wife to bind her husband (and herself, as personal representative) according to the plain language terms of the arbitration agreement. (See Ex. 5, p. 5). Likewise, in Spears, the arbitration agreement at issue contained an express attestation of authority to enter into the agreement on behalf of the resident very similar to Plaintiff's attestation in the Arbitration Agreement noted above.⁷ As such, this Court in Spears held, in part, that the wife's authority to sign the arbitration agreement at issue was "valid on its face" by its plain language (and indeed the arbitration agreement as a whole was

⁷ The arbitration agreement at issue in Spears contained the exact same attestation of authority as this case: "By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative."

found to be valid on its face) and that the skilled nursing facility had no obligation whatsoever to inquire as to the signatory plaintiff's authority beyond her own attestation. (See Ex. 6, p. 4).

As in Price and in Spears, Plaintiff in this matter expressly attested to her own authority to enter into the Arbitration Agreement on behalf of her father, Mr. Ramsey, and herself. As further discussed herein, Plaintiff is competent now to serve as the Personal Representative in this litigation and there is absolutely no reason to believe she was not competent to have entered into the Arbitration Agreement as of August 9, 2019. By signing the Arbitration Agreement, Plaintiff is "presumed to have read, understood, and assented to [the] terms" of it. Gibson v. Epting, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) ("[O]ne who has signed a contract is presumed to have read, understood and assented to its terms."). Therefore, the Court should find that Plaintiff is bound by the plain language of the Arbitration Agreement and the authority that she attested to therein is sufficient to enforce the Arbitration Agreement and compel this matter to arbitration.

B. The Arbitration Agreement and the Admission Agreement Merged (i.e., Should be Construed Together as a Single Contract), and Plaintiff Should Be Estopped from Denying the Enforceability of the Arbitration Agreement.

As an additional ground to compel arbitration, the Admissions Agreement and Arbitration Agreement should be construed together (i.e., merged) and, Mr. Ramsey having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff should be equitably estopped to deny the enforceability of the Arbitration Agreement merged therewith.

(1) Merger

Courts in South Carolina construe contemporaneous instruments together; if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another,

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

Indeed, in Coleman v. Mariner Health Care, Inc., even though our Supreme Court found against merger on the particular facts of the case, it nonetheless confirmed the validity of the general proposition of law on which the Coleman appellants based their merger/equitable estoppel argument in the very context of nursing home admission agreements and arbitration agreements. 407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (“Appellants’ equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. . . . Here, the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.”).

The court in McCutcheon analyzed facts almost identical to the case at bar and determined that the arbitration agreement and admissions agreement had merged for purposes of equitable estoppel. McCutcheon v. THI of S.C. at Charleston, LLC, No. 2:11-CV-02861, 2011WL6318575 (See **Exhibit 7**). Indeed, this Court has cited to McCutcheon on numerous occasions in holding that a nursing home arbitration agreement merged with the admission agreement for purposes of equitable estoppel under precisely the same circumstances. See Abrams v. Fundamental Long-term Care Holdings, LLC, et al, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); Campsen v. Fundamental Long-Term Care Holdings, LLC et al, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012). See Abrams and Campsen attached hereto as **Exhibits 8 and 9**, respectively.

The Admission Agreement and the Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction.⁸ They should be considered merged, i.e., they should be considered and construed together as effectively one contract.

(2) Equitable Estoppel of Merged Agreement

⁸ To be clear, Coleman unequivocally answers the question of whether the Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. As the Coleman Court expressly observed regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), “the documents *were* executed at *the same time, by the same parties, for the same purposes, and in the course of the same transaction.*” 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

“South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including . . . estoppel.” Wilson v. Willis, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019). “Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity.” Int’l Paper Co. v. Schwabedissen Maschinen & Anlaeen GMBH, 206 F.3d 411, 417-18 (4th Cir. 2000) (citation and internal quotation marks omitted). “A nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause.’” Id. (quoting Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999)); see also Pearson v. Hilton Head Hosp., 400 S.C. 281, 290–297, 733 S.E.2d 597, 601–605 (Ct. App. 2012) (applying the direct benefits test as set forth in International Paper Co. to reverse the circuit court’s denial of a motion to compel arbitration); Wilson, 426 S.C. at 339–345, 827 S.E.2d at 174–177 (favorably discussing the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals’ earlier decision in *Pearson*, 400 S.C. 281, 733 S.E.2d 597, and under which Defendants contend Plaintiff is estopped to deny the enforceability of the Arbitration Agreement here, where Mr. Ramsey received direct benefits (in the form of his admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement merged); see also *id.* at 340, 827 S.E.2d at 175 n. 6 (while expressing no opinion on the petitioner’s alternative argument based on the application of the state’s “traditional” six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., “[t]he traditional test referenced by [the] [p]etitioners,” “has been analyzed most-often in *non*-arbitration cases”) (emphasis added).

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

“Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract.” E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates S.A.S., 269 F.3d 187, 200 (3d Cir. 2001)(citing Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999) (finding non-signatory derived benefit from contract and could not avoid the arbitration clause contained therein)). As noted by the Federal District Court in Jackson v. Iris.com:

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

. . . .

[W]here . . . a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine estops the non-signatory from claiming that he is not bound to the arbitration agreement when he receives a direct benefit from a contract containing an arbitration clause.

524 F. Supp. 2d 742, 749-50 (E.D. Va. 2007) (quoting in part Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bide. Corp., 659 F.2d 836, 839 (7th Cir. 1981) (citing in part Int'l Paper Co., 206 F.3d at 416) (internal quotations omitted)).⁹

The key to determining when direct benefits estoppel may be applied is whether the contractual benefits flowing to the nonsignatory, i.e., the party to be estopped, are direct or indirect. See Wilson, 426 S.C. at 343, 827 S.E.2d at 176 (“It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.”) (internal citations omitted). Direct benefits estoppel simply recognizes, and remedies, the patent inequity that would result if a party were able to enjoy direct benefits under an agreement containing an arbitration clause while at the same time denying that the arbitration clause is enforceable.

Here, Mr. Ramsey embraced all aspects of the Admission Agreement with the Facility. Indeed, his receipt of direct benefits under the Admission Agreement (with which the Arbitration Agreement merged) cannot reasonably be denied. Undoubtedly, Mr. Ramsey received direct benefits (in the form of room, board, various amenities/services, and the care/treatment she received at the Facility about which Plaintiff does not complain). To deny his receipt of such

⁹ See also THI of S.C. at Columbia, LLC v. Wiggins, C/A No. 3:11-888-CMC, 2011 WL 4089435, at *6 (D.S.C. Sept.13, 2011) (“Hall’s care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate.”); accord THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert, No. 7:13-CV-2929-BHH, 2014 WL 6863550, at *4 (D.S.C. Oct. 31, 2014), *report and recommendation adopted*, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. Mar. 19, 2015).

benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of his residency: every night's stay, every meal, every amenity/service provided, every instance of care/treatment, essentially every moment at the Facility—even Plaintiff's complaint does not go nearly so far as that. (*See generally* Compl.)

It would be manifestly inequitable to permit a party to claim the other is liable in tort based upon a contractual relationship, while at the same time allowing that party to avoid the arbitration provisions of the contract upon which the party bases its claims, when such claims are in the scope of the arbitration provisions. In other words, Plaintiff cannot “have it both ways” by relying upon certain terms of the Admission Agreement when it works to his advantage and repudiating the Arbitration Agreement when it works to her disadvantage.

As described, the Plaintiff's allegations fall within the scope of the Arbitration Agreement. In accordance with the foregoing law, Plaintiff cannot assert claims against Defendants based upon certain terms of the Admission Agreement while repudiating the Arbitration Agreement, and should be prevented from doing so pursuant to the doctrine of equitable estoppel.

(3) *Coleman, Thompson, and Hodge are Distinguishable.*

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

In Coleman, Ann Coleman signed a number of documents, including arbitration agreements, when admitting her sister to a health care facility. 407 S.C. at 350, 755 S.E.2d at 452. Coleman brought suit after her sister's death, and the facility sought to compel arbitration. In

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

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

Unlike the arbitration agreements in Coleman, Thompson, and Hodge, the Arbitration Agreement and Admission Agreement in the case at bar should not be considered “separate” for purposes of denying merger. Unlike Coleman, Thompson, and Hodge, the Arbitration Agreement in this case does not state that it can be revoked after it has been signed. Furthermore, it does not state that arbitration is a precondition to admission to the Facility.

Instead, in the present case, the agreements “were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction” and, therefore, the

documents merged. Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (citing Klutts, *supra*, 268 S.C. at 88, 232 S.E.2d at 24).¹⁰ Specifically, the Admission and Arbitration Agreements were signed by the Ms. Rahn, on Mr. Ramsey’s and her own behalf, and by the Facility at the time of Mr. Ramsey’s admission. The documents were signed by the exact same people: Ms. Rahn as representative for her father and by the authorized representative for the Facility. The documents were signed for the same purpose and transaction of establishing Mr. Ramsey’s residency at the skilled nursing facility.

Unlike the arbitration agreements at issue in Coleman, Thompson, and Hodge, all of which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), the instant Arbitration Agreement has no such disclaimer/revocation provision. Moreover, while the Admission Agreement in this case does contain an “Entire Agreement” clause, unlike the admission agreements in those other cases, it does not reference the Arbitration Agreement as a separate contract. Indeed, directly contradicting the idea of “separatedness” (in the parlance of the Coleman Court¹¹), the “Entire Agreement” clause in the instant Admission Agreement expressly states that “other Admissions materials” are part of the Admission Agreement, thereby expressly

¹⁰ To be clear, even though the Coleman Court found evidence of an intent contrary to merger on the particular facts before it, it nonetheless recognized as *correct* the general proposition of law on which the Coleman Appellants’ based their merger argument, i.e., the Coleman Court expressly observed that the admission agreements and arbitration agreements before it (which, in this respect, are no different than the instant agreements—though that is not the case in regard to the material facts bearing on the question of merger), “the documents were [indeed] executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction.” 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

¹¹ 407 S.C. at 356, 755 S.E.2d at 455 (explaining how, in Coleman—unlike in the instant case—the “Entire Agreement” clause expressly referred to a separate arbitration agreement and, thus, “recognize[d] the ‘*separatedness*’ of the [arbitration agreement] and the admission agreement, not a merger of the two contracts.”) (emphasis added).

contemplating the lack of its own supposed “separatedness.” And without question, the Arbitration Agreement is among these other admissions materials. See Stott, 426 S.C. at 571–72, 828 S.E.2d at 84 (“The same day as Decedent’s admission to White Oak, Stott, acting as Decedent’s authorized representative, signed White Oak’s admission documentation—including the Arbitration Agreement.”) (emphasis added) (internal footnote omitted).

Also absent here is the type of discrepancy the Hodge Court pointed out with respect to the respective provisions of the admission and arbitration agreements before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare* Admission Agreement p. 10 (providing “This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located.”) *with* Arbitration Agreement (providing that, “because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action;” but also providing that arbitration shall be “as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules”).) Essentially, both instruments provide that South Carolina law applies except where it is displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, the termination provisions provide no evidence of “separatedness.” Again, the only reason for the Arbitration Agreement is the Admission Agreement—the only point of the Arbitration Agreement is to cover disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still *connected* to the

Admission Agreement even after the termination of the Admission Agreement. This is simply how agreements to arbitrate work. See Hooters of America, Inc. v. Phillips, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) (“Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.”).

The merger question examines whether, “where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,”¹² as indeed the admission and arbitration agreements were here, there is evidence to upset the *default presumption* that the contracting parties intended the instruments to be construed together as effectively one contract. As a practical matter, if this presumption is to mean anything, upsetting it must require actual evidence of sufficient probity that, notwithstanding the concurrence of all the circumstances that must come together for the presumption of merger to even arise in the first place—i.e., same time, parties, purpose, and transaction—a reasonable, non-speculative inference can be drawn that the parties’ possessed a contrary intention. Cf. The Huffines Co., LLC v. Lockhart, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). No such inference can be drawn here. It does not even make sense that the parties would not have intended the Admission Agreement and the Arbitration Agreement to merge.

Such superficial things as the fact that the admission arbitration agreements have their own titles, are separately paginated, and/or are separately signed cannot suffice to show evidence of intent contrary to merger. To point to such things is really to do no more than to point out that the admission agreement and arbitration agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they

¹² Coleman, 407 S.C. at 355, 755 S.E.2d at 455.

should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger. The very nature of merger is to *merge* separate documents.

And to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that, as a matter of law, *merger is the default position*, i.e., it is *presumed*, and that this presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our courts will consider and construe the documents together *unless* there is evidence of a contrary intention. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence “indicating [(i.e., affirmatively showing)] a contrary intention.” 407 S.C. at 355, 755 S.E.2d at 455. To allow the merger presumption to be upset based on evidence that is merely ambiguous—i.e., that does not even go so far as to clearly indicate a contrary intention, but at most might (or might not) reflect a contrary intention—is to allow the exception to devour the rule.

Even though, as noted above, the Arbitration Agreement was not a precondition to admission, this does not mean that the two instruments did not work hand-in-hand once the Arbitration Agreement came into existence (i.e., once it was in fact entered into). While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true; the Admission Agreement is indeed necessary to the Arbitration Agreement. In other words, yes, the Admission Agreement *could* have stood on its own, without the Arbitration Agreement

ever having been executed, in which case no question of merger would have even arisen to begin with; *but that is not what happened*. The Arbitration Agreement was in fact executed, of course, and it was executed under circumstances giving rise to a presumption of merger—again, same time, parties, purpose, and transaction. Unlike the Admission Agreement, however, which is capable of making sense either standing alone or, alternatively, together with the Arbitration Agreement, the Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the Arbitration Agreement’s) sole reason for being.

It matters not whether the Arbitration Agreement was a condition of admission, only that it was in fact agreed to in conjunction with admission; and, here, there can be no question that the Arbitration Agreement—once agreed upon—was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument, governing various interrelated aspects of Mr. Ramsey’s relationship with the Facility. Indeed, this conclusion finds direct support in the Admission Agreement’s “Entire Agreement” provision, which states, “[t]he undersigned further acknowledges that he/she has received and read the Admission Handbook and other Admissions materials and understand that these documents are made a part of this Agreement by reference herein.” See **Ex. 1, p. 12** (emphasis added). Had the Arbitration Agreement not been executed, it would not constitute admissions material, but, of course, it was executed, and it does constitute admissions material; most respectfully, to conclude otherwise simply does not make sense.

Respectfully, the material facts of Coleman, Thompson, and Hodge, are different from the material facts of the instant case, and they do not control the outcome here. Under the particular facts of this case, an intent contrary to merger cannot reasonably be found.

VII. SHOULD THE COURT DECIDE TO DENY THE MOTIONS, THE PARTIES SHOULD BE PERMITTED TO CONDUCT ADDITIONAL DISCOVERY.

If the Court is not inclined to grant the instant motion on the grounds contained in this memorandum, the Facility requests that the parties be permitted to conduct additional discovery on the issues raised herein, and in particular, the nature of Ms. Rahn's agency relationship with Mr. Ramsey and the circumstances surrounding the admissions process.

In a case involving similar issues, the Honorable Perry Gravely allowed the parties to conduct additional discovery on the issue of a mother's authority to execute an Arbitration Agreement on her son's behalf in connection with his admission to a skilled nursing facility. *See James Boyd v. THI of South Carolina, LLC d/b/a at Magnolia Place-Greenville, et. Al*, 2018-CP-23-01934 (S.C. Com. Pls. July 9, 2018). Critical to the court's decision in that case was whether the son's conduct and admissions director's understanding of that conduct created apparent agency so as to bind the son to an arbitration agreement. The court permitted the parties to take the depositions of the mother, the son, the admissions coordinator for the skilled nursing facility, and the case manager for the hospital the son was transferred from. After considering the testimony of those individuals, the court found there was evidence to support a finding of apparent agency.

Likewise, the Honorable Alison Lee allowed the parties to conduct additional discovery on a wife's authority to execute an arbitration agreement on behalf of her husband. *See Priscilla Brown, as Personal Representative of the Estate of James Brown v. THI of South Carolina at Columbia at Magnolia Manor d/b/a Midlands Health and Rehabilitation Center*, 2017-CP-40-00516 (S.C. Com. Pls. Nov. 7, 2019). The case at the bar involves Ms. Rahn's own authority to execute the Arbitration Agreement and the circumstances surrounding its execution. As in *Boyd* and *Brown*, if the Court determines the record is insufficient to properly rule on the issues before it, additional discovery should be permitted as necessary.

Most respectfully, if the Court should make such a determination, it is only fair to allow the Facility to engage in some appropriately limited discovery to attempt to protect its arbitration rights. It must be remembered that the Facility moved to compel arbitration under a facially valid arbitration agreement. The Facility believes Ms. Rahn had the authority to execute the Arbitration Agreement on behalf of her uncle. And neither Plaintiff nor Mr. Ramsey ever called Ms. Rahn's authority to enter into the Arbitration Agreement into question until now. The Facility had no reason to conduct discovery until this dispute arose, and even then, it still maintain its primary position that the Arbitration Agreement was enforceable based on the record as is. If further development of the record is needed on any point material to arbitrability, the Court should expressly allow the Facility to protect its legitimate interests through discovery into the relevant subject matter without exposing itself to a claim of waiver by Plaintiff, i.e., without having to expose itself to a potential Catch-22 where it could be said to have waived its arbitration rights simply by endeavoring to prove them.

CONCLUSION

For the reasons set forth herein, the Facility respectfully requests that this Court enter an Order dismissing or staying the pending action and compelling arbitration. Alternatively, and if the Court is not inclined to grant the instant motions on any of the grounds asserted above, the Facility requests that the parties be permitted to conduct additional discovery. The Facility also requests permission to be heard after such discovery is conducted and requests that they be permitted to submit supplemental memoranda along with any additional evidence procured.

Respectfully submitted,
CLEMENT RIVERS, LLP

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Charleston, South Carolina

May 18, 2022

ADMISSION AGREEMENT - SOUTH CAROLINA

RESIDENT NAME:

Robert Ramsey

RESIDENT NUMBER:

DATE OF ADMISSION:

8-9-19

THIS ADMISSION AGREEMENT ("Agreement") as above dated is by and among St. George Healthcare Center ("Facility"), Robert Ramsey ("Resident") and/or Robert Ramsey ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative").

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

I. GENERAL CONDITIONS

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

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FFSC001 South Carolina Admission Agreement (Rev. 6/2009)

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DEFENDANT'S
EXHIBIT

1

ROA 090

II. AGREEMENT FOR CARE

A. FACILITY AGREES TO:

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

Original: Business File • Photocopy: Resident/Representative

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

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

Original: Business File • Photocopy: Resident/Representative

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

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

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

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

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

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

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

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

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

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

Original: Business File • Photocopy: Resident/Representative

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

III. FINANCIAL AGREEMENT

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

1. Room and board, including meals, laundering of linens and bedding, nursing care, personal care or custodial care for the health, grooming and well-being of Resident in (☐-private) (☒-semi-private) accommodations, for a basic fee of \$ 220.00 per day, payable one month in advance. In the event Resident is unable or unwilling to receive any of the services included in the room and board charge, such as meals, laundry, etc., no adjustment will be made to the daily rate. Payment for all invoices is due upon receipt. In the event public aid funds are denied for services for which coverage has been expected, Resident and/or Representative will be responsible for payment and will pay such charges upon receipt of invoice. Resident and/or Representative agree(s) to pay any rate change charged to Resident so long as each party to this Agreement is given at least thirty (30) days written notice of the new rate, including any increases or adjustments in Resident's liability by any financial third party or regulatory agency. Additional notice may be provided under applicable state regulations.

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

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

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

Original: Business File • Photocopy: Resident/Representative

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

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

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

IV. TERMINATION

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

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

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

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

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

V. MEDICAID BENEFICIARIES

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

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

Original: Business File • Photocopy: Resident/Representative

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

3. **Non-Covered Services.**

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

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

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

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

VI. MEDICARE BENEFICIARIES

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

Original: Business File • Photocopy: Resident/Representative

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

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

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

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

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

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

VII. PRIVATE PAY/INSURANCE

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

Original: Business File • Photocopy: Resident/Representative

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

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

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

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

VIII. NOTICES

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

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

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

Original: Business File • Photocopy: Resident/Representative

IX. GOVERNING LAW

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

X. SEVERABILITY

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

XI. CAPTIONS

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

XII. MODIFICATIONS

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

XIII. WAIVER

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

XIV. RESIDENT

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

XV. ASSIGNABILITY

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

Original: Business File • Photocopy: Resident/Representative

XVI. INFORMATION RELEASE/BILLING AUTHORIZATION

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

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

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

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

XVII. MISCELLANEOUS

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

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

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

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

Original: Business File • Photocopy: Resident/Representative

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

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

XVIII. ENTIRE AGREEMENT

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

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

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

Signature of Resident Date

Printed Name of Resident

Resident Social Security Number

Witness Signature Date

Printed Name of Witness

OR
X  8/9/19
Signature of Representative, if any Date

Printed Name of Representative

Witness Signature Date

Printed Name of Witness

Representative Social Security No. (Voluntary Info.)



Signature of Facility Official
8/11/19

Date



Printed Name of Facility Official & Title

Original: Business File • Photocopy: Resident/Representative

ASSIGNMENT AGREEMENT

THIS ASSIGNMENT AGREEMENT ("Agreement"), made and entered into as of this 9th day of Aug 20 19 by and between St. George ("Facility") AND Robert R. Rousey ("Resident") AND/OR Robert R. Rousey ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party," hereinafter collectively "Representative"), who together shall be referred to as "Resident" within this agreement;

NOW, THEREFORE, intending to be bound and as consideration for admission to the Facility, the Parties hereto agree as follows:

1. **Obligations of Resident.** Resident agrees to make full and complete disclosure to the local Medicaid Program Office regarding all financial resources and income during the application process, including all transfers of assets and/or financial resources having taken place within the preceding five years of the date of application for admission to Facility. Failure to identify all resources, income, and transfers or the submission of false information may result in the termination of this Agreement and financial liability. Resident is obligated to notify Facility when only \$ 2,000.00, or the value thereof, exists to satisfy financial obligations under this Agreement and/or the Admissions Agreement. Resident agrees to apply for Medicaid benefits at such time as his/her resources will no longer be sufficient to pay all Facility charges for Resident's care and stay.
2. **Patient Pay Amount.** For residents approved for Medicaid benefits, Facility will accept payment from Medicaid and, if applicable, the Resident's Patient Liability Amount as determined by Medicaid as payment in full only for those services covered by the Medicaid Program. During the period of time that the application for Medicaid benefits is pending, Resident shall pay such monthly Patient Liability Amount (less any qualified medical expense deductions) as estimated by the Facility and the Medicaid Program at the time of application for Medicaid benefits.
3. **Determination of Medicaid Eligibility.** Resident is obligated to cooperate fully in any Medicaid eligibility determination or redetermination process. In the event that Resident's eligibility for Medicaid benefits is denied, interrupted or terminated due to his/her failure to cooperate in the Medicaid application process, redetermination or appeal process, Resident shall be liable for the applicable daily room rate plus charges for ancillary services and supplies, during any period of nonpayment.
4. **Eligibility for Third-Party Payments.** Resident may be or may become eligible to receive financial assistance, reimbursement, or other benefits from third parties, such as private insurance, employee benefit plans, benefits under the Medicaid Program, Medicare benefits, managed care coverage, supplementary medical or other health insurance, supplemental security income insurance, or old-age survivors' or disability insurance. It is Resident's responsibility to apply for these benefits. If Resident is or becomes eligible to receive payments from any third parties for Resident's stay and care, the Facility reserves the right to collect such payments directly from the third-party source. Resident shall at all times cooperate fully with Facility and each third-party payor to secure payment. Cooperation includes providing information, signing and delivering documents, and assigning to Facility (to the extent permitted by law) any payments from Federal Social Security benefits, from any other federal or state governmental assistance programs, reimbursement or benefits of any third party payor to the extent of all amounts due the Facility. Resident agrees to reimburse Facility for any and all costs incurred by Facility to collect such payments directly from the third-party source.

Original: Business File • Photocopy: Resident/Representative

5. **Assignment of Payments.** Although it is Resident's responsibility to secure payment from third-party resources, including but not limited to Medicaid benefits, Resident authorizes Facility to make such claims and to take such actions as it deems necessary to secure for the Facility receipt of third-party payments to reimburse Facility for its charges associated with Resident's stay and care. This assignment includes, but is not limited to, filing an application for Medicaid benefits and pursuing any and all appeals in the event the application is denied. To the fullest extent permitted by law, as security for payment of charges, Resident hereby assigns to Facility all of his/her rights to any third-party payments now or subsequently payable to the extent of all charges due under this Agreement and/or the Admission Agreement. To the extent permitted by law, Resident shall promptly endorse and turn over to Facility any payments received from third parties to the extent necessary to satisfy the charges under this Agreement and/or the Admission Agreement.

By way of this assignment, Resident hereby authorizes and directs any financial institution, governmental agency, entity or person having or possessing information in whatever form that is requested or needed to determine Resident's eligibility for third-party payments, including, but not limited to Medicaid, to turn over or produce the information to the Facility upon written demand.

Signature of Resident Date

Printed Name of Resident

Resident Social Security Number

Witness Signature Date

Printed Name of Witness

OR

X *Janifer Parker* 8-9-19
Signature of Representative, if any Date

Printed Name of Representative

Witness Signature Date

Printed Name of Witness

Sahar
Signature of Facility Official
8-9-19
Date

[Signature]
Printed Name of Facility Official & Title

Original: Business File • Photocopy: Resident/Representative

AUTHORIZATIONS, CONSENTS & ACKNOWLEDGMENTS

Please read, review and acknowledge each the following:

Treatment/Health Care Professionals:**Authorization for Treatment**

☒ JLR

I hereby authorize Facility's professional staff to administer nursing procedures, podiatric procedures, therapies, skin scrapings, nonsurgical dental procedures and laboratory and x-ray procedures on me/Resident. I understand that I may withdraw this consent at any time by notifying Facility in writing. I further understand that an additional consent will be required for any surgical treatment or for any treatment requiring the use of general anesthesia.

Medical Treatment

☒ JLR

It is understood and agreed that Resident is under the control of his/her elected physician and/or his/her designee and that Facility is not liable for any act or omission as a result of following instructions of said physician(s)/designee(s). Resident consents to diagnostic imaging procedures, laboratory procedures, or medical treatment rendered to Resident under the general and special instructions of Resident's physician or physician's designee.

General Duty Nursing

☒ JLR

Facility provides general duty nursing care. Under this system, nurses are called to the resident's bedside by a signal system. If Resident is in such condition as to need continuous or special duty nursing care, it is agreed that Resident, Resident's legal representative or Resident's physician(s) will make the necessary arrangements for such care. It is understood and agreed that Facility shall not, in any way, be responsible for the failure to provide such care and is hereby released from any and all liability arising from the fact Resident is not provided with such care.

Independent Status of Health Care Providers and their Agents/Designees

☒ JLR

Resident and/or Resident's legal representative acknowledges that any and all health care providers and their agents/designees are not agents or employees of Facility. Resident and/or Resident's legal representative understands and agrees that each health care provider or their agent/designee who renders services to Resident will independently bill and collect fees for these services. Resident and/or Resident's legal representative agrees and understands that the health care provider's bills will be separate and apart from Facility's.

Selection of Medical Professionals:

You have the right to use your personal health care providers during your stay. In the event you do not have a current provider, the facility has a list of independent providers who are available to provide on-site care. If you have difficulty contacting any of these professionals, please notify our staff. Please indicate your choice of health care providers below, including the provider's phone number and address.

PHYSICIAN:

Name:

Dr. Papp

Address:

Phone:

DENTAL☐ Yes☐ No

Examination Charge \$ _____

I would like to receive dental services at the above charge and have selected the following provider:

Name:

Address:

Phone:

VISION☐ Yes☐ No

Examination Charge \$ _____

I would like to receive vision services at the above charge and have selected the following provider:

Name:

Address:

Phone:

PODIATRY☐ Yes☐ No

Examination Charge \$ _____

I would like to receive podiatry services at the above charge and have selected the following provider:

Name:

Address:

Phone:

FFUS003 (Authorizations, Consents & Acknowledgments)

Self-Administration of Medications

Please indicate whether or not you wish to invoke your right to self-administer medications prescribed by your physician as outlined in the Admission Handbook.

☐ _____ I wish to invoke my right to self-administer medications prescribed by my physician. I authorize and consent to an evaluation by the Interdisciplinary Team in order to determine my ability to carry out this responsibility.

☒ JLR I wish to waive my right to self-administer medications. I request and authorize Facility's nursing staff to administer medications prescribed by my physician. **I understand that I am entitled to this right and that I may invoke this right any time in the future by written notification to the facility.**

Personal Property/Valuables/Money:

☒ JLR I acknowledge that I have received, read or had read to me, and understand Facility's policy on personal property, valuables and money. I understand that all personal belongings should be labeled properly and entered on a personal inventory list. I understand that all items removed from or brought into the facility after admission should be documented on the inventory list and that missing items must be reported to appropriate staff as soon as possible.

☒ JLR I acknowledge and understand that Facility is not responsible for damage to or theft/loss of any personal property/valuables/money not kept in compliance with Facility policies.

Deposit of Personal Funds:

Please indicate below whether or not you wish to deposit personal funds with Facility in accordance with the *Protection of Resident's Funds* policy outlined in the Admission Handbook. **Please note that you are not required to deposit any funds with the facility.**

☐ _____ I do not wish to deposit personal funds with the facility at this time.

☒ JLR I authorize Facility to accept, hold and account for my personal funds in accordance with the policies outlined herein. I acknowledge that I have the right to revoke this authorization at any time upon written notice to Facility. I acknowledge that authorized State agencies may audit this account, regardless of my payer source.

FFUS003 (Authorizations, Consents & Acknowledgments)

Page 3 of 6

Beneficiary Designation: (THIS PORTION TO BE FILLED IN BY RESIDENT ONLY)

In the event of my death, I authorize Facility to transfer all personal funds and property held by Facility to the following person(s): Jennifer Bahn. If I have not named a beneficiary or the beneficiary cannot be located, I understand that Facility will hold and pay the funds in line with the State's regulations.

Advance Directive Acknowledgment:

☒ JLR

I acknowledge that I have received, read or have had read to me, and understand *Facility's Policy and State Requirements for Advance Directives* and have executed the following advance directive measures and a photocopy has been provided to the facility for inclusion with my Medical Records:

☐ Living Will

☒ Durable Power of Attorney for Health Care or similar agent designation

☒ "Do-Not-Resuscitate" Identification (CPR)

☐ Other: _____

☐ _____

I acknowledge that I have received, read or have had read to me, and understand *Facility's Policy and State Requirements for Advance Directives* and have elected **NOT** to execute any advance directive at this time, including DNR Identification. I understand that facility staff will respond to medical emergencies with CPR measures and a full code will be instituted.

Special Services:

Please indicate whether or not you authorize the following services to be provided. All associated fees with be charged to your account:

Telephone ☒ Yes ☐ No ☐ N/A Charge \$ _____

Television ☒ Yes ☐ No ☐ N/A Charge \$ _____

Newspaper ☐ Yes ☐ No ☒ N/A Charge \$ _____

Laundry ☒ Yes ☐ No ☐ N/A Charge \$ _____

Beauty Shop ☒ Yes ☐ No ☐ N/A See charge list

Other(s) (Please Specify Below)

_____ ☐ Yes ☐ No Charge \$ _____

_____ ☐ Yes ☐ No Charge \$ _____

FFUS003 (Authorizations, Consents & Acknowledgments)

Photographs by State/Federal Survey Agencies

I acknowledge and understand that, during my/Resident's stay, Federal and/or State surveyors (investigators) may take my/Resident's photograph as part of their independent survey/investigation process and in line with conditions of my/Resident's participation in the Medicare and/or Medicaid program. I understand that, in line with CMS guidelines, the surveyors must obtain written consent from Resident or his/her surrogate before any photographs are taken. I understand that the Federal/State Survey Agency is wholly responsible for acquiring and securing any photographs they may take.

☒ JLR

I acknowledge and understand that neither Facility nor its parent, affiliates, officers, directors, employees, attorneys, assigns or any other person acting on its behalf, has any oversight or responsibility for the surveyors actions or inactions as it relates to taking photographs for their independent investigations.

Photograph/Audiotape/Videotape
☒ Yes JLR
☐ No _____

I hereby authorize Facility to photograph/audiotape/videotape me/Resident for its use in resident identification, infection control, surveillance and/or other medical purposes. I understand that, if the facility wishes to photograph/audiotape/video tape me for any other reason, (activities, marketing, media coverage, etc.), the facility will secure permission from me through a separate written authorization.

Posted Information
☒ Yes JLR
☐ No _____

To better serve you and meet your health care needs, permission is needed to post information regarding your/Resident's health care needs within your room and the facility as needed. The information to be disclosed will be the minimum amount necessary and shall serve as a means of communication, enabling staff to provide service while, at the same time, ensuring your/Resident's rights to privacy. Information to be disclosed may include, but not be limited to, therapy schedules, activities of daily living, ambulation/mobility parameters, swallowing and aspiration precautions, do-not-resuscitate orders.

Authorization to Release and Obtain Information
☒ Yes JLR
☐ No _____

I hereby authorize the facility to release and/or obtain medical information or other necessary data which may be necessary for my/Resident's continued treatment and care at the facility, including but not limited to the filing of insurance claims in my/Resident's/Facility's interest. I further authorize the release of information, medical or otherwise, to any government agency without my prior approval or that of my representative, if any.

Authorization to Receive/Open Mail
☐ Yes _____

☒ No JLR

I hereby authorize Facility to open all mail received by me/Resident. Further, I would like this mail to be read to me/Resident upon receipt. You have the right to revoke this authorization at any time upon written notice to the facility.

*** SIGNATURE PAGE FOLLOWS***

Resident Signature

Date

Printed Name of Resident

Lanija R. Rahm *8/9/19*

Legal Representative Signature, if any

Date

Printed Name of Representative

verbal consent with Lanija Rahm *8/9/19*

Witness Signature

Date

Printed Name of Witness

[Signature] *8-9-19*

Facility Representative Signature

Date

Printed Name and Title

[Signature]

CONSENT FOR THE RELEASE OF MEDICAL RECORDS

NOTE: This form is to be used only when the facility needs to request a patient's/resident's medical records from another health care provider. This form does NOT authorize the facility to release a patient's/resident's medical record.

Patient/Resident Name Robert Ramsey Medicare No. _____
 Provider _____ Social Security No. _____
 Service Dates: From _____ To _____ DOB: _____

By my signature below, I hereby authorize and request Provider to release the following information contained in the medical/financial record of: _____ ("Patient/Resident") to _____ ("Facility"). I understand these records will be made a permanent part of Patient's/Resident's medical record currently at Facility and that the information will be used for purposes of Patient's/Resident's continued treatment and care at Facility.

Information to be disclosed shall include:

☐ complete record	☐ history and physical
☐ abstract	☐ progress notes
☐ clinical resume	☐ emergency/urgent care
☐ consultation reports	☐ procedures: operative/anesthetic
☐ therapy record	☐ discharge summary
☐ lab/x-ray/diagnostic results	☐ other _____

I understand that this medical record may include information concerning psychiatric diagnoses, drug abuse, alcoholism or communicable or venereal diseases (including but not limited to diseases such as hepatitis, syphilis, gonorrhea or the human immunodeficiency virus, also known as Acquired Immune Deficiency Syndrome ["AIDS"]). With this knowledge, I hereby give my consent to release the requested information from Patient's/Resident's medical record, including any information concerning Patient's/Resident's identity.

I understand that Provider will not condition Patient's/Resident's continued treatment, payment, enrollment or eligibility for benefits on my signing this authorization and that I may revoke this authorization at any time by notifying Provider in writing, except to the extent that action has been taken in reliance on this authorization prior to the revocation. I further understand that the Facility is bound by federal privacy regulations, and that the information described above may not be re-disclosed by them without proper authorization.

This authorization shall expire on _____ OR _____ (event).
(If no expiration date or event, this authorization will expire six (6) months from the date on which it was signed.)

Signed By:

 on 8/9/19 (date)
 Patient/Resident OR Legal Representative

Original: Medical Chart • Photocopy: Resident/Representative

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT
MACIE PRICE AS PERSONAL) CASE NO. 2018-CP-42-01054
REPRESENTATIVE OF THE ESTATE)
OF MELVIN PRICE,)
PLAINTIFF,)
vs.)
THI OF SOUTH CAROLINA AT)
MAGNOLIA MANOR INMAN, LLC)
D/B/A MAGNOLIA MANOR-INMAN;)
THI OF SOUTH CAROLINA, LLC;)
AND NAKHYA STANTON AS)
OWNER/MANAGER OF MAGNOLIA)
MANOR SPARTANBURG,)
DEFENDANTS.)

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**ORDER GRANTING DEFENDANT THI
OF SOUTH CAROLINA AT MAGNOLIA
MANOR-INMAN, LLC'S MOTION TO
DISMISS AND COMPEL ARBITRATION**

This matter was before the Court on June 6, 2018 upon Defendant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman's ("Magnolia" or "Defendant Magnolia") Motion to Dismiss and Compel Arbitration. Counsel of record for all pertinent parties were present including Perry M. Buckner, IV for Defendant Magnolia and Stefan B. Fielder for the Plaintiff. Having reviewed the submissions by counsel and heard all arguments advanced, the Court hereby **GRANTS** Magnolia's Motion and orders that this matter be compelled to arbitration in accordance with the below findings.

FACTUAL BACKGROUND

Plaintiff's decedent, Mr. Melvin Price, was admitted to Magnolia in February of 2015. Mr. Price was legally blind at the time of his admission with a history of multiple strokes and was recovering from a recent hospitalization. He was admitted to Magnolia with the assistance and aid

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of his wife of nearly 50 years, the named Plaintiff, Mrs. Macie Price. Prior to his admission, Mr. Price entered into a number of contracts with Magnolia. The contracts were each signed by the Plaintiff, as representative of Mr. Price, on February 16, 2015. These executed contracts included an Admission Agreement and Arbitration Agreement. Based on the Admission Agreement and pursuant to the agreements set forth therein, Mr. Price was admitted to Magnolia Manor and received skilled nursing care and treatment. During his stay at Magnolia, Mr. Price accepted the benefits of the contracts entered into on his behalf by his representative, Macie Price. Such benefits included, but are not limited to, Mr. Price's admission to Magnolia and his receipt of the skilled nursing care provided therein. Mr. Price never challenged any agreement's validity during his lifetime nor did any representative challenge any agreement until the Arbitration Agreement was challenged by Plaintiff in response to the instant Motion. Notably, Plaintiff does not assert that the Admissions Agreement is invalid or that Mr. Price entered Magnolia unwillingly or without consent.

Upon admission, Mrs. Price explicitly represented that she was authorized to admit Mr. Price to Magnolia and execute necessary documents on his behalf, including an Arbitration Agreement. Indeed, the very first provision of the Admissions Agreement states that all information provided, including her authority to bind her husband to certain agreements, is truthful and correct.

The Arbitration Agreement at issue defines Magnolia Manor as the "Facility," Mr. Price as the "Resident," and Mrs. Price as the "Representative." The relevant provisions of the Arbitration Agreement state the following:

It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal

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injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules.

The Arbitration Agreement further provides:

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

Regarding Mrs. Price's authority to sign on behalf of her husband, the Arbitration Agreement states:

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

The Arbitration Agreement was executed by Macie Price as "Representative" and Darlene Lindsay, the Admissions Director of the Facility, on behalf of Magnolia Manor. Because the acts complained of by the Plaintiff fall within the scope of the Arbitration Agreement, the Court finds that matter should be dismissed and compelled to arbitration.

LAW/ANALYSIS

I. POLICY IN FAVOR OF ARBITRATION

At the outset, this Court is mindful of the strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir.1997). Indeed, both federal and state policy favor arbitrating disputes. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995) ("The policy of the United States and this State is to favor arbitration of disputes."). "This preference for

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arbitration has manifested itself in legislation and judicial decisions supporting the expeditious appeal of decisions denying an application to compel arbitration.” *Towles v. United HealthCare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999). Therefore, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Id.*, 338 S.C. at 41, 524 S.E. 2d at 846 (internal quotations and citations omitted).

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

This Court finds that the Arbitration Agreement, by its terms and by law, is governed by the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014). Under the FAA, any written provision in “a contract evidencing a transaction involving commerce” providing that disputes be settled by arbitration is “valid, irrevocable, and enforceable.” 9 U.S.C. § 2. The language of the Act is mandatory and requires the enforcement of all arbitration agreements. Section 4 of the FAA provides, in pertinent part, as follows:

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

9 U.S.C. § 4 (emphasis added). “By its terms, the act leaves no place for the exercise of discretion by a... court, but instead mandates that... courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

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Under the FAA, a party seeking arbitration must only show two things in order to compel arbitration: (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving interstate commerce. 9 U.S.C. § 2. This Court finds that Defendant Magnolia has demonstrated both.

III. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE

A. The Plain Language of the Agreement Binds Plaintiff

This Court finds that the Plaintiff represented herself to staff and admissions personnel Magnolia as her husband's representative, with the authority to sign documents on Mr. Price's behalf and bind Mr. Price and the Facility pursuant to those documents.¹ It was clearly Mrs. Price's intention to bind Mr. Price (and herself, as personal representative) according to the terms of the Admissions Agreement and Arbitration Agreement and Mr. Price evinced no intentions or directions to the contrary. The terms of the Arbitration Agreement clearly apply to the instant dispute.

B. Plaintiff Possessed the Apparent and Inherent Authority to Bind Mr. Price under the Arbitration Agreement, and Plaintiff Should be Estopped from Denying the Validity of the Arbitration Agreement

a. Agency Relationship / Apparent Authority / Inherent Agency

A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Froneberger v. Smith*, 406 S.C. 37, 49,

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

748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006).
 “An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties.”
Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 145-146, 425 S.E.2d 764, 773 (Ct. App. 1992.)

This Court finds the records presented to it show that Plaintiff held herself out as an agent for her husband without any indication to the contrary. Under the record before this Court, an apparent agency relationship has been fairly demonstrated such that the Arbitration Agreement should be deemed enforceable. While Plaintiff's counsel has asserted that Mr. Price was capable of making his own decisions, no evidence was offered that Mr. Price objected or opposed the execution of any documents whatsoever. To the contrary, these facially valid contracts remained in effect for years without any formal or informal challenge by him or the Plaintiff. While the arbitration agreement is now being formally challenged, Mr. Price does not assert that the Admissions Agreement was invalid or that his wife lacked authority to admit him to Magnolia. *See, Dean v. Heritage Healthcare of Ridgeway, LLC*, 2014 WL 11802563, at *4 (Ct. App. 1st District, September 8, 2014) (“To the extent the Plaintiff is correct that [the resident] had capacity to contract, I find that [the resident] gave apparent authority to her daughter to contract on her behalf or she ratified both contracts during her two and a half years residency.”); *See also, Fuller v. Eastern Fire & Cas. Ins Co* 240 S.C.75, 86, 124 S.E.2d 602, 608 (1962)(holding “[r]atification as it relates to the law of agency may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent.”).

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

The basis for this doctrine is that, as between an equally innocent principal and third party, the third party should prevail. This well-established law follows from one of the cardinal principles of agency law: that third parties, such as Magnolia, should not be disadvantaged because they dealt with an agent rather than a principal. As set forth above, there is no dispute as to whether the Plaintiff was authorized to admit her husband to Magnolia. To the extent Plaintiff takes issue with her own authority to bind her husband to the Arbitration Agreement and the specific terms therein, such actions merely accompanied and were incidental to her authority to admit Mr. Price as a resident at Magnolia. Magnolia should not be disadvantaged for acting in accordance with the express representations of Plaintiff regarding her authority.



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

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

Applying *Carraway* to the instant facts, Plaintiff executed various admission documents on behalf of her husband including the Arbitration Agreement. She executed these documents in her capacity as "representative." Just as in *Carraway*, the Arbitration Agreement provides that

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signing was on behalf of the resident. It was Magnolia's reasonable and justified belief that Mrs. Price was her husband's authorized representative and had the authority to execute the documents on his behalf.

b. Agency by Estoppel

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

In the case at bar, Magnolia had no knowledge or reason to believe that Plaintiff was not Mr. Price's authorized agent for purposes of executing the Arbitration Agreement or and other admissions paperwork. Magnolia relied on the affirmative representations of Plaintiff in admitting her husband to the Facility for the provision of the skilled nursing care. Additionally, the Arbitration Agreement was signed and executed with the expectation that all disputes between the parties would be governed by its contents and such representations were relied upon by Defendant Magnolia for years only for the instant lawsuit to seemingly ignore the binding agreement. Accordingly, agency by estoppel is present based upon the record before this court such that the arbitration agreement is similarly enforceable.

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

a. Merger

As additional grounds to compel arbitration, the Court finds the Admissions Agreement and Arbitration Agreement should be construed together and merged such that the Plaintiff is bound to arbitrate her claims against the Facility. The validity of these agreements, including the Arbitration Agreement, must be determined in accordance with the general principles of contract law and agency law that would apply to any other contract. *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010).

The Arbitration Agreement provides that “any controversy or dispute between the parties arising out of or relating to Facility’s Admission Agreement . . . or relating in any way to Resident’s stay at Facility” shall be resolved by arbitration pursuant to the terms of the Arbitration Agreement. This Court finds that the Arbitration Agreement and the Admission Agreement were both signed by Mrs. Price on behalf of her husband on the same day, at the same time, upon Mr. Price’s admission to Magnolia.

Courts in South Carolina construe contemporaneous instruments together; if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated. *Klutts Resort Realty, Inc. v. Down'Round Development Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977). Absent some evidence indicating a contrary intention, when instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will generally consider and construe them together on the theory that the instruments are effectively one instrument or contract. *Id. See also Saro*



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Investments v. Ocean Holiday Partnership, 314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994) (holding that promissory notes and a mortgage agreement executed contemporaneously on the same date, must be construed together). Furthermore, even when instruments are entered into by the same parties at different times but relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties. *See Plaza Development Services v. Joe Hardin Builder, Inc.*, 294 S.C. 430, 365 S.E.2d 231 (Ct. App. 1988); *accord Cafe Associates, Ltd v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991).

The United States District Court for the District of South Carolina in *McCutcheon* analyzed facts almost identical to the case at bar and determined that the arbitration agreement and admissions agreement had merged for purposes of equitable estoppel. *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011WL6318575 (D.S.C. Dec. 15, 2011). Indeed, this very Court has cited to *McCutcheon* on numerous occasions in holding that a nursing home arbitration agreement merged with the admissions agreement for purposes of equitable estoppel under precisely the same circumstances. *See Abrams v. Fundamental Long-term Care Holdings, LLC, et al*, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); *Campsen v. Fundamental Long-Term Care Holdings, LLC et al*, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012).

Accordingly, Mr. Price, by and through the acts of his representative, the Plaintiff and Magnolia, both contemplated that the terms of the agreement to admit Mr. Price were contained in the Admissions Agreement and Arbitration Agreement. Plaintiff executed the Arbitration Agreement at the same time as the Admissions Agreement; the Arbitration Agreement and the Admissions Agreement both covered the same subject matter and transaction (Mr. Price's residency at Magnolia Place); the Arbitration Agreement and Admissions Agreement were

executed by the same parties; the Arbitration Agreement specifically makes citation to and incorporates the Admission Agreement; and thus the Arbitration Agreement and Admissions Agreement should be construed as part and parcel of the same agreement between the parties.

b. Equitable Estoppel of Merged Agreement

This Court finds the doctrine of equitable estoppel applies to the instant case such that Plaintiff cannot dispute the validity of the Arbitration Agreement. “Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity.” *Int’l Paper Co. v. Schwabedissen Maschinen & Anlaeen GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000) (citation and internal quotation marks omitted). “A nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause.’” *Id.* (quoting *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999)).

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

“Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract.” *E.I. DuPont de Nemours & Co. v. Rhone*



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Poulenc Fiber & Resin Intermediates. S.A.S., 269 F.3d 187, 200 (3d Cir. 2001)(citing *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) (finding non-signatory derived benefit from contract and could not avoid the arbitration clause contained therein)). As noted by the Federal District Court in *Jackson v. Iris.com*:

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

....

[W]here . . . a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine estops the non-signatory from claiming that he is not bound to the arbitration agreement when he receives a direct benefit from a contract containing an arbitration clause.

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

c. Coleman and Hodge are Distinguishable

To the extent Plaintiff argues the Admissions Agreement and Arbitration Agreement are not merged pursuant to *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544,

² See also *THI of S.C. at Columbia, LLC v. Wiggins*, C/A No. 3:11-888-CMC, 2011 WL 4089435, at *6 (D.S.C. Sept.13, 2011) (“Hall’s care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate.”); accord *THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. 7:13-CV-2929-BHH, 2014 WL 6863550, at *4 (D.S.C. Oct. 31, 2014), report and recommendation adopted, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. Mar. 19, 2015).

813 S.E.2d 292 (Ct. App. 2018) and *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 350, 755 S.E.2d 450, 452 (2014), such reliance is misplaced.

In *Coleman*, Ann Coleman signed a number of documents, including arbitration agreements, when admitting her sister to a health care facility. 407 S.C. at 350, 755 S.E.2d at 452. Coleman brought suit after her sister's death, and the facility sought to compel arbitration. In determining that the arbitration and admission agreements in the case had not merged, the Supreme Court found, "On its face, this clause recognizes the 'separatedness' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts. Moreover, the [arbitration agreement] could be disclaimed within thirty days of signing while the admission agreement could not, evidencing an intention that each contract remain separate." *Id.* at 452. "By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply." *Id.*

Similarly, in *Hodge*, the admissions agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law. 422 S.C. 544, 813 S.E.2d at 302. Furthermore, like in *Coleman*, the arbitration agreement in *Hodge* recognized a separateness, as it referenced the two documents separately, stating "[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement." *Id.* Finally, the arbitration agreement in *Hodge* stated it could be revoked within thirty days, whereas the admission agreement contained no such indication. *Id.*

Unlike the arbitration agreements in *Coleman* and *Hodge*, the Arbitration Agreement and Admissions Agreement in the case at bar should not be considered "separate" for purposes of denying merger. Unlike *Coleman* and *Hodge*, the Arbitration Agreement in this case does not

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state that it can be revoked after it has been signed. Furthermore, it does not state that arbitration is a precondition to admission to the Facility.

Instead, in the present case, the agreements “were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction” and, therefore, the documents merged.” *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (citing *Klutts*, *supra*, 268 S.C. at 88, 232 S.E.2d at 24). Specifically, the Admissions and Arbitration Agreements were executed for the same parties, by Plaintiff, on her husband’s behalf, and the Facility on February 15, 2016. The documents were signed by the exact same people: Macie Price as representative for her husband and by Darlene Lindsay, Admissions Director for Magnolia, as representative for Magnolia. The documents were signed for the same purpose and transaction of establishing Mr. Price’s residency at the skilled nursing facility. While the Admissions Agreement in this case does contain an “Entire Agreement” clause, unlike the admission agreements in *Hodge* and *Coleman*, the provision in this case does not separately reference the Arbitration Agreement (in fact, it doesn’t refer to it at all). Accordingly, there is no language in either the Admission or Arbitration Agreement akin to the language in *Hodge* or *Coleman* to indicate the parties desired the documents be considered as separate contracts. As such, *Coleman* and *Hodge* are not controlling Plaintiff’s claims should be compelled to arbitration pursuant to the contract.

This Court recognizes that the agreements are in fact separately signed and have different terms and provisions. That is to be expected. However, unlike *Coleman* and *Hodge*, the documents are not sufficiently separate such that the presumption of merger can be overcome.

D. The Arbitration Agreement is Not Unconscionable

Lastly, this Court finds that the Arbitration Agreement is unconscionable. an initial matter, both state and federal courts in South Carolina have consistently ruled that arbitration

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agreements identical to the one *sub judice* are not unconscionable. See *McCutcheon v. THI of S.C. at Charleston, LLC, supra*, at 6* - *8; *Benson v. THI of S.C. at Charleston, LLC*, No. C.A. No. 7:11-CV-2613-HMH (D.S.C. Nov. 30, 2011); *Abrams v. Fundamental Long-term Care Holdings, LLC, et al*, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); *Campsen v. Fundamental Long-Term Care Holdings, LLC et al*, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012).

Furthermore, anyone who enters into a written contract has a duty to read the contract which she or he signs. *Maw v. McAlister*, 252 S.C. 280, 284-285, 166 S.E.2d 203, 204 (1969). Anyone who is capable of reading and understanding, but fails to read a contract before signing, is bound by the terms thereof. *Sims v. Tyler*, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981). Furthermore, arbitration clauses are not unconscionable and will be enforced if a person who can read fails to read the contract, regardless of whether he was advised of the arbitration terms by the contracting party. *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (holding the plaintiff's failure to read an arbitration provision did not render it unconscionable even though the plaintiffs claimed they were not advised of those terms). Additionally, "inequality of bargaining power alone will not invalidate an arbitration agreement." *Id.*

The Arbitration Agreement clearly articulates that the resident entering into the Agreement is fully aware of his or her healthcare options and other potential providers of nursing home facilities. The Agreement states:

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

Furthermore, on that same signature page, the Arbitration Agreement states clearly in bold

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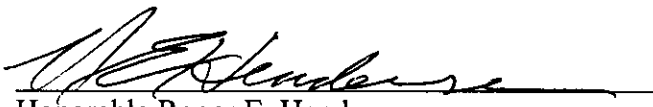
lettering in a separate heading: “**I understand and agree that I am giving up and waiving my right to a jury trial.**” (emphasis in original).

Since Mr. Price’s representative and agent, Mrs. Price, had a duty to read and understand the documents she was signing on Mr. Price’s behalf under proper authority, she also had a duty to communicate those terms to Mr. Price as his agent. To the extent she did not, Plaintiff cannot now claim that Mr. Price was unaware of the terms of the Arbitration Agreement that Mrs. Price voluntarily and with proper authority executed on her husband’s behalf.

CONCLUSION

For the reasons set forth herein, the Defendant’s Motion to Compel is hereby **GRANTED** and this matter is compelled to arbitration.

IT IS SO ORDERED!


Honorable Roger E. Henderson
Presiding Judge

Chesterfield
~~Spartanburg~~, South Carolina

August 7, 2018

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M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTH JUDICIAL CIRCUIT
COUNTY OF CHESTERFIELD	)	CASE NO. 2019-CP-13-00308
JOSEPHINE SPEARS,	)	
as power of attorney for Howard Spears,	)	
	)	
Plaintiff,	)	
	)	ORDER GRANTING DEFENDANT’S
vs.	)	MOTION TO COMPEL ARBITRATION
	)	
REHAB CENTER OF CHERAW, LLC,	)	
d/b/a Chesterfield Convalescent Center,	)	
	)	
Defendant.	)	

This matter is before the Court on motion of Defendant, Rehab Center of Cheraw, LLC, d/b/a Chesterfield Convalescent Center (the “Facility”), to compel arbitration (the “Subject Motion”).¹ For the reasons set forth below, the Subject Motion is GRANTED.

BACKGROUND

Plaintiff, Josephine Spears (“Plaintiff” or “Mrs. Spears”), is, and at all relevant times has been, married to Howard Spears (“Mr. Spears”). She has brought this action in her capacity as Mr. Spears’s attorney-in-fact, asserting claims for damages arising out of alleged deficiencies in the care/treatment provided to Mr. Spears when he was a resident of the Facility.²

When Mr. Spears was admitted to the Facility in late January 2016, Mrs. Spears signed a number of documents on his behalf, including an Admission Agreement and the Arbitration Agreement that the Subject Motion seeks to enforce. Although she represented to the Facility that she had authority to sign for her husband, Mrs. Spears did not have power of attorney for Mr. Spears

¹ The Subject Motion was filed on June 21, 2019. It was heard on September 25, 2019, at the Chesterfield County Courthouse, with both parties represented by counsel. Having been duly heard and considered, it is ripe for decision.

² The Facility is a skilled nursing facility.

at the time. It was not until late February 2016, approximately halfway through Mr. Spears's residency at the Facility,³ that he executed a durable power of attorney in favor of Mrs. Spears.

ANALYSIS

The issue before the Court comes down to this: Is the Arbitration Agreement (which Mrs. Spears signed for Mr. Spears) enforceable against Mr. Spears (or, more precisely, Plaintiff, i.e., Mrs. Spears, as Mr. Spears's attorney-in-fact) even though it was not signed by Mr. Spears himself? The Court concludes that, yes, the Arbitration Agreement is enforceable against Plaintiff. The Court's reasoning is as follows.

1. The Arbitration Agreement is governed by the FAA⁴.

Unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce. *Allied–Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273–77 (1995). The Arbitration Agreement expressly states that the FAA applies:

The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the [FAA], notwithstanding any contrary provision of this Agreement or contrary state law.

Moreover, our state Supreme Court has held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014). Clearly, the Arbitration Agreement is governed by the FAA.⁵

³ Mr. Spears's residency ended in March 2016.

⁴ The "FAA" is the Federal Arbitration Act, 9 U.S.C §§ 1–16.

⁵ Indeed, neither party disputes the FAA's applicability here.

2. The Arbitration Agreement must be placed on equal footing with all other contracts.

“[T]he basic purpose of the [FAA] is to overcome courts’ refusals to enforce agreements to arbitrate”⁶ and “ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement.” *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). “By its terms, the [FAA] leaves no place for the exercise of discretion by a . . . court, but instead *mandates* that . . . courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis added); *see also* 9 U.S.C. § 4 (“The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.*”) (emphasis added). While a court may invalidate an arbitration agreement based on “generally applicable contract defenses,” it may not do so based on legal rules that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (citing *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)); *see also* 9 U.S.C. § 2 (providing that an arbitration agreement is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”). The FAA requires that the Court place the Arbitration Agreement “on *equal footing with other contracts . . .*” *Concepcion* at 339 (emphasis added).

⁶ *Allied-Bruce*, 513 U.S. at 270.

3. The Arbitration Agreement is valid on its face.

The Court finds that the Arbitration Agreement is valid on its face. In other words, there is nothing within the four corners of the document itself that appears out of order. It sets forth the materials terms of an agreement to arbitrate. It expressly attests to Mrs. Spears's authority to sign on behalf of Mr. Spears. It is duly signed by Mrs. Spears and the Facility's director of admissions.

The Court recognizes that Mrs. Spears has filed an affidavit in opposition to the Subject Motion, wherein she states (contrary to her representation in the Arbitration Agreement itself) that she did not have authority to sign on Mr. Spears's behalf. She also suggests that the Facility should have inquired further into her authority to sign for Mr. Spears and should have explained to her what an arbitration agreement was. To be clear, in observing that the Arbitration Agreement is valid on its face, the Court is not finding that Mrs. Spears in fact had actual or apparent authority to sign the Arbitration Agreement on Mr. Spears's behalf.⁷ The Court, however, is rejecting the notion that the Facility was obligated to investigate Mrs. Spears's authority or to explain the Arbitration Agreement's terms to her.

There is no question here as to Mrs. Spears's competency. Indeed, she expressly attests to her competency in her aforementioned affidavit. Besides that, the fact of her competency is implicit in her service as Mr. Spears's attorney-in-fact. She is thus "presumed to have read, understood, and assented to [the] terms" of the Arbitration Agreement,⁸ including, of course, those whereby she represented herself to the Facility as having authority to act on Mr. Spears's behalf.

⁷ As further explained below, the Court's decision to grant the Subject motion is based on estoppel, not on a finding that Mrs. Spears had actual or apparent authority to bind Mr. Spears at the time she signed the Arbitration Agreement.

⁸ *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) ("[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms.").

Moreover, there is an implied covenant of good faith and fair dealing in every contract,⁹ and Mrs. Spears is no less bound by this covenant than the Facility. Further still, to require anything more from the Facility as a contracting party just because the contract in issue is an arbitration agreement would violate the FAA's requirement that arbitration agreements be placed on equal footing with other contracts. *Concepcion* at 339.

4. Plaintiff's claims are within the scope of the Arbitration Agreement.

In pertinent part, the Arbitration Agreement reads as follows:

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

This plain language clearly embraces the subject matter of Plaintiff's claims against the Facility. Moreover, even were there "any doubts concerning the scope of arbitrable issues[,] [they] should be resolved in favor of arbitration" *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999) (quoting *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273–74 (4th Cir. 1997)) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)) (internal quotation marks omitted); *see also Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995) ("The policy of the United States and this State is to favor arbitration of disputes.").

⁹ *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995).

5. The Arbitration Agreement is enforceable against Plaintiff.

In opposition to the Subject Motion, Plaintiff argues that the Arbitration Agreement is not enforceable against Mr. Spears because he himself did not sign it and, at the time Mrs. Spears signed it for him (January 25, 2016), she did not have authority to do so. In furtherance of this argument, Plaintiff points to the fact that it was not until February 23, 2016,¹⁰ that Mr. Spears gave Mrs. Spears power of attorney.¹¹

“South Carolina,” however, “has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel.” *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (confirming the validity of the general proposition of law on which the appellants based their merger/equitable estoppel argument: “Appellants’ equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. . . . Here, the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that

¹⁰ The Court would note here that, while the power of attorney provides no basis to find that Mrs. Spears was authorized to sign the Arbitration Agreement for Mr. Spears when she signed it, the power of attorney does confirm Mr. Spears’s competency through at least the date of its execution, which was approximately one month into his residency. *See In re Thames*, 344 S.C. 564, 570, 544 S.E.2d 854, 857 (Ct. App. 2001) (“[I]n order to execute or revoke a valid power of attorney, the principal must possess contractual capacity.”) (emphasis added).

¹¹ Plaintiff also argues that neither the Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80 (the “AHCCA”), nor the Bill of Rights for Residents of Long-Term Care Facilities, S.C. Code Ann. §§ 44-81-10 to -70 (the “Residents Bill of Rights”), gave Mrs. Spears authority to sign the Arbitration Agreement on Mrs. Spears’s behalf; however, these arguments are of no moment because neither the Subject Motion nor this order relies on the AHCCA or the Resident’s Bill of Rights as having granted Mrs. Spears any authority to sign the Arbitration Agreement for Mr. Spears.

there was a merger.”). The Court finds that the Arbitration Agreement is enforceable against Plaintiff based on estoppel.

“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 courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.” *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (quoting *Klutts Resort Realty, Inc. v. Down’Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)).

The merger question examines whether, “where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,”¹² as the Admission Agreement and the Arbitration Agreement were here, there is evidence to upset the presumption of merger. This is a question of the parties’ intention. *Id.* at 355, 755 S.E.2d at 455 (“in the absence of anything indicating a contrary *intention* . . .”) (emphasis added). “[I]n attempting to ascertain th[e] [parties’] intention,” the Court “endeavor[s] to determine the situation of the parties, as well as their purposes, at the time the contract was entered into.” *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

It must be remembered that, where, as here, the instruments in question were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, merger is *presumed*. For this presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the circumstances giving rise to the merger presumption (same time, parties, purpose, and transaction)—can support a reasonable, non-speculative inference that the parties’ intention was contrary to merger. *Cf. The*

¹² *Id.* at 355, 755 S.E.2d at 455.

Huffines Co., LLC v. Lockhart, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). No such inference can be drawn here.

The cases Plaintiff cites in opposition to merger are inapposite. The “Entire Agreement” clause in the subject Admission Agreement expressly states that other admissions materials are deemed a part of it. While it is true that the Arbitration Agreement was not required for Mr. Spears’s admission to the Facility, all this means is that it did not have to be agreed to for Mr. Spears to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was in fact agreed to. In other words, even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Mr. Spears’s relationship with the Facility: the Admission Agreement setting forth the terms of his admission, the Arbitration Agreement providing for arbitration of disputes arising out of his admission.

Indeed, the fact that the Arbitration Agreement was not required for admission underscores its connectedness to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement). The Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the Arbitration Agreement’s) sole reason for being.

The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. To point to such things is to do no more than to point out that the

Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger.

Moreover, to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. Again, where, as here, the instruments in question are signed at the same time, by the same parties, for the same purpose, in the course of the same transaction, merger is presumed. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence “indicating [(i.e., affirmatively showing)] a contrary intention.” 407 S.C. at 355, 755 S.E.2d at 455. To allow the merger presumption to be upset based on evidence that is at best ambiguous—i.e., that does not even go so far as to clearly indicate a contrary intention—is to allow the exception to devour the rule.

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement under the “direct benefits” test our Supreme Court endorsed in *Wilson*, 426 S.C. 326, 827 S.E.2d 167. The *Wilson* Court favorably discussed the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals’ earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which it is now contended that Plaintiff is estopped from refusing to comply with the Arbitration Agreement here. *Wilson*, 426 S.C. at 340–345, 827

S.E.2d at 175–177; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner’s alternative argument based on the application of the state’s “traditional” six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., “[t]he traditional test referenced by [the] [p]etitioners,” “has been analyzed most-often in non-arbitration cases”) (emphasis added). “Under direct benefits estoppel, ‘[a] nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause.’” *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601 (quoting *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)).

Without question, Mr. Spears received direct benefits from the Admission Agreement in the form of his admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein.¹³ Plaintiff cannot now deny the validity of the Arbitration Agreement with which the Admission Agreement merged.

¹³ To deny Mr. Spears’s receipt of any benefit one would have to accept the absurd premise that every single aspect of his residency—every instance of care/treatment, every meal, all day every day—was deficient. Plaintiff herself does not even suggest this.

CONCLUSION

For the reasons set forth herein, the Subject Motion is hereby GRANTED, this action is STAYED, and this matter is compelled to ARBITRATION.

IT IS SO ORDERED.

ROGER E. HENDERSON
Presiding Judge – Fourth Judicial Circuit
Court of Common Pleas – Chesterfield County

Chesterfield, South Carolina
Dated: _____



Chesterfield Common Pleas

Case Caption: Josephine Spears , plaintiff, et al VS Rehab Center Of Cheraw Llc ,
defendant, et al
Case Number: 2019CP1300308
Type: Order/Other

So Ordered

s/Roger E. Henderson 2754

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

ELIJAH R. MCCUTCHEON,)
INDIVIDUALLY AND AS PERSONAL)
REPRESENTATIVE OF THE ESTATE)
OF CARMELA MCCUTCHEON,)

Plaintiff,)

vs.)

THI OF S.C. AT CHARLESTON, LLC,)
d/b/a DRIFTWOOD REHABILITATION)
AND NURSING CENTER, n/k/a)
RIVERSIDE HEALTH AND REHAB,)

Defendant.)

No. 2:11-CV-02861

ORDER

This matter is before the court on a motion to dismiss and to compel arbitration brought by defendant THI of South Carolina at Charleston, LLC, d/b/a Driftwood Rehabilitation and Nursing Center, n/k/a Riverside Health and Rehab (“Driftwood”). For the reasons set forth below, the court grants defendant’s motion.

I. BACKGROUND

Elijah R. McCutcheon, individually and as personal representative of the estate of Carmela B. McCutcheon, originally filed suit on September 15, 2011, in the South Carolina Court of Common Pleas for the Ninth Judicial District. Driftwood filed a notice of removal in federal court on October 20, 2011, asserting diversity jurisdiction under 28 U.S.C. § 1332. Driftwood then answered the complaint on October 24, 2011. On November 1, 2011, Driftwood filed a motion to dismiss and to compel arbitration. On November 30, 2011, McCutcheon filed a response in opposition. Driftwood filed a reply on December 6, 2011.

Plaintiff brings this action against Driftwood for: negligence; negligence per se; breach of contract; fraud and misrepresentation; violation of the South Carolina Unfair Trade Practices Act; negligence – wrongful death; and negligence – survivorship. The dispute arises from Carmela McCutcheon’s care while residing at the Driftwood Rehabilitation and Nursing Center in Charleston.

Upon her admittance into the facility, Carmela McCutcheon and Driftwood entered into an Admissions Agreement and an Arbitration Agreement. Def.’s Mot. 2. These documents were signed by Elijah McCutcheon, Carmela McCutcheon’s husband, as Carmela’s “‘Durable Power of Attorney for Health Care’ / ‘Legal Guardian’ / ‘Responsible Party.’” See id. Ex. A. The Arbitration Agreement provided in part,

[I]n the event of any controversy or dispute between the parties arising out of or relating to Health Care Center’s Admission Agreement, or breach thereof, or relating in any way to Resident’s stay at Health Care Center, or to the provisions of care or services to Resident, included but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively “Disputes”), and the parties are unable to resolve such through negotiation, then **the parties agree that such Dispute(s) shall be resolved by arbitration**, as provided by the South Carolina Alternate Dispute Resolution/Media Rules.

...

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

...

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

Id. (emphasis added).

II. DISCUSSION

Driftwood moves to compel arbitration under Section 4 of the Federal Arbitration Act (“FAA”), which provides in part that a “party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.” 9 U.S.C. § 4. “[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . [A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 23-24 (1983). Section 2 of the FAA states that a written arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

A court shall compel arbitration pursuant to the FAA if a party demonstrates:

(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of [a party] to arbitrate the dispute.

Am. Gen. Life & Accident Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005) (internal quotation marks omitted). Plaintiff only contests the second and third elements of the four-part test, arguing that the dispute is not arbitrable because there is no valid and enforceable arbitration agreement, and that the FAA does not apply because the transaction does not “in fact” involve interstate or foreign commerce. While federal law governs the arbitrability of disputes, state law governs issues regarding contract formation. Hill v. PeopleSoft USA, Inc., 412 F.3d 540, 543 (4th Cir. 2005). Because this

case involves the question of whether the Arbitration Agreement was a valid contract, the court looks to South Carolina law, as the agreement was entered into in South Carolina and contemplated services to be rendered in South Carolina.

A. Existence of Enforceable Arbitration Agreement

Driftwood argues plaintiff should be equitably estopped from denying the validity of the Arbitration Agreement, and that Carmela McCutcheon is bound to the agreement as a third party beneficiary. Plaintiff responds that the arbitration agreement is not enforceable.

1. Equitable Estoppel

First, Driftwood argues plaintiff should be equitably estopped from denying that Elijah McCutcheon had authority to bind Carmela McCutcheon. “[T]he doctrine of estoppel is equitable in nature.” Ahrens v. State, 709 S.E.2d 54, 58 (S.C. 2011). “Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do.” Parker v. Parker, 443 S.E.2d 388, 391 (S.C. 1994). “[N]o party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein.” United States v. Bankers Ins. Co., 245 F.3d 315, 323 (4th Cir. 2001); see Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) (internal quotation marks omitted) (“To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.”).

Here, the Arbitration Agreement and Admissions Agreement, while separate documents, were executed by the same parties, at the same time, and regarding the same transaction; therefore, they constitute the entire agreement between the parties. See Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 232 S.E.2d 20, 24 (S.C. 1977) (“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 courts will consider and construe the instruments together. The theory is that the instruments are effectively one instrument or contract.”). Plaintiff attempts to hold Driftwood liable for alleged breach of certain contractual terms while simultaneously denying the enforceability of other terms. Even if the Arbitration Agreement and Admissions Agreement constitute two separate contracts, plaintiff still takes inconsistent positions regarding these contracts, which were executed by the same parties under the same purported authority. It would be inequitable, for example, to allow plaintiff to assert that Elijah McCutcheon had authority to sign the Admissions Agreement on behalf of Carmela McCutcheon, but lacked such authority to sign the Arbitration Agreement. For these reasons, the court finds that plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

2. Third Party Beneficiary

Alternatively, Driftwood argues Carmela McCutcheon is an intended third party beneficiary and is therefore bound by the Arbitration Agreement. “A third party beneficiary is a party that the contracting parties intend to directly benefit.” Helms Realty, Inc. v. Gibson-Wall Co., 611 S.E.2d 485, 488 (S.C. 2005). “[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the

contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person.” Bob Hammond Const. Co. v. Banks Const. Co., 440 S.E.2d 890, 891 (S.C. Ct. App. 1994). Moreover, “[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.” Int’l Paper Co., 206 F.3d at 416-17 (emphasis added).

Carmela McCutcheon’s care was the essential purpose of the agreement, as she is named in both the Arbitration Agreement and the Admissions Agreement as the resident to be admitted into the facility. Further, the terms of both agreements refer to the rights and obligations of Carmela McCutcheon as resident of the facility, and Driftwood as the caregiver. As such, Carmela McCutcheon was an intended beneficiary to the contract, and the court finds that the arbitration provision was binding on her and remains binding on her estate. See THI of S.C. at Columbia, LLC v. Wiggins, No 11-888, 2011 WL 4089435, at *6 (D.S.C. Sept. 13, 2011) (“Hall’s care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate.”); Cook v. GGNCS Ripley, LLC, 786 F. Supp. 2d 1166, 1172 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care bound third-party beneficiary and her estate).

3. Unconscionability

Plaintiff argues the arbitration contract is unconscionable and should not be enforced. “Unconscionability has been recognized as the absence of meaningful choice

on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” Fanning v. Fritz’s Pontiac-Cadillac-Buick, Inc., 472 S.E.2d 242, 245 (S.C. 1996).

In determining whether a contract was “tainted by an absence of meaningful choice,” 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 the challenged clause; and the conspicuousness of the clause.

Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 669 (S.C. 2007) (citation omitted).

Plaintiff argues the Arbitration Agreement is unconscionable because: it is not “geared towards achieving an unbiased decision by a neutral decision-maker”; Elijah McCutcheon was disadvantaged in terms of bargaining power and sophistication; and the clause stating that the agreement is governed by interstate commerce is inconspicuous and constitutes an element of surprise. Pl.’s Resp. 10-11. First, the law does not require that an arbitration agreement specifically state that the arbitrator will be neutral. Even though the Arbitration Agreement does not contain the terms “neutral” or “unbiased,” it provides that, in the event the parties fail to agree on an arbitrator, the court will select one. See Def.’s Mot. Ex. A. In addition, the Arbitration Agreement here does not create any unfair process for selection of arbitrators, such as requiring that the arbitrators be chosen from a list created by Driftwood alone. Cf. Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938-39 (4th Cir. 1999). Next, any lack of sophistication on the part of Elijah McCutcheon does not overcome the fairness of the terms in the agreement itself. See

Munoz v. Green Tree Fin. Corp., 542 S.E.2d 360, 365 n.5 (S.C. 2001) (“[I]nequality of bargaining power alone will not invalidate an arbitration agreement.”). Finally, the clause stating that the agreement is governed by interstate commerce was set in normal text, rather than obscured in smaller text or in a footnote. See Def.’s Mot. Ex. A. “[A] person who can read is bound to read an agreement before signing it,” Munoz, 542 S.E.2d at 365, and the law generally presumes that a party to a contract has read and understood the contract’s terms. Simpson, 644 S.E.2d at 670. The clause relating to interstate commerce did not constitute an unfair surprise. For these reasons, the court finds that the Arbitration Agreement was not unconscionable.¹

B. Applicability of Federal Arbitration Act

Plaintiff argues that even if the Arbitration Agreement is enforceable, the FAA does not apply because the transaction between McCutcheon and Driftwood does not “in fact” involve interstate or foreign commerce. For an arbitration agreement to be subject to the FAA, it must involve interstate commerce. 9 U.S.C. § 2. “The FAA has an expansive reach, similar to that of the Commerce Clause, such that an arbitration clause merely ‘affecting’ interstate commerce would be covered by the statute.” Wiggins, No. 11-888, 2011 WL 4089435, at *1 n.3 (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273-74 (1995)). “Congress’ Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice . . . subject

¹ Plaintiff also argues that an enforceable arbitration agreement does not exist because Elijah McCutcheon had neither apparent agency authority nor statutory authority to bind Carmela McCutcheon under the contract. Because the court holds that plaintiff is equitably estopped from denying the validity of the Arbitration Agreement, and that Carmela McCutcheon was a third party beneficiary and the Arbitration Agreement remains binding on her estate, the court need not reach plaintiff’s additional arguments.

to federal control.” Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) (internal quotation marks omitted).

The Arbitration Agreement here clearly states that “the services and reimbursement thereof effects a transaction that involves interstate commerce.” Def.’s Mot. Ex. A. Courts look to the terms of the arbitration agreement itself as evidence of whether the transaction involves interstate commerce. Wood, 429 F.3d at 87 (emphasis added) (noting that courts must consider “the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce”). Even without this stipulation in the Arbitration Agreement, the FAA still applies because the type of nursing home care involved here affects interstate commerce. Driftwood’s Administrator, Jim Thomas, submitted an affidavit wherein he attested that food is supplied to Driftwood, located in South Carolina, by Sysco Corporation, which is headquartered in Texas. Def.’s Mot. Ex. E, ¶ 6. Thomas further stated that supplies used at Driftwood are purchased from manufacturers in California, Colorado, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Missouri, and Wisconsin. Id. at ¶¶ 7-13. These supplies must be shipped across state lines to reach Driftwood’s facility. Finally, Driftwood participates in the federal Medicare and Medicaid programs. Id. at ¶ 14. The court finds this evidence sufficient to fulfill the interstate commerce requirement.

Plaintiff cites to Timms v. Greene, 427 S.E.2d 642 (S.C. 1993), as support for his argument that the transaction at issue does not involve interstate commerce. In Timms, the South Carolina Supreme Court found that an affidavit from the administrator of a health care center, in which the administrator averred that the center engaged in interstate commerce, was “insufficient to form the basis of the contract between the parties.” Id. at

644. Timms is distinguishable from the present case, because the Arbitration Agreement signed by plaintiff specifically stated that the underlying transaction involves interstate commerce. Thus, the Arbitration Agreement “on its face evidences commerce.” Id. The court finds that the FAA applies in this case.

III. CONCLUSION

For the foregoing reasons, the court **GRANTS** defendant’s motion to compel arbitration.

The court dismisses this matter, but retains jurisdiction to select an arbitrator in the event that the parties cannot reach a mutual decision.

AND IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'D. Norton', is written over a horizontal line.

DAVID C. NORTON
CHIEF UNITED STATES DISTRICT JUDGE

December 15, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT
ROBERT ABRAMS,) CASE NO. 2010-CP-42-6861
))
))
PLAINTIFF,))
))
vs.))
))
FUNDAMENTAL LONG-TERM CARE)
HOLDINGS, LLC D/B/A MAGNOLIA)
MANOR-INMAN; THI OF SOUTH)
CAROLINA AT MAGNOLIA MANOR-)
INMAN, LLC D/B/A MAGNOLIA)
MANOR-INMAN; ROBERT CROOKS;)
DALE LYLES; AND CAROL CLARK,)
))
DEFENDANTS.)

ORDER

Date of Hearing: July 21, 2011
Date of Re-hearing: March 13, 2012
Attorneys for Plaintiff: Gary W. Poliakoff and Raymond P. Mullman, Jr.
Attorneys for Defendant: Lori Proctor

This matter is before the Court on Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman, Robert Crooks, Dale Lyles and Carol Clark, and a Motion to Stay on behalf of Defendant Fundamental Long-Term Care Holdings, LLC. The Court denied these motions by Order dated August 25, 2011, after a hearing on July 21, 2011. Defendants filed a Motion to Alter, Amend or Reconsider the August 25, 2011 Order. For the reasons set forth below, the Court vacates the August 25, 2011 Order and grants Defendants' motions.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff has sued Defendants for Negligence, Negligence per Se, Intentional and Negligent Infliction of Emotional Distress, Breach of Fiduciary Duty and Unjust Enrichment,

pursuant to the Plaintiff's residency at the Magnolia Manor-Inman nursing facility. Plaintiff was a resident of the Magnolia Manor-Inman facility from approximately November 23, 2008, to January 23, 2009. Pursuant to Plaintiff's admission to Magnolia Manor-Inman, his wife Rebecca Abrams, acting as his representative, executed an Admissions Agreement and an Arbitration Agreement.

The Arbitration Agreement defines Magnolia Manor-Inman as the "Health Care Center," Robert J. Abrams as the "Resident" and Rebecca Abrams as "Representative." Mot. Exh. A. The relevant provisions of the Arbitration Agreement state the following:

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

Id. The Arbitration Agreement further states that:

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

Id. Regarding Rebecca Abrams authority to sign on behalf of her husband, the Arbitration Agreement states:

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

The Arbitration Agreement was executed by Rebecca Abrams as "Representative" and the admissions director at Magnolia Manor-Inman as the "Authorized Agent for Healthcare Center."

II. DISCUSSION

A. Arbitration Under the Federal Arbitration Act

Defendants move for arbitration under the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 et seq. The FAA and its expression of the federal policy favoring arbitration are binding in state and federal courts. Zabinski v. Bright Acres Associates, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001). Arbitration is available “only when the parties involved contractually agree to arbitrate.” Towles v. United HealthCare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) (Citations omitted.). State law governs issues of contract formation. See Hill v. PeopleSoft USA, Inc., 412 F.3d 540, 543 (4th Cir. 2005); Davis v. KB Home of S. Carolina, Inc., 394 S.C. 116, 124, 713 S.E.2d 799, 803 (Ct. App. 2011)(“[E]ven in cases where the 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. §2. The Court must “decide whether there is an agreement to arbitrate according to common law principles of contract law” and “apply ordinary state-law principles that govern the formation of contract.” Towles, 338 S.C. at 37, 524 S.E.2d at 844.

There is a “strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes.” Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). “The policy of the United States and this State is to favor arbitration of disputes.” Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). “[T]he heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.” Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir. 1989). Any doubts concerning the “scope of arbitrable issues” should be resolved in favor of arbitration.

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Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 941 (1983).

The FAA establishes a “broad principle of enforceability;” arbitration agreements must not be singled out for suspect status, but rather it is required that arbitration provisions are “placed upon the same footing as other contracts.” Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 682, 684-85, 116 S. Ct. 1652, 1653, 1655 (1996).

Thus, the court may not deny a party’s request to arbitrate an issue “unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute.” Towles, 338 S.C. at 41-42, 524 S.E.2d at 846 (Ct. App. 1999).

B. Application of the FAA

Plaintiff argues that the South Carolina Uniform Arbitration Act applies to the Arbitration Agreement and that the FAA does not apply to the Arbitration Agreement because the parties’ agreement does not touch on interstate commerce.

The FAA will govern the enforcement of an arbitration agreement when a contract provides that it shall be governed by the FAA. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363-364 (2001); Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S.Ct. 1248 (1989). “Arbitration agreements, like other contracts, are enforceable in accordance with their terms.” Id. Clearly, the parties here have agreed that the Arbitration Agreement will be governed by the FAA.

Because the FAA applies, the requirements as set forth under the South Carolina Uniform Arbitration Act, (“SCUAA”) S.C. Code §15-48-10 et seq., are not applicable. In passing the FAA, “Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed

to resolve by arbitration . . . Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.” Perry v. Thomas, 482 U.S. 483, 489, 107 S. Ct. 2520, 2525 (1987). Therefore, the FAA supersedes state acts governing arbitration agreements, including the SCUAA, in situations such as the case here.

Furthermore, the parties’ transaction and relationship in fact involve interstate commerce. As required, this court has “examine[d] the agreement, the complaint, and the facts to ascertain whether the transaction is one involving commerce within the meaning of the [the FAA].” Mathews v. Fluor Corp., 312 S.C. 404, 407, 440 S.E.2d 880, 881 (1994). “[T]he FAA applies in federal and state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.” Munoz, 343 S.C. at 538-539, 542 S.E.2d at 363, citing Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 115 S. Ct. 834 (1995); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996). “The FAA has an expansive reach, similar to that of the Commerce Clause, such that an arbitration clause merely ‘affecting’ interstate commerce would be covered by the statute.” THI of S. Carolina at Columbia, LLC v. Wiggins, 2011 WL 4089435 (D.S.C. 2011), citing Allied-Bruce, 513 U.S. 265, 273-74. “Congress’ Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice . . . subject to federal control.” Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) (internal quotation marks omitted).

The Arbitration Agreement here clearly states that “the services and reimbursement thereof effects a transaction that involves interstate commerce.” Mot. Ex. A. Courts look to the terms of the arbitration agreement itself as evidence of whether the transaction involves interstate

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commerce. Am. Gen. Life & Acc. Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005)(noting that courts must consider “the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce”). “Arbitration agreements, like other contracts, are enforceable in accordance with their terms.” Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001), citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). Even without this stipulation in the Arbitration Agreement, the FAA must apply because the type of nursing home care involved here affects interstate commerce. Magnolia Manor-Inman’s Administrator, Dale Lyles, submitted an affidavit wherein he attested that medical supplies used in the care of residents and personal supplies used at the facility come from outside the state of South Carolina. Mtn. Ex. D. These supplies must be shipped across state lines to reach Magnolia Manor-Inman’s facility. Dale Lyles further attested that part of Mr. Abrams stay at the facility was paid for by the federal Medicare program; insurance companies outside of South Carolina electronically deposited payments in the facility’s bank accounts which are also outside of South Carolina. *Id.* These are clear examples of interstate commerce.

Furthermore, arbitration agreements have consistently been interpreted under the FAA in similar nursing home negligence cases. See Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012); McCutcheon v. THI of S.C. at Charleston, LLC, 2011 WL 6318575 (D.S.C. 2011); Wiggins.

Plaintiff cites to Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642, (1993), as support for his argument that the transaction at issue does not involve interstate commerce as necessary to apply the FAA. In Timms, the administrator of a nursing home set forth via affidavit a number of factors indicating how the nursing home engaged in interstate commerce. The Court held that

“[a]lthough these factors could evidence the [nursing home]’s involvement in interstate commerce, we find that their relationship to the agreement between the [nursing home] and the [plaintiff] is insufficient to form the basis of the contract between the parties.” Id., 310 S.C. at 473, 427 S.E.2d at 644. Timms is distinguishable from the present case for a number of reasons, namely that the parties here explicitly agreed that the FAA would apply and that “the services and reimbursement thereof effects a transaction in interstate commerce.” Mot. Exh. A. Furthermore, the reasoning used in Timms has been subsequently implicitly overruled by the United States Supreme Court. In Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 123 S. Ct. 2037 (2003), the Court discussed the relationship between the arbitration agreement and interstate commerce such as to require the application of the FAA. The Court held:

We have interpreted the term “involving commerce” in the FAA as the functional equivalent of the more familiar term “affecting commerce”- words of art that ordinarily signal the broadest permissible exercise of Congress’ Commerce Clause power. Because the [FAA] provides for “the enforcement of arbitration agreements within the full reach of the Commerce Clause,” it is perfectly clear that the FAA encompasses a wider range of transactions than those actually “in commerce”- that is, “within the flow of interstate commerce,” . . . [A]pplication of the FAA [is not] defeated because the [the transactions at issue,] taken alone, did not have a “substantial effect on interstate commerce.” **Congress’ Commerce Clause power “may be exercised in individual cases without showing any specific effect upon interstate commerce” if in the aggregate the economic activity in question would represent “a general practice ... subject to federal control.” Only that general practice need bear on interstate commerce in a substantial way.**

Id., 539 U.S. at 56-57, 123 S. Ct. at 2040. (Citations omitted.)(Emphasis added.) When determining effect on interstate commerce, it is the general practice, not the particular transaction at issue, which must be analyzed. Here, the nursing home at issue is clearly involved in interstate commerce, and provision of nursing home services effects interstate commerce in a substantial way. See Mot. Exh. D. As such, the Timms analysis of the interstate commerce question is effectively overruled, and must not be given credence by this Court.

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The Court finds this evidence sufficient to fulfill the interstate commerce requirement.

C. Existence of Enforceable Arbitration Agreement

Plaintiff denies the validity of the Arbitration Agreement with Magnolia Manor-Inman.

1. Equitable Estoppel

Magnolia Manor-Inman argues the Plaintiff should be equitably stopped from denying that Rebecca Abrams had authority to bind Robert Abrams.

“[T]he doctrine of estoppel is equitable in nature.” Ahrens v. State, 392 S.C. 340, 348, 709 S.E.2d 54, 58 (2011). “Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do.” Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). “[N]o party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein.” United States v. Bankers Ins. Co., 245 F.3d 315, 323 (4th Cir. 2001); see Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) (internal quotation marks omitted) (“To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.”).

Here, the Arbitration Agreement and Admissions Agreement, while separate documents, were executed by the same parties, at the same time, and regarding the same transaction; therefore, the two instruments constitute the entire agreement between the parties and must be construed together. See Klutts Resort Realty, Inc. v. Down’Round Dev. Corp., 268 S.C. 80, 88-89, 232 S.E.2d 20, 24, (1977) (“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 courts will consider and construe the

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instruments together. The theory is that the instruments are effectively one instrument or contract.”).

Plaintiff admits he was a resident of Magnolia Manor-Inman pursuant to the terms of the Admissions Agreement. (See Complaint ¶34: Plaintiff states he “resided at the [] facility pursuant to the terms of the admissions agreement.”) Yet Plaintiff simultaneously denies the enforceability of terms of the Arbitration Agreement. The Admissions Agreement and Arbitration Agreement must be construed as one agreement; Plaintiff cannot claim the benefits of one while denying the perceived burdens of the other.

Even if the Arbitration Agreement and Admissions Agreement constitute two separate contracts, Plaintiff still takes inconsistent positions regarding these contracts. It would be inequitable, for example, to allow Plaintiff to assert that Rebecca Abrams had authority to sign the Admissions Agreement on behalf of Robert Abrams, but lacked such authority to sign the Arbitration Agreement.

Plaintiff further argues that no cause of action for breach of contract has been pled, and thus the doctrine of equitable estoppel should not apply. However, the doctrine of equitable estoppel has a much broader application than suggested by Plaintiff. It is well settled that when a duty arises from contractual obligations, equitable estoppel may apply with equal effect to a related tort action. The Fourth Circuit Court of Appeals examined this exact issue in American Bankers Ins. Group v. Long, 453 F.3d 623 (4th Cir. 2006). In reversing the trial court’s denial of the defendant’s motion to compel arbitration, the Court stated:

The legal principle [underlying the theory of equitable estoppel] rests on a simple proposition: it is unfair for a party to rely on a contract when it works to its advantage, and repudiate it when it works to its disadvantage. To be equitably estopped from denying the applicability of an arbitration clause, therefore, the [plaintiff] need not necessarily assert a cause of action for breach of contract containing the arbitration clause. Instead, **estoppel is appropriate if in**

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substance the [plaintiff]’s complaint [is] based on the [defendant’s] alleged breach of the obligations and duties assigned to it in the agreement, regardless of the legal label assigned to the claim.

Id. (Emphasis added.)(Internal citations omitted.) South Carolina District Courts have continually endorsed this precise proposition as well. See Thomas v. Matrix Sys. Auto. Finishers, LLC, 2010 WL 147956, at 8 (D.S.C. 2010); Wiggins. Because Plaintiff’s claim in substance is based on the breach of certain duties assigned the Defendants pursuant to their contractual agreements, equitable estoppel may be applied to prevent Plaintiff from denying the validity of the Arbitration Agreement.

For these reasons, the Court finds that Plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

2. Third Party Beneficiary

Magnolia Manor-Inman alternatively argues that Robert Abrams is a third-party beneficiary and is therefore bound by the Arbitration Agreement.

“A third party beneficiary is a party that the contracting parties intend to directly benefit.” Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). “[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person.” Bob Hammond Const. Co. v. Banks Const. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994). Moreover, “[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.” Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416-417 (4th Cir. 2000).

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Robert Abrams' care was the essential purpose of the parties' agreement, as he is named in both the Arbitration Agreement and the Admissions Agreement as the resident to be admitted into the facility. Further, the terms of both agreements refer to the rights and obligations of Robert Abrams as resident of the facility, and Magnolia Manor-Inman as the caregiver. As such, Robert Abrams was an intended beneficiary to the contract, and the Court finds that the arbitration provision is binding on him. See Wiggins ("Hall's care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate."); Cook v. GGNSC Ripley, LLC, 786 F. Supp. 2d 1166, 1172 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care bound third-party beneficiary and her estate).

3. Unconscionability

Plaintiff further argues the Arbitration Agreement is invalid because it is unconscionable.

"[A]n adhesion contract is not per se unconscionable." Munoz, 343 S.C. at 541, 542 S.E.2d at 365. "Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996). "Further, a person who can read is bound to read an agreement before signing it." Munoz, 343 S.C. at 541, 542 S.E.2d at 365 (holding that arbitration provision was not unconscionable even though plaintiffs did not read it and were not advised of those terms). In

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addition, "inequality of bargaining power alone will not invalidate an arbitration agreement." Id. at n.5.

In Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, (2007), our Supreme Court held that:

In determining whether a contract was "tainted by an absence of meaningful choice," 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 the challenged clause; and the conspicuousness of the clause.

373 S.C. at 25, 644 S.E.2d at 669 (citation omitted).

"[W]here the contract is subject to the FAA, this court must defer to that legislative policy and may not view arbitration as an inherently less beneficial form of dispute resolution." Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 400, 498 S.E.2d 898, 905 (Ct. App. 1998). In addition, "a party desiring to avoid an arbitration clause on the grounds that no reasonable person would have agreed to it merely because it precludes judicial remedies must demonstrate how he or she has been prejudiced by compelled arbitration. This requires, at the least, identification of judicial relief not available in arbitration." Id. "The loss of the right to a jury trial is an obvious result of arbitration." Simpson, 373 S.C. at 27, 644 S.E.2d at 670 (holding that arbitration clause was unconscionable because in addition to "the inconspicuous nature of [the] provision, which was drafted by the superior party," the provision "also required Simpson to forego certain [significant] remedies that were otherwise required by statute").

The Arbitration Agreement clearly states that the party entering into the Agreement is fully aware of his healthcare options and other potential providers of nursing home facilities. The Agreement states:

It is understood by Resident/Representative that he/she is not required to use the



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aforesaid Health Care Center for Resident's healthcare needs and that there are numerous other health care providers in the State where Health Care Center is located that are qualified to provide such care to Resident.

Mot. Exh. A. Furthermore, the Arbitration Agreement states clearly in bold lettering in a separate heading: **"I understand and agree that I am giving up and waiving my right to a jury trial."** Mot. Exh. A (Emphasis in Original.).

Any lack of sophistication on the part of Rebecca Abrams does not overcome the fairness of the terms in the agreement itself. See Munoz. All judicial remedies available in a jury trial are available to Abrams in arbitration, and as such Robert Abrams is not prejudiced by enforcement of the Arbitration Agreement. Furthermore, the express terms of the Arbitration Agreement, which Rebecca Abrams was bound to read, indicate she understood and agreed that she was giving up the right to a jury trial. There is no fine print or convoluted language here; the Arbitration Agreement is fair, clear and unambiguous.

Further, the Arbitration Agreement does not create any unfair process for selection of arbitrators, such as requiring that the arbitrators be chosen from a list created by Magnolia Manor-Inman alone. Cf. Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938-39 (4th Cir. 1999). The Arbitration Agreement is not unconscionable, as it applies equally to both the resident and the facility. Each party is given equal rights to seek arbitration of disputes.

For these reasons, the court finds that the Arbitration Agreement is not unconscionable.

4. Federal Statutes and Regulations Governing Medicare and/or Medicaid

Abrams' further argues that the Arbitration Agreement is not enforceable because it amounts to an additional charge for admission into the facility pursuant to 42 U.S.C. §1396r(c)(5)(A)(iii) and 42 C.F.R. §483.12(d)(3), which prohibit the requirement of other consideration as a precondition of admission." This argument too is unpersuasive.

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In Sanford v. Castleton Health Care Ctr., LLC, 813 N.E.2d 411, 419 (Ind. Ct. App. 2004), the Indiana Court of Appeals noted that requiring a nursing-home admittee to sign an arbitration agreement is not akin to charging an additional fee or other consideration as a prerequisite of admittance. Rather, an arbitration agreement merely establishes a forum for future disputes; both parties are bound to it and both parties receive whatever benefits and detriments accompany the arbitral forum. Id.; Owens v. Coosa Valley Health Care, Inc., 890 So.2d 983, 989 (Ala. 2004) (finding that the argument that arbitration agreement violated 42 U.S.C. §1396r(c)(5)(A)(iii) prohibition of “other consideration” failed and noting that “[i]f we were to agree with Owens, virtually any contract term Owens decided she did not like could be construed as requiring other consideration in order to gain admittance to the nursing home and thus be disallowed by the statute); Owens v. Nat. Health Corp., 263 S.W.3d 876, 887 (Tenn. 2007) (finding no violation); Broughsville v. OHECC, LLC, 2005 WL 3483777 (Ohio Ct. App. 2005) (unpublished); Gainesville Health Care Ctr., Inc. v. Weston, 857 So.2d 278, 288 (Fla. Ct. App. 1 Dist. 2003) (“We have found no authority from any jurisdiction which holds that an arbitration provision constitutes ‘consideration’ in this sense; nor do we believe that the federal regulation was intended to apply to such a situation.”). The Court agrees with the reasoning in the above cited cases and finds that 42 U.S.C. § 1396r(c)(5)(A)(iii) and 42 C.F.R. § 483.12(d)(3) are not intended to apply to this case and further, that an arbitration agreement is not considered an additional charge as contemplated therein.

5. Plaintiff’s Claims Fall within the Scope of the Arbitration Agreement

Plaintiff further argues that his claims do not fall within the scope of the Arbitration Agreement. However, the Arbitration Agreement is broadly worded to include “any controversy or dispute . . . relating in any way to Resident's stay at Health Care Center, or to the provisions of

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care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim . . .” Mot. Exh. A. Furthermore, the FAA’s “text includes no exception for personal-injury [] claims” but rather “requires courts to enforce the bargain of the parties to arbitrate.” Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203 (2012). Clearly the disputes raised in Plaintiff’s Complaint fall under the terms of the Arbitration Agreement.

6. Defendants have not Waived their Right to Arbitrate

Plaintiff further argues Defendants have by their conduct nullified the Arbitration Agreement and waived their right to Arbitrate. Defendants filed their Motion to Dismiss and Petition to Compel Arbitration at their first opportunity for a responsive pleading i.e. at the same time as answering the Plaintiff’s Complaint. No action was pending against the Defendants prior to Plaintiff filing his Complaint, and as such no assertion of the right to arbitration was required and no possibility of waiver existed. Defendants have not waived or abandoned their right to enforce a proper arbitration agreement.

D. Defendants Magnolia Manor-Inman, Robert Crooks, Dale Lyles and Carol Clark Have Standing to Assert Arbitration

The express written language of the Arbitration Agreement indicates the following:

This Agreement is made between Magnolia Manor-Inman (“Health Care Center”), its agents, employees and servants, and Robert J. Abrams (“Resident”) or Rebecca Abrams [as “Representative”]. . . It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.

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Mot. Exh. A. It is well established that non-signatories have the right to enforce arbitration agreements in certain situations. See Am. Bankers Ins. Group, Inc. v. Long, 453 F.3d 623 (4th Cir. 2006). Robert Crooks, Dale Lyles and Carol Clark were members of Magnolia Manor-

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Inman's governing body. Further, it appears Dale Lyles was the facility administrator and Carol Clark was the director of nursing at all times relevant to Plaintiff's claim. Plaintiff does not contest this. As such, Robert Crooks, Dale Lyles and Carol Clark are all agents of Magnolia Manor-Inman pursuant to their roles as members of the governing body. Further, Dale Lyles and Carol Clark are employees of Magnolia Manor-Inman. As such, each individual has a right to assert the terms of the Arbitration Agreement.

III. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman, Robert Crooks, Dale Lyles and Carol Clark. The Court **STAYS** the matter as to the remaining Defendant, Fundamental Long-Term Care Holding, LLC, until the arbitration process has been completed. The Court retains jurisdiction of the matter as to the Dismissed Defendants only to the following extent: should the parties to the Arbitration Agreement be unable to select an arbitrator or unable to agree on one pursuant to the terms of the Arbitration Agreement, this Court retains jurisdiction of the matter to assist the parties in selecting an arbitrator.

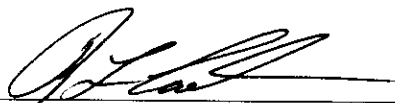
It is therefore

ORDERED that Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman, Robert Crooks, Dale Lyles and Carol Clark are **GRANTED** and the matter is **STAYED** for the remaining Defendant until arbitration has been completed.



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IT IS SO ORDERED.



Honorable Roger L. Couch
Presiding Judge Seventh Judicial Circuit

Spartanburg, South Carolina

Dated: 6/22/12

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

FRANK A. CAMPSSEN BY AND) CASE NO. 2011-CP-42-0438
THROUGH HIS ATTORNEY-IN-FACT)
LARRY F. CAMPSSEN,)
PLAINTIFFS,)
VS.)
FUNDAMENTAL LONG-TERM CARE)
HOLDINGS, LLC; FUNDAMENTAL)
CLINICAL CONSULTING, LLC;)
FUNDAMENTAL ADMINISTRATIVE)
SERVICES, LLC; THI OF BALTIMORE,)
INC.; THI OF SOUTH CAROLINA,)
LLC; THI OF SOUTH CAROLINA AT)
MAGNOLIA PLACE AT)
SPARTANBURG, LLC D/B/A)
MAGNOLIA PLACE AT)
SPARTANBURG; EDWARD WARREN,)
MD; NETWORK GERIATRICS)
SERVICES, P.A.; ROBERT CROOKS;)
PATRICIA HARRIS; AND MARGARET)
KELLER,)
DEFENDANTS.)

ORDER

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Date of Hearing: July 21, 2011
Date of Re-hearing: March 13, 2012
Attorneys for Plaintiff: Gary W. Poliakoff and Raymond P. Mullman, Jr.
Attorneys for Defendant: Lori Proctor

This matter is before the Court on Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg ("Magnolia Place"), Robert Crooks, Patricia Harris and Margaret Keller, and Motions to Stay on behalf of Defendants Fundamental Long-Term Care Holdings, LLC, Fundamental Administrative Services, LLC, Fundamental Clinical



Consulting, LLC, THI of Baltimore, Inc. and THI of South Carolina, LLC. The Court denied these motions by Order dated August 25, 2011, after a hearing on July 21, 2011. Defendants filed a Motion to Alter, Amend or Reconsider the August 25, 2011 Order. For the reasons set forth below, the Court vacates the August 25, 2011 Order and grants Defendants' motions.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff has sued Defendants for Negligence, Negligence per Se, Breach of Fiduciary Duty and Unjust Enrichment, pursuant to Frank A. Campsen's residency at the Magnolia Place nursing facility. Mr. Campsen was a resident of the Magnolia Place facility from approximately October 21, 2009, to December 20, 2009. Pursuant to Mr. Campsen's admission to Magnolia Place, Larry F. Campsen, acting as his representative, executed an Admissions Agreement and an Arbitration Agreement. Frank Campsen had previously designated Larry F. Campsen as his General Durable Power of Attorney and Healthcare Power of Attorney, and given him authority to enter into agreements on his behalf. Mtn. Exh. D.

The Arbitration Agreement defines Magnolia Place as the "Facility," Frank A. Campsen as the "Resident" and Larry Campsen as "Resident's Durable Power of Attorney for Healthcare" and "Representative." *Id.* The relevant provisions of the Arbitration Agreement state the following:

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

Id. The Arbitration Agreement further states that:

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

Id. Regarding Larry Campsen's authority to sign on behalf of Frank Campsen, the Arbitration Agreement states:

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

The Arbitration Agreement clearly sets forth the parties to be bound by the Agreement:

It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.

Id. The Arbitration Agreement was executed by Larry Campsen as "Representative" of Frank Campsen and by the "Authorized Agent of Facility."

II. DISCUSSION

A. Arbitration Under the Federal Arbitration Act

Defendants move for arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. The FAA and its expression of the federal policy favoring arbitration are binding in state and federal courts. Zabinski v. Bright Acres Associates, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001). Arbitration is available "only when the parties involved contractually agree to arbitrate." Towles v. United HealthCare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999), (Citations omitted.). State law governs issues of contract formation. See Hill v. PeopleSoft USA, Inc., 412 F.3d 540, 543 (4th Cir. 2005); Davis v. KB Home of S. Carolina, Inc., 394 S.C. 116, 124, 713 S.E.2d 799, 803 (Ct. App. 2011)("[E]ven in cases where the 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. §2. The Court must “decide whether there is an agreement to arbitrate according to common law principles of contract law” and “apply ordinary state-law principles that govern the formation of contract.” Towles, 338 S.C. at 37, 524 S.E.2d at 844.

There is a “strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes.” Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). “The policy of the United States and this State is to favor arbitration of disputes.” Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). “[T]he heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.” Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir. 1989). Any doubts concerning the “scope of arbitrable issues” should be resolved in favor of arbitration. Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 941 (1983).

The FAA establishes a “broad principle of enforceability;” arbitration agreements must not be singled out for suspect status, but rather it is required that arbitration provisions are “placed upon the same footing as other contracts.” Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 682, 684-85, 116 S. Ct. 1652, 1653, 1655 (1996).

Thus, the court may not deny a party’s request to arbitrate an issue “unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute.” Towles, 338 S.C. at 41-42, 524 S.E.2d at 846 (Ct. App. 1999).

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B. Application of the FAA

Plaintiff argues that the South Carolina Uniform Arbitration Act applies to the Arbitration Agreement and that the FAA does not apply to the Arbitration Agreement because the parties' agreement does not touch on interstate commerce.

The FAA will govern the enforcement of an arbitration agreement when a contract provides that it shall be governed by the FAA. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363-364 (2001); Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S.Ct. 1248 (1989). "Arbitration agreements, like other contracts, are enforceable in accordance with their terms." Id. Clearly, the parties here have agreed that the Arbitration Agreement will be governed by the FAA.

Because the FAA applies, the requirements as set forth under the South Carolina Uniform Arbitration Act, ("SCUAA") S.C. Code §15-48-10 et seq., are not applicable. In passing the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration . . . Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." Perry v. Thomas, 482 U.S. 483, 489, 107 S. Ct. 2520, 2525 (1987). Therefore, the FAA supersedes state acts governing arbitration agreements, including the SCUAA, in situations such as the case here.

Furthermore, the parties' transaction and relationship in fact involve interstate commerce. As required, this court has "examine[d] the agreement, the complaint, and the facts to ascertain whether the transaction is one involving commerce within the meaning of the [the FAA]."
Mathews v. Fluor Corp., 312 S.C. 404, 407, 440 S.E.2d 880, 881 (1994). "[T]he FAA applies in federal and state court to any arbitration agreement regarding a transaction that in fact involves

interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.” Munoz, 343 S.C. at 538-539, 542 S.E.2d at 363, citing Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 115 S. Ct. 834 (1995); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996). “The FAA has an expansive reach, similar to that of the Commerce Clause, such that an arbitration clause merely ‘affecting’ interstate commerce would be covered by the statute.” THI of S. Carolina at Columbia, LLC v. Wiggins, 2011 WL 4089435 (D.S.C. 2011), citing Allied-Bruce, 513 U.S. 265, 273-74. “Congress’ Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice . . . subject to federal control.” Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) (internal quotation marks omitted).

The Arbitration Agreement here clearly states that “the services and reimbursement thereof effects a transaction that involves interstate commerce.” Mot. Ex. A. Courts look to the terms of the arbitration agreement itself as evidence of whether the transaction involves interstate commerce. Am. Gen. Life & Acc. Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005)(noting that courts must consider “the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce”). “Arbitration agreements, like other contracts, are enforceable in accordance with their terms.” Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001), citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). Even without this stipulation in the Arbitration Agreement, the FAA must apply because the type of nursing home care involved here affects interstate commerce. Magnolia Place’s Business Office Manager, Lynn Henderson, submitted an affidavit wherein she attested that medical supplies used in the care of residents and

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personal supplies used at the facility come from outside the state of South Carolina. Mtn. Ex. F. These supplies must be shipped across state lines to reach Magnolia Place's facility. Timothy Johnson further attested that part of Mr. Campsen stay at the facility was paid for by the federal Medicare program; insurance companies outside of South Carolina electronically deposited payments in the facility's bank accounts which are also outside of South Carolina. *Id.* These are clear examples of interstate commerce.

Furthermore, arbitration agreements have consistently been interpreted under the FAA in similar nursing home negligence cases. See Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012); McCutcheon v. THI of S.C. at Charleston, LLC, 2011 WL 6318575 (D.S.C. 2011); Wiggins.

Plaintiff cites to Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642, (1993), as support for his argument that the transaction at issue does not involve interstate commerce as necessary to apply the FAA. In Timms, the administrator of a nursing home set forth via affidavit a number of factors indicating how the nursing home engaged in interstate commerce. The Court held that "[a]lthough these factors could evidence the [nursing home]'s involvement in interstate commerce, we find that their relationship to the agreement between the [nursing home] and the [plaintiff] is insufficient to form the basis of the contract between the parties." *Id.*, 310 S.C. at 473, 427 S.E.2d at 644. Timms is distinguishable from the present case for a number of reasons, namely that the parties here explicitly agreed that the FAA would apply and that "the services and reimbursement thereof effects a transaction in interstate commerce." Mot. Ex. A. Furthermore, the reasoning used in Timms has been subsequently implicitly overruled by the United States Supreme Court. In Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 123 S. Ct. 2037,

(2003), the Court discussed the relationship between the arbitration agreement and interstate commerce such as to require the application of the FAA. The Court held:

We have interpreted the term “involving commerce” in the FAA as the functional equivalent of the more familiar term “affecting commerce”- words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power. Because the [FAA] provides for “the enforcement of arbitration agreements within the full reach of the Commerce Clause,” it is perfectly clear that the FAA encompasses a wider range of transactions than those actually “in commerce”- that is, “within the flow of interstate commerce,” . . . [A]pplication of the FAA [is not] defeated because the [the transactions at issue,] taken alone, did not have a “substantial effect on interstate commerce.” **Congress' Commerce Clause power “may be exercised in individual cases without showing any specific effect upon interstate commerce” if in the aggregate the economic activity in question would represent “a general practice ... subject to federal control.” Only that general practice need bear on interstate commerce in a substantial way.**

Id., 539 U.S. at 56-57, 123 S. Ct. at 2040. (Citations omitted.)(Emphasis added.) When determining effect on interstate commerce, it is the general practice, not the particular transaction at issue, which must be analyzed. Here, the nursing home at issue is clearly involved in interstate commerce, and provision of nursing home services effects interstate commerce in a substantial way. See Mot. Exh. D. As such, the Timms analysis of the interstate commerce question is effectively overruled, and must not be given credence by this Court.

The Court finds this evidence sufficient to fulfill the interstate commerce requirement.

C. Existence of Enforceable Arbitration Agreement

Plaintiff denies the validity of the Arbitration Agreement with Magnolia Place.

1. Larry Campsen As Personal Representative of the Estate of Frank Campsen

In pursuing this action, Larry Campsen acts as personal representative of Frank Campsen's estate. Under South Carolina law, “a personal representative of a decedent domiciled in this State at his death has the same standing to sue and be sued in the courts of this State and the courts of any other jurisdiction as his decedent had immediately prior to death.” S.C.Code

Ann. § 62-3-703. Thus, Larry Campsen is bound in his capacity as personal representative if Frank Campsen would have been bound immediately prior to his death.

2. Equitable Estoppel

Magnolia Place argues the Plaintiff should be equitably stopped from denying that Larry Campsen had authority to bind Frank Campsen.

“[T]he doctrine of estoppel is equitable in nature.” Ahrens v. State, 392 S.C. 340, 348, 709 S.E.2d 54, 58 (2011). “Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do.” Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). “[N]o party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein.” United States v. Bankers Ins. Co., 245 F.3d 315, 323 (4th Cir. 2001); see Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) (internal quotation marks omitted) (“To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.”).

Here, the Arbitration Agreement and Admissions Agreement, while separate documents, were executed by the same parties, at the same time, and regarding the same transaction; therefore, the two instruments constitute the entire agreement between the parties and must be construed together. See Klutts Resort Realty, Inc. v. Down’Round Dev. Corp., 268 S.C. 80, 88-89, 232 S.E.2d 20, 24, (1977) (“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 courts will consider and construe the

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instruments together. The theory is that the instruments are effectively one instrument or contract.”).

Plaintiff admits Frank Campsen was a resident of Magnolia Place pursuant to the terms of the Admissions Agreement. (See Amended Complaint ¶37: Plaintiff states Frank Campsen “resided at the [] facility pursuant to the terms of the admissions agreement.”) Yet Plaintiff simultaneously denies the enforceability of terms of the Arbitration Agreement. The Admissions Agreement and Arbitration Agreement must be construed as one agreement; Plaintiff cannot claim the benefits of one while denying the perceived burdens of the other.

Even if the Arbitration Agreement and Admissions Agreement constitute two separate contracts, Plaintiff still takes inconsistent positions regarding these contracts. It would be inequitable, for example, to allow Plaintiff to assert that Larry Campsen had authority to sign the Admissions Agreement on behalf of Frank Campsen, but lacked such authority to sign the Arbitration Agreement.

Plaintiff further argues that no cause of action for breach of contract has been pled, and thus the doctrine of equitable estoppel should not apply. However, the doctrine of equitable estoppel has a much broader application than suggested by Plaintiff. It is well settled that when a duty arises from contractual obligations, equitable estoppel may apply with equal effect to a related tort action. The Fourth Circuit Court of Appeals examined this exact issue in American Bankers Ins. Group v. Long, 453 F.3d 623 (4th Cir. 2006). In reversing the trial court’s denial of the defendant’s motion to compel arbitration, the Court stated:

The legal principle [underlying the theory of equitable estoppel] rests on a simple proposition: it is unfair for a party to rely on a contract when it works to its advantage, and repudiate it when it works to its disadvantage. To be equitably estopped from denying the applicability of an arbitration clause, therefore, the [plaintiff] need not necessarily assert a cause of action for breach of contract containing the arbitration clause. Instead, **estoppel is appropriate if in**

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substance the [plaintiff]'s complaint [is] based on the [defendant's] alleged breach of the obligations and duties assigned to it in the agreement, regardless of the legal label assigned to the claim.

Id. (Emphasis added.)(Internal citations omitted.) South Carolina District Courts have continually endorsed this precise proposition as well. See Thomas v. Matrix Sys. Auto. Finishers, LLC, 2010 WL 147956, at 8 (D.S.C. 2010); Wiggins. Because Plaintiff's claim in substance is based on the breach of certain duties assigned the Defendants pursuant to their contractual agreements, equitable estoppel may be applied to prevent Plaintiff from denying the validity of the Arbitration Agreement.

For these reasons, the Court finds that Plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

3. Third Party Beneficiary

Magnolia Place alternatively argues that Frank Campsen is a third-party beneficiary and is therefore bound by the Arbitration Agreement.

"A third party beneficiary is a party that the contracting parties intend to directly benefit." Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). "[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." Bob Hammond Const. Co. v. Banks Const. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994). Moreover, "[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416-417 (4th Cir. 2000).

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Frank Campsen's care was the essential purpose of the parties' agreement, as he is named in both the Arbitration Agreement and the Admissions Agreement as the resident to be admitted into the facility. Further, the terms of both agreements refer to the rights and obligations of Frank Campsen as resident of the facility, and Magnolia Place as the caregiver. As such, Frank Campsen was an intended beneficiary to the contract, and the Court finds that the arbitration provision is binding on him. See Wiggins ("Hall's care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate."); Cook v. GGNSC Ripley, LLC, 786 F. Supp. 2d 1166, 1172 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care bound third-party beneficiary and her estate).

4. Unconscionability

Plaintiff further argues the Arbitration Agreement is invalid because it is unconscionable.

"[A]n adhesion contract is not per se unconscionable." Munoz, 343 S.C. at 541, 542 S.E.2d at 365. "Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996). "Further, a person who can read is bound to read an agreement before signing it." Munoz, 343 S.C. at 541, 542 S.E.2d at 365 (holding that arbitration provision was not unconscionable even though plaintiffs did not read it and were not advised of those terms). In

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addition, “inequality of bargaining power alone will not invalidate an arbitration agreement.” Id. at n.5.

In Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, (2007), our Supreme Court held that:

In determining whether a contract was “tainted by an absence of meaningful choice,” 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 the challenged clause; and the conspicuousness of the clause.

373 S.C. at 25, 644 S.E.2d at 669 (citation omitted).

“[W]here the contract is subject to the FAA, this court must defer to that legislative policy and may not view arbitration as an inherently less beneficial form of dispute resolution.” Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 400, 498 S.E.2d 898, 905 (Ct. App. 1998). In addition, “a party desiring to avoid an arbitration clause on the grounds that no reasonable person would have agreed to it merely because it precludes judicial remedies must demonstrate how he or she has been prejudiced by compelled arbitration. This requires, at the least, identification of judicial relief not available in arbitration.” Id. “The loss of the right to a jury trial is an obvious result of arbitration.” Simpson, 373 S.C. at 27, 644 S.E.2d at 670 (holding that arbitration clause was unconscionable because in addition to “the inconspicuous nature of [the] provision, which was drafted by the superior party,” the provision “also required Simpson to forego certain [significant] remedies that were otherwise required by statute”).

The Arbitration Agreement clearly states that the party entering into the Agreement is fully aware of his healthcare options and other potential providers of nursing home facilities. The Agreement states:

It is understood by Resident/Representative that he/she is not required to use the

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aforesaid Facility for Resident's healthcare needs and that there are numerous other health care providers in the State where Facility is located that are qualified to provide such care to Resident.

Mot. Exh. A. Furthermore, the Arbitration Agreement states clearly in bold lettering in a separate heading: **"I understand and agree that I am giving up and waiving my right to a jury trial."** Mot. Exh. A (Emphasis in Original.).

Any lack of sophistication on the part of Larry Campsen does not overcome the fairness of the terms in the agreement itself. See Munoz. All judicial remedies available in a jury trial are available to Plaintiff in arbitration, and as such Plaintiff is not prejudiced by enforcement of the Arbitration Agreement. Furthermore, the express terms of the Arbitration Agreement, which Larry Campsen was bound to read, indicate he understood and agreed that he was giving up the right to a jury trial. There is no fine print or convoluted language here; the Arbitration Agreement is fair, clear and unambiguous.

Further, the Arbitration Agreement does not create any unfair process for selection of arbitrators, such as requiring that the arbitrators be chosen from a list created by Magnolia Place alone. Cf. Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938-39 (4th Cir. 1999). The Arbitration Agreement is not unconscionable, as it applies equally to both the resident and the facility. Each party is given equal rights to seek arbitration of disputes.

For these reasons, the court finds that the Arbitration Agreement is not unconscionable.

5. Federal Statutes and Regulations Governing Medicare and/or Medicaid

Plaintiff further argues that the Arbitration Agreement is not enforceable because it amounts to an additional charge for admission into the facility pursuant to 42 U.S.C. §1396r(c)(5)(A)(iii) and 42 C.F.R. §483.12(d)(3), which prohibit the requirement of other consideration as a precondition of admission." This argument too is unpersuasive.

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In Sanford v. Castleton Health Care Ctr., LLC, 813 N.E.2d 411, 419 (Ind. Ct. App. 2004), the Indiana Court of Appeals noted that requiring a nursing-home admittee to sign an arbitration agreement is not akin to charging an additional fee or other consideration as a prerequisite of admittance. Rather, an arbitration agreement merely establishes a forum for future disputes; both parties are bound to it and both parties receive whatever benefits and detriments accompany the arbitral forum. Id.; Owens v. Coosa Valley Health Care, Inc., 890 So.2d 983, 989 (Ala. 2004) (finding that the argument that arbitration agreement violated 42 U.S.C. §1396r(c)(5)(A)(iii) prohibition of “other consideration” failed and noting that “[i]f we were to agree with Owens, virtually any contract term Owens decided she did not like could be construed as requiring other consideration in order to gain admittance to the nursing home and thus be disallowed by the statute); Owens v. Nat. Health Corp., 263 S.W.3d 876, 887 (Tenn. 2007) (finding no violation); Broughsville v. OHECC, LLC, 2005 WL 3483777 (Ohio Ct. App. 2005) (unpublished); Gainesville Health Care Ctr., Inc. v. Weston, 857 So.2d 278, 288 (Fla. Ct. App. 1 Dist. 2003) (“We have found no authority from any jurisdiction which holds that an arbitration provision constitutes ‘consideration’ in this sense; nor do we believe that the federal regulation was intended to apply to such a situation.”). The Court agrees with the reasoning in the above cited cases and finds that 42 U.S.C. § 1396r(c)(5)(A)(iii) and 42 C.F.R. § 483.12(d)(3) are not intended to apply to this case and further, that an arbitration agreement is not considered an additional charge as contemplated therein.

6. Plaintiff’s Claims Fall within the Scope of the Arbitration Agreement

Plaintiff further argues that his claims do not fall within the scope of the Arbitration Agreement. However, the Arbitration Agreement is broadly worded to include “any controversy or dispute . . . relating in any way to Resident’s stay at Facility, or to the provisions of care or

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services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim . . .” Mot. Exh. A. Furthermore, the FAA’s “text includes no exception for personal-injury [] claims” but rather “requires courts to enforce the bargain of the parties to arbitrate.” Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203 (2012). Clearly the disputes raised in Plaintiff’s Amended Complaint fall under the terms of the Arbitration Agreement.

7. Defendants have not Waived their Right to Arbitrate

Plaintiff further argues Defendants have by their conduct nullified the Arbitration Agreement and waived their right to Arbitrate. Defendants filed their Motion to Dismiss and Petition to Compel Arbitration at their first opportunity for a responsive pleading i.e. at the same time as answering the Plaintiff’s Complaint. No action was pending against the Defendants prior to Plaintiff filing his Complaint, and as such no assertion of the right to arbitration was required and no possibility of waiver existed. Defendants have not waived or abandoned their right to enforce a proper arbitration agreement.

D. Defendants Magnolia Place, Robert Crooks, Patricia Harris and Margaret Keller Have Standing to Assert Arbitration

The express written language of the Arbitration Agreement indicates the following:

This Agreement is made between Magnolia Place at Spartanburg (“Facility”); its agents, employees and servants, and Frank A. Campsen (“Resident”) or Larry Campsen [as “Resident’s Durable Power of Attorney for Health Care” and “Representative”]. . . It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.

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Mot. Exh. A. It is well established that non-signatories have the right to enforce arbitration agreements in certain situations. See Am. Bankers Ins. Group, Inc. v. Long, 453 F.3d 623 (4th Cir. 2006). Robert Crooks, Patricia Harris and Margaret Keller were members of Magnolia Place’s governing body. Further, it appears Patricia Harris was the facility administrator and

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Margaret Keller was the director of nursing at all times relevant to Plaintiff's claim. Plaintiff does not contest this. As such, Robert Crooks, Patricia Harris and Margaret Keller are all agents of Magnolia Place pursuant to their roles as members of the governing body for the purposes of the Arbitration Agreement. Further, Patricia Harris and Margaret Keller are employees of Magnolia Place for the purposes of the Arbitration Agreement. As such, each individual has a right to assert the terms of the Arbitration Agreement.

III. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg, Robert Crooks, Patricia Harris and Margaret Keller. The Court **STAYS** the matter as to the Defendants Fundamental Long-Term Care Holdings, LLC, Fundamental Administrative Services, LLC, Fundamental Clinical Consulting, LLC, THI of Baltimore, Inc. and THI of South Carolina, LLC. The Court retains jurisdiction of the matter as to the Dismissed Defendants only to the following extent: should the parties to the Arbitration Agreement be unable to select an arbitrator or unable to agree on one pursuant to the terms of the Arbitration Agreement, this Court retains jurisdiction of the matter to assist the parties in selecting an arbitrator.

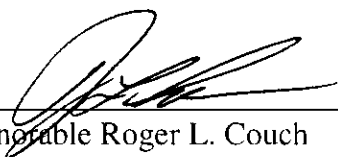
It is therefore

ORDERED that Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg, Robert Crooks, Patricia Harris and Margaret Keller are **GRANTED** and the matter is **STAYED** for the remaining Defendants until arbitration has been completed.



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IT IS SO ORDERED.


Honorable Roger L. Couch
Presiding Judge Seventh Judicial Circuit

Spartanburg, South Carolina

Dated: 6/22/12


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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Gladys Benson,	)	
	)	C.A. No. 7:11-2613-HMH
Plaintiff,	)	
	)	OPINION & ORDER
vs.	)	
	)	
THI of South Carolina at	)	
Magnolia Place at Spartanburg, LLC,	)	
d/b/a Magnolia Place of Spartanburg,	)	
	)	
Defendant.	)	

This matter is before the court on the Defendant's motion to compel arbitration pursuant to 9 U.S.C. § 2 of the Federal Arbitration Act ("FAA") and dismiss the action. For the reasons set forth below, the court grants the Defendant's motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

According to the complaint, the Plaintiff, Gladys Benson ("Benson"), was admitted to the Defendant's facility for rehabilitation and care as part of her recovery from surgery to repair a hip fracture on July 28, 2009. (Compl. ¶¶ 7-8.) Benson alleges that after her admission to the Defendant's facility on August 3, 2009, she developed a pressure ulcer in her right sacral and hip area and ulcers on her heels. (Id. ¶¶ 8, 13-14.) Benson remained in the care of the Defendant for approximately one month. Because of the ulcers, Benson was readmitted to Spartanburg Regional Medical Center on September 1, 2009. (Id. ¶ 14.) Benson developed sepsis from her ulcers and ultimately underwent a right knee leg amputation in January 2010. (Id. ¶¶ 14-17.) Benson alleges that the Defendant was negligent in providing care which resulted in the infection and amputation of her right leg. (Id. ¶ 21.)

**DEFENDANT'S
EXHIBIT**

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Upon her admission into the Defendant's facility, Benson was unable to personally execute the admission paperwork. (Pl. Mem. Opp'n Mot. Compel Arbitration 2.) Gladys Cornelia Anderson ("Anderson"), pursuant to a valid power of attorney, executed the admission paperwork. (Id.) Anderson, on behalf of Benson, executed an Admissions Agreement, an Acknowledgment of Documents, and an Arbitration Agreement. (Id.) The Arbitration Agreement provides in pertinent part as follows:

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

(Def.'s Mem. Supp. Mot. Compel Arbitration Ex. 1 (Agreement).) The Defendant moved to compel arbitration of this matter on October 20, 2011. Benson has opposed the motion, alleging that the Arbitration Agreement is unconscionable. This matter is now ripe for consideration.

II. DISCUSSION OF LAW

The Defendant moves to compel arbitration. Section 2 of "[t]he [FAA] applies to contracts 'evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract.'" Long v. Silver, 248 F.3d 309, 315 (4th Cir. 2001) (quoting 9 U.S.C. § 2). "Under the [FAA], a party may demand a stay of federal judicial proceedings pending exercise of a contractual right to have the subject matter of the federal action decided by arbitration, unless the party seeking arbitration is in default of that right." Microstrategy, Inc. v. Lauricia, 268 F.3d 244, 249 (4th Cir. 2001) (internal quotation marks

omitted). In addition, the Supreme Court has announced a strong federal policy favoring arbitration. See Long, 248 F.3d at 316 (citing Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)). The FAA “establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” Moses H. Cone Mem’l Hosp., 460 U.S. at 24-25. To that end, “the heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.” Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir. 1989). Thus, the court may not deny a party’s request to arbitrate an issue “unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” Id.

“[A] federal court may consider only issues relating to the making and performance of the agreement to arbitrate.” Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967). “[F]ederal courts may not address the validity or enforceability of the contract as a whole.” Ticknor v. Choice Hotel Int’l, Inc., 265 F.3d 931, 937 (9th Cir. 2001) (citing Prima Paint, 388 U.S. at 401).

Despite a federal policy favoring arbitration, “arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate.” Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 668 (S.C. 2007). Therefore, “a party may seek revocation of the contract under such grounds as exist at law or in equity, including fraud, duress, and unconscionability.” Id. (internal quotation marks omitted). In deciding whether a party agreed to

arbitrate a particular dispute, “the court should apply ordinary state-law principles that govern the formation of contracts.” Johnson v. Circuit City Stores, 148 F.3d 373, 377 (4th Cir. 1998) (internal quotation marks omitted). The parties agree that South Carolina law governs the Arbitration Agreement.

Benson argues that the Arbitration Agreement is unconscionable, rendering it unenforceable. Generally, “[u]nconscionability has . . . been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 843 F. Supp. 1027, 1046 (D.S.C. 1993).

The factors determining “unconscionability” are various: 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.

Kaplan v. RCA Corp., 783 F.2d 463, 467 (4th Cir. 1986).

Benson agrees that the FAA applies in this case because the transaction involved interstate commerce. (Pl. Mem. Opp’n Mot. Compel Arbitration 3.) However, Benson contends that the Arbitration Agreement is unconscionable because (1) “the injuries suffered by the Plaintiff in this case are bodily injuries of a nature consistent with traditional tort remedies and not the type of commercial dispute usually associated with arbitration;” (2) the Plaintiff, “an elderly woman who was in need of medical care of a highly specialized nature,” was “extremely limited in [her] choice of facility” because of the limited number of beds available to a Medicare and Medicaid patient; (3) there was a “relative disparity of the parties’ bargaining power with respect to the negotiation of any fair and balanced Arbitration Agreement;” (4) Benson and

Anderson are not “sophisticated commercial negotiators who would have the ability to appreciate the significance of the language contained in the Arbitration Agreement;” and (5) “42 C.F.R. § 483.10 provides that a facility may not require additional consideration for admission” and Benson is “being required to agree to procure the services of an arbitrator at unknown cost and prejudice as a condition of her admission to the Defendant’s facility for necessary medical care.” (Pl. Mem. Opp’n Mot. Compel Arbitration 7-8.)

“[A]n adhesion contract is not per se unconscionable.” Munoz v. Green Tree Fin. Corp., 542 S.E.2d 360, 365 (S.C. 2001). “Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” Fanning v. Fritz’s Pontiac-Cadillac-Buick, Inc., 472 S.E.2d 242, 245 (S.C. 1996). “Further, a person who can read is bound to read an agreement before signing it.” Munoz, 542 S.E.2d at 365 (holding that arbitration provision was not unconscionable even though plaintiffs did not read it and were not advised of those terms). In addition, “inequality of bargaining power alone will not invalidate an arbitration agreement.” Id. at n.5.

“[W]here the contract is subject to the FAA, this court must defer to that legislative policy and may not view arbitration as an inherently less beneficial form of dispute resolution.” Lackey v. Green Tree Fin. Corp., 498 S.E.2d 898, 905 (S.C. Ct. App. 1998). In addition, “a party desiring to avoid an arbitration clause on the grounds that no reasonable person would have agreed to it merely because it precludes judicial remedies must demonstrate how he or she has been prejudiced by compelled arbitration. This requires, at the least, identification of judicial

relief not available in arbitration.” Id. “The loss of the right to a jury trial is an obvious result of arbitration.” Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 670 (S.C. 2007) (holding that arbitration clause was unconscionable because in addition to “the inconspicuous nature of [the] provision, which was drafted by the superior party,” the provision “also required Simpson to forego certain [significant] remedies that were otherwise required by statute”).

The Defendant alleges that Anderson was not required to execute the Arbitration Agreement in order for Benson to be admitted to the facility. (Def. Reply 3.) The Defendant notes that the Admissions Agreement was a separate agreement. (Id.) However, even assuming the Arbitration Agreement was an adhesion contract, there is no evidence that she has been prejudiced as a result of entering into the Arbitration Agreement. To the contrary, all judicial remedies available in a jury trial are available to Benson in arbitration. (Def. Mem. Supp. Mot. Compel Arbitration Ex. A (Arbitration Agreement).) Further, the Arbitration Agreement provides in bold lettering as follows: “**I understand and agree that I am giving up and waiving my right to a jury trial.**” (Id. Ex. A (Arbitration Agreement).) Based on the foregoing, the lack of sophistication and inequality of bargaining power alone do not support a finding of unconscionability in this case. Munoz, 542 S.E.2d at 365.

Further, Benson argues she had no meaningful choice of another facility because available beds for Medicaid and Medicare patients are “extremely limited.” (Pl. Mem. Opp’n Mot. Compel Arbitration 6.) The limited number of beds does not support a finding of unconscionability because even though the options may have been limited as compared to those with private insurance, Benson does not allege and there is no evidence that the only option was the Defendant’s facility.

In addition, Benson's argument that the Arbitration Agreement amounts to an additional charge for admission into the facility, which is improper under 42 C.F.R. § 483.10, is unpersuasive. Benson alleges that the Arbitration Agreement is silent regarding who is responsible for the costs associated with arbitration and therefore, she may be held responsible for these costs. (*Id.* 8.) Section 483.10(c)(8)(iii)(b) provides that "[t]he facility must not require a resident (or his or her representative) to request any item or service as a condition of admission or continued stay." Research did not reveal any cases in South Carolina addressing this argument. However, several other courts have addressed the issue of whether arbitration agreements violate 42 U.S.C. § 1396r(c)(5)(A)(iii) and 42 C.F.R. § 483.12(d)(3), which prohibit the requirement of "other consideration as a precondition of admission." In Sanford v. Castleton Health Care Ctr., LLC, the Indiana Court of Appeals noted

that requiring a nursing-home admittee to sign an arbitration agreement is not akin to charging an additional fee or other consideration as a prerequisite of admittance. Rather, an arbitration agreement merely establishes a forum for future disputes; both parties are bound to it and both parties receive whatever benefits and detriments accompany the arbitral forum.

813 N.E.2d 411, 419 (Ind. Ct. App. 2004); Owens v. Coosa Valley Health Care, Inc., 890 So.2d 983, 989 (Ala. 2004) (finding that the argument that arbitration agreement violated 42 U.S.C. § 1396r(c)(5)(A)(iii) prohibition of "other consideration" failed and noting that "[i]f we were to agree with Owens, virtually any contract term Owens decided she did not like could be construed as requiring other consideration in order to gain admittance to the nursing home and thus be disallowed by the statute); Owens v. Nat. Health Corp., 263 S.W.3d 876, 887 (Tenn. 2007) (finding no violation); Broughsville v. OHECC, LLC, No. 05CA008672, 2005 WL 3483777 (Ohio Ct. App. Dec. 21, 2005) (unpublished); Gainesville Health Care Ctr., Inc. v. Weston, 857

So.2d 278, 288 (Fla. Ct. App. 1 Dist. 2003) (“We have found no authority from any jurisdiction which holds that an arbitration provision constitutes ‘consideration’ in this sense; nor do we believe that the federal regulation was intended to apply to such a situation.”). The court agrees with the reasoning in the above cited cases and finds that § 483.10(c)(8)(iii)(b) was not intended to apply to this case and further, that an arbitration agreement is not an additional charge.

Lastly, negligence claims may not be the type of cases intended for arbitration under the FAA. However, arbitration agreements with respect to claims for bodily injury are enforceable under the FAA and not unconscionable. Osborne v. Marina Inn at Grande Dunes, LLC, Civil Action No. 4:08-cv-0490, 2009 WL 3152044, at *6 (D.S.C. Sept. 23, 2009) (unpublished); THI of South Carolina at Columbia, LLC. v. Wiggins, C/A No. 3:11-888-CMC, 2011 WL 4089435, at *9 (D.S.C. Sept. 13, 2011) (unpublished) (declaring arbitration agreement valid and enforceable where dispute involved claims of bodily injury of resident at residential healthcare facility). Based on the foregoing, the court is constrained to grant the Defendant’s motion.

Therefore, the court dismisses this matter. See Choice Hotels Int’l, Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707, 709-10 (4th Cir. 2001) (“[D]ismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable.”). However, as set forth below, the court retains jurisdiction to select an arbitrator if the parties are unable to agree on one pursuant to the terms of the Arbitration Agreement. (Def. Mem. Supp. Mot. Compel Arbitration Ex. A (Arbitration Agreement) (noting that “[i]f the parties cannot reach a mutual decision on the selection of an arbitrator, the parties agree that an arbitrator shall be selected by the Court”).) Therefore, the parties are ordered to inform the court within 21 days of the date of this order

whether an arbitrator has been selected. If no arbitrator has been agreed upon by the parties, the court will then appoint an arbitrator.

It is therefore

ORDERED that Defendant's motion to compel arbitration, docket number 10, is granted and this matter is dismissed.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States District Judge

Greenville, South Carolina
November 30, 2011

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	CIVIL ACTION NO.: 2021-CP-15-00657
	)	
Jennifer Rahn, as Personal	)	
Representative of the Estate of	)	
Robert Ramsey,	)	
	)	
Plaintiff,	)	
	)	
v.	)	MEMORANDUM IN OPPOSITION TO
	)	MOTION TO COMPEL ARBITRATION
Priority Home Care, LLC and St.	)	
George Health Care, LLC, d/b/a St.	)	
George Healthcare Center,	)	
	)	
Defendants.	)	

Defendant St. George Health Care, LLC d/b/a St. George Health Care Center has moved to dismiss this action and compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. The basis of Defendant's Motion is that a valid and enforceable arbitration agreement exists between the parties. Defendant relies on a slew of unreported Circuit Court orders to support its arguments.¹ In doing so, Defendant attempts to minimize and distract from four precedential decisions of the Supreme Court of South Carolina and Court of Appeals, *Arredondo*, *Coleman*, *Thompson*, and *Hodge*, which are nearly identical to the case at hand, and define the current law of South Carolina pertaining to arbitration agreements within the health care facility context.

¹ Plaintiff has attached unreported Circuit Court orders supporting her arguments as Exhibit B.

The Arbitration Agreement relied upon by Defendant was signed by Plaintiff, who is the daughter of the decedent, at a time when she did not have authority to enter any such agreement on the decedent's behalf. Further, the Arbitration Agreement was separate from and does not merge with the Admission Agreement, so Plaintiff is not equitably estopped from denying the Arbitration Agreement's enforceability. Lastly, there is no evidence that Plaintiff had actual or apparent authority to enter the Arbitration Agreement on behalf of the decedent, and South Carolina law is clear that only the representations and conduct of the principal himself, and not the actions of the agent, can create the agency relationship. Therefore, Defendant's Motion should be denied by the Court.

FACTUAL BACKGROUND

On July 27, 2019, the decedent fractured his femur after falling at home while in the care of Defendant Priority Home Care. (Compl. ¶ 5). Shortly thereafter, Mr. Ramsey was admitted to Defendant St. George Healthcare's facility on August 9, 2019 due to the nature of his injuries. (*Id.* at ¶ 6). An initial skin assessment noted several areas where Mr. Ramsey had skin tears, redness, and blisters. (*Id.*). Shortly thereafter, these wounds became necrotic and Mr. Ramsey began to experience severe and rapid weight loss. (*Id.* at ¶ 7). Additional pressure sores developed on his sacrum, hip, and heels, with the heel wound being so severe that amputation was recommended. (*Id.* at ¶¶ 8-9). Mr. Ramsey passed away approximately one month later. (*Id.* at ¶ 12).

Plaintiff commenced this action on November 4, 2021, alleging wrongful death and survival claims as a result of the care and treatment provided to Mr. Ramsey while a he was a resident at Defendants' facilities. (*See generally* Compl.). On March 7, 2022, Defendant filed a Motion to Compel Arbitration, relying on an Arbitration Agreement that was signed by Plaintiff on August 9, 2019 and a health care power of attorney that was signed by Mr. Ramsey on August 25, 2016 designating Plaintiff as his agent for the purposes of health care decisions. (Mot. Compel Arbitration, Ex. A). Presumably, Plaintiff signed the Agreement instead of Mr. Ramsey because he was suffering from dementia as documented in his medical records. The health care power of attorney was not recorded.

ARGUMENT

While a signed Arbitration Agreement exists in this case, it is not a valid, enforceable agreement for the simple reason that Plaintiff did not have authority to execute the Arbitration Agreement at the time it was entered by the parties. While there is a presumption in favor of arbitration, it only applies to the scope of an arbitration agreement; "it does not apply to the existence of such an agreement or to the identity of the parties who may be bound to such an agreement." *Wilson v. Willis*, 426 S.C. 326, 337, 827 S.E.2d 167, 173 (2019).

To the extent that Defendant may maintain that Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement due to her execution of an admission agreement, there was no merger of the agreements, as the language of the Arbitration Agreement indicates that Defendant considered it to

be a separate agreement. Additionally, there is no evidence that Plaintiff had actual or apparent authority to act on Mr. Ramsey's behalf at the time she entered the Arbitration Agreement, as there is no evidence that Mr. Ramsey ever consciously represented or implied to Defendant that she was his agent for the purposes of entering an arbitration agreement. For these and the following reasons, Defendant's motion should be denied.

I. Plaintiff may have had authority to make health care decisions for Mr. Washington, as well as any financial decisions necessitated by those decisions, but did not have authority to waive Plaintiff's right to a jury trial.

"It is essential that the parties to a contract have the capacity to contract Furthermore, a capacity to contract relates to the status of the person rather than to the circumstances surrounding the transaction." 17 C.J.S. Contracts § 45. At the time Mr. Ramsey was admitted to Defendant's facility, he had executed a health care power of attorney granting Plaintiff authority to take actions necessary to assuring implementation of his health care, including granting a release from liability required by any health care provider. However, this power of attorney was never recorded as required by S.C. Code Ann. § 62-5-501(C), so it was not effective at the time of his admission to Defendant's facility.² Thus, any authority Plaintiff had to act would have been derived from the Adult Health Care Consent Act, S.C. Code Ann. § 44-66-10 *et seq.*, which only permits a surrogate to make health care decisions, and not decisions pertaining to a patient's right to a jury trial.

² The power of attorney at issue was executed prior to the enactment of South Carolina's Uniform Power of Attorney Act (S.C. Code Ann. §§ 62-8-101 through -403), so the previous version of the statute regarding the recording of powers of attorney, section 62-5-501, applies to the subject power of attorney. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 574 n.4, 828 S.E.2d 82, 85 n.4 (Ct. App. 2019).

Even if the power of attorney was effective, it only grants authority to make ancillary decisions related to Mr. Ramsey's health care if they are **necessary**, and the subject Arbitration Agreement was optional. Plaintiff concedes that Mr. Ramsey did not have the capacity to consent or enter Defendant's Admission Agreement on the date of his admission to its facility. Therefore, any capacity that Plaintiff had to act on his behalf must have derived from the Adult Health Care Consent Act.

A. The health care power of attorney is not effective, and even if it was, it did not grant Plaintiff authority to make unnecessary decisions that were incidental to Mr. Ramsey's medical care.

The power of attorney was executed on August 25, 2016, but was never recorded. S.C. Code Ann. § 62-5-501(C) provides that a power of attorney must be recorded to be effective, unless the authority of the attorney in fact "relates **solely** to the person of the principal" "Thus, a durable power of attorney that delegates authority **related only to health care** need not be recorded." Elizabeth G. Patterson, *Planning for Health Care Using Living Wills and Durable Powers of Attorney: A Guide for the South Carolina Attorney*, 42 S.C. L. Rev. 525, 573 (1991) (explaining section 62-5-501(C)). While the subject power of attorney at first glance appears to solely address Mr. Ramsey's health care, a closer inspection reveals that it goes much further and also relates to potential future property interests of Mr. Ramsey and his estate. Section 4, subsection D of the document permits the attorney in fact to "pursue legal action in [Mr. Ramsey's] name" in order to seek actual or punitive damages for the failure of third parties to comply with his wishes. (Ex. A, p. 5).

Therefore, the subject power of attorney does not solely relate to Mr. Ramsey's person and health care, but it also contemplates the attorney in fact's authority to exercise rights related to the property interests of Mr. Ramsey and his estate that may arise as a result of his health care. *See Arredondo v. SNH SE Ashley River Tenant, LLC*, 433 S.C. 69, 77, 856 S.E.2d 550, 555 (2021) (noting that a chose in action is a property right in personam and includes a claim for damages). Under the version of the statute in effect at that time it was executed, the power of attorney would only have been effective once it was recorded, since it does not solely relate to Mr. Ramsey's person. Since the power of attorney was never recorded, it was not effective, and any authority Plaintiff had to make decisions on Mr. Ramsey's behalf could only have been derived from the Adult Health Care Consent Act.

As a final note, even if the power of attorney was effective, it only grants the attorney in fact authority to take actions incidental to Mr. Ramsey's healthcare if they are "necessary." (Ex. A, pg. 5). Here, as in most nursing home cases, the Arbitration Agreement was optional. While the power of attorney authorizes Plaintiff to pursue legal action and to grant waivers required by health care providers, the Supreme Court of South Carolina has already analyzed its language and these facts under identical circumstances in *Arredondo* and determined that the exact language contained in the subject power of attorney does not grant authority to an attorney in fact to make decisions regarding arbitration unless they

are necessary and required for admission. *Arredondo*, 433 S.C. at 80-85, 856 S.E.2d at 556-59.

B. The Adult Health Care Consent Act only grants authority to make health care decisions, and not the decision to waive Mr. Ramsey's (and his estate's) right to a jury trial.

The Act pertains to adults who are “unable to appreciate the nature and implications of [their] condition and proposed health care, to make a reasoned decision concerning the proposed health care, or to communicate that decision in an unambiguous manner.” S.C. Code Ann. § 44-66-20(8). Under the Act, health care is defined as

[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 injured, disabled, or sick persons; and the placement in or removal from a facility that provides these forms of care.

S.C. Code Ann. § 44-66-20(1). In contrast, arbitration is a means of resolving a legal dispute outside of the typical civil litigation process – a definition unrelated to physical or mental condition. *See Black's Law Dictionary*, 125 (10th ed. 2014).

Therefore, independently of any valid and effective power of attorney, the Act gave Plaintiff authority to consent on behalf of Mr. Ramsey to the provision of medical care, including placement in Defendant's facility, as well as authority to make certain financial decisions on behalf of Mr. Ramsey which he would be obligated to pay. This authority “extends primarily to traditional health care decisions, and only secondarily to the financial decisions necessitated by those decisions.” *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 353, 755 S.E.2d

450, 454 (2014). Most jurisdictions, including South Carolina, have ruled execution of an arbitration agreement is not a health care decision. *See Johnson v. Kindred Healthcare, Inc.*, 466 Mass. 779, 789-90, 2 N.E.3d 849, 857-58 (Mass. 2014) (collecting cases).

Consequently, even though Plaintiff did have authority to make health care decisions on Mr. Ramsey's behalf under the Act, she did not have authority to sign an arbitration agreement waiving his right to a jury trial such that she would later be bound to the agreement as the personal representative of his estate. Upon seeking the admission of Mr. Ramsey to Defendant's facility, Plaintiff was presented with two documents, an Admission Agreement and an Arbitration Agreement. The Arbitration Agreement is separate from the Admission Agreement and contains no provision for medical, nursing, or health care services to be provided to Mr. Ramsey, nor does it require any financial commitment to pay for such services.³ The agreement is separately titled "Facility – Resident/Representative Arbitration Agreement", is paginated as "Page 1 of 1", and contains its own signature lines. Further, the Arbitration Agreement by its very language distinguishes between itself and the Admission Agreement, stating that the Arbitration Agreement will survive any "breach of this Agreement or the Admission Agreement." While the Admission Agreement purports to incorporate admissions materials into itself "by reference herein", when viewed alongside the

³ The Arbitration Agreement was presumptively optional under federal law. *See* 42 C.F.R. § 483.70(n). There is no language within the Arbitration Agreement indicating that it was a prerequisite to admission, and Defendant has represented that the Arbitration Agreement was optional.

other details of the agreements, it creates an ambiguity as to merger when taken in context of the totality of the circumstances, and “the law is clear that any ambiguity in such a clause is construed against the drafter”, i.e., Defendant. *See Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

The Supreme Court of South Carolina has held that a surrogate without proper legal authority cannot bind a person, or that person's estate, to arbitration. In *Coleman*, the circuit court refused to compel arbitration because the sister of a nursing home resident who signed the arbitration and admission agreements lacked authority to bind the resident to the arbitration agreement. In affirming the circuit court's order, the Supreme Court found that, although the South Carolina Adult Healthcare Consent Act gave the sister authority to make ‘healthcare decisions’ on behalf of her sister, consent for medical treatment is not the same as binding an incompetent person to a legally binding contract such as an arbitration agreement. *Coleman*, 407 S.C. at 352, 755 S.E.2d at 453-54. The court reasoned that the Act only extends authority to surrogates to make traditional healthcare decisions and financial decisions that arise out of those decisions. Extending this reasoning to the present circumstances, Plaintiff lacked legal authority to enter into a contract, the Arbitration Agreement is void and unenforceable.

II. Plaintiff is not equitably estopped from denying the validity of the Arbitration Agreement because the Admission Agreement and Arbitration Agreement do not merge.

Plaintiff cannot be equitably estopped from denying enforcement of the Arbitration Agreement. “Equitable estoppel is a contract defense and the party

asserting this defense bears the burden of proving all of its elements.” *Kelly v. Logan, Jolley & Smith*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that **the party to be estopped** (1) acted in a way amounting to a false representation; (2) intended that such conduct be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting the estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on the conduct of the party to be estopped. *Id.* Defendant cannot demonstrate that Mr. Ramsey’s estate made any false representations as far as the subject power of attorney is concerned, because Plaintiff was acting in her individual capacity at the time she signed the Arbitration Agreement.

Since Plaintiff did not have authority to sign the Arbitration Agreement under the executed power of attorney or the Adult Health Care Consent Act, the fact that Plaintiff signed the Arbitration Agreement in her individual capacity and is now a party to this action as a nonsignatory in her capacity as personal representative of the estate does not bind the estate to the Arbitration Agreement, at least as far as equitable estoppel is concerned. The Court of Appeals addressed this concept in *Thompson v. Pruitt Corp.*:

Respondent is attempting to use equitable estoppel against [the patient’s] estate based on actions that [patient’s daughter] took *in her individual capacity*. The fact that [the patient’s daughter] is *now the personal representative for [the patient’s] estate* is of no moment; we

will not hold this circumstance against [the patient's] estate. Simply put, [the patient's] estate is the plaintiff in this case, and Respondent has alleged no conduct on the part of [the patient's] estate, that has affected Respondent's position. This, too, is a necessary element of an equitable estoppel defense.

Thompson, 416 S.C. 43, 61, 784 S.E.2d 679, 689 (Ct. App. 2016).

Equitable estoppel arguments within the health care facility context are frequently premised on the contention that admission agreements and arbitration agreements merge. *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

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 courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.

Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977). Any ambiguity as to merger is to be construed against the drafter. *See Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 129 n.4, 713 S.E.2d 799, 805 n.4 (Ct. App. 2011).

Here, the Admission Agreement and Arbitration Agreement are separate contracts that do not merge. *See Hodge v. UniHealth Post-Acute Care of Bamberg LLC*, 422 S.C. 544, 561-63, 813 S.E.2d 292, 308 (Ct. App. 2018); *Thompson v. Pruitt Corp*, 416 S.C. 43, 50, 784 S.E.2d 679, 683 (Ct. App. 2016); *Coleman*, 407 S.C. at 352, 755 S.E.2d at 450. *Coleman* refused to apply the doctrine of merger because language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455. *Thompson* and *Hodge* applied *Coleman* and provided further examples of factors

demonstrating “separateness and preventing merger.” *Thompson*, 416 S.C. at 52, 784 S.E.2d at 684; *Hodge*, 422 S.C. at 563, 813 S.E.2d at 302.

Defendant’s assertion that Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement seems to hinge on a direct benefits theory of estoppel, i.e., that since Mr. Ramsey benefited from the terms of an Admission Agreement that Plaintiff signed, she should be estopped as the personal representative of his estate from denying the validity of the Arbitration Agreement. *See Wilson*, 426 S.C. at 340, 827 S.E.2d at 175. Virtually all of the Circuit Court orders filed by Defendant in support of its Motion rely in some form or another on this theory. However, as the Supreme Court explained in *Wilson*, to successfully assert direct benefits estoppel, the arbitration agreement must be a clause within the larger admissions agreement, and the plaintiff must be seeking to assert causes of action that arise from and are created by the contract. Here, as explained above and below, the Admission Agreement and optional Arbitration Agreement are separate documents that did not merge. Second, Plaintiff does not assert breach of contract, or a violation of contractual duties, and instead has brought her lawsuit under a negligence theory arising from common law duties. *See Wilson*, 426 S.C. at 342, 827 S.E.2d at 176. If anything, Plaintiff’s claims are indirectly related to the Arbitration Agreement, as it was optional, ancillary to, and separate from the Admission Agreement. *See id.* (stating that under direct benefits estoppel a claim must be directly, not just indirectly, based on the contract containing the arbitration agreement).

As discussed above briefly, there were two separate agreements and they were not merged. As in *Hodge*, the separate contracts here have separate signature pages and separate pagination. The Arbitration Agreement is a separate document designated as “Page 1 of 1”. As in *Thompson*, the arbitration agreement announces its independence with its “Arbitration Agreement” title. The text of the Arbitration Agreement refers to Defendant’s Admission Agreement as a separate, standalone document (“This Agreement . . . shall survive any termination or breach of **this Agreement or the Admission Agreement.**”). This language mirrors that addressed in *Coleman* and *Thompson*, in which the Supreme Court and Court of Appeals found such language to be proof that an admission agreement was separate and did not merge with an arbitration agreement:

The court then explained the evidence of the parties’ intent to keep the two agreements separate by highlighting the admission agreement’s recognition of the arbitration agreement as a separate document, i.e., “This Agreement, including all Exhibits hereto, and the Arbitration Agreement”

Thompson, 416 S.C. at 52, 784 S.E.2d at 685.

Since the arbitration and admission contracts have different pagination with different signature pages, and the arbitration contract is entitled “Arbitration Agreement” at the top of its first page, these factors further indicate the parties’ intent for the Arbitration Agreement to stand by itself as an independent contract. *Thompson*, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n.1; *Hodge*, 422 S.C. at 562-63, 813 S.E.2d at 302. The Arbitration Agreement was not a precondition to admission.

Defendant will likely argue that such details are “superficial things” and that they cannot be relied on by Plaintiff as proof that the two separate agreements never merged. However, to do so flies in the face of binding precedent from our Supreme Court indicating that such details are exactly what should be looked to by courts in determining whether merger exists. *See Hodge*, 422 S.C. at 562-63, 813 S.E.2d at 302 (“Further, each document was separately paginated and had its own signature page. Additionally, the Arbitration Agreement stated signing it was not a precondition to admission.”); *Thompson*, 416 S.C. at 52, 784 S.E.2d at 684 (noting that evidence of parties’ intent to keep two agreements separate includes language from agreements recognizing and referring to agreements as separate documents). The details of Defendant’s Admission Agreement and Arbitration Agreement are nearly identical to those addressed by our Supreme Court in *Coleman*, *Hodges*, and *Thompson*. Defendant cannot meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit, and any equitable estoppel argument should be denied by the Court.

III. Plaintiff did not have actual or apparent authority to enter the Arbitration Agreement.

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*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004). It is the duty of one dealing with an agent to use due care to ascertain the scope of the agent’s authority. *Frasier v. Palmetto Homes of Florence*, 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996). South Carolina law requires that to prove apparent

authority, the defendant must show: (1) **that the purported principal consciously or impliedly represented another to be his agent**; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." *Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 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. Dep't 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 Ins. Co.*, 306 S.C. 423, 428, 412 S.E.2d 425, 428 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists. *Id.*

Defendant has not produced any evidence indicating that Plaintiff had authority to enter the Arbitration Agreement on Mr. Ramsey's behalf or waive Mr. Ramsey's right to a jury trial. For the reasons mentioned above, neither the executed power of attorney nor the Adult Health Care Consent Act bestowed Plaintiff with the authority to enter the Arbitration Agreement. The simple fact that Plaintiff signed the agreements so that her father could be admitted to Defendant's facility and receive health care in no way indicates a manifestation of authority by Mr. Ramsey to waive his right to a jury trial or agree to arbitration. There is no evidence that Mr. Ramsey ever manifested any form of assent

establishing Plaintiff as his agent beyond that bestowed by the invalid power of attorney, which only purported to give Plaintiff authority to enter agreements necessary to Mr. Ramsey's health care. Defendant will likely point to language in the Arbitration Agreement indicating that the executing party of the agreement had authority to sign on the resident's behalf. However, this language is not a representation made by Mr. Ramsey to Defendant that his daughter had authority to act on his behalf. Instead, it is a representation made by Plaintiff in her individual capacity to Defendant, and fails to meet the requirement for proving apparent authority.

In fact, Defendant's position has been directly addressed and disagreed with by the Supreme Court in *Hodge*. In *Hodge*, the facility argued that a husband had taken over his wife's medical affairs and had authority to enter an arbitration agreement on her behalf. The court described the apparent authority as follows:

Apparent authority to do an act is created as to a third person **by written or spoken words or any other conduct of the *principal*** which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him. Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief.

Hodge, 422 S.C. at 572, 813 S.E.2d at 307. (emphasis added) (citations and punctuation omitted). The court then went on to disagree with the exact arguments advanced in this case by Defendant, stating that merely because a family member signs an arbitration agreement, admissions agreement, and other forms does not make them an agent, especially when there is no valid power of attorney and there

is no evidence that the principal represented the family member was their agent for the purpose of signing an arbitration agreement. *Id.* at 573-74, 813 S.E.2d at 308.

Apparent authority must be established based upon manifestations by the principal, **not the agent**. The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent, but on that between the principal and the third party.

Id. at 577, 813 S.E.2d at 310.

In *Thompson*, other circumstances similar to the instant facts were addressed by the Supreme Court and found not to constitute evidence of apparent or actual authority. In *Thompson*, the facility asserted that the resident “allowed, passively or otherwise” a family member to sign her admissions agreement and arbitration agreement, and to handle other financial affairs for her, as evidence of apparent or actual authority. *Thompson*, 426 S.C. at 55, 784 S.E.2d at 686. The court did not take the same view of the circumstances:

While the evidence indicates Son handled Mother’s finances in the years leading up to her admission to UniHealth, the evidence also indicates Mother had dementia prior to being admitted to UniHealth. Therefore, her incapacity prevented her from “consciously or impliedly” representing another to be her agent. Further, the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal’s right of access to the courts and to a jury trial. Based on the foregoing, the evidence does not show that Son had either actual or apparent authority to execute the AA on Mother’s behalf.

Thompson, 416 S.C. at 55-56, 784 S.E.2d at 686 (citations omitted). In other words, “an agency may not be established solely by the declarations and conduct of an alleged agent.” *Id.* (citation omitted).

Defendant's assertion that Plaintiff held "inherent agency powers" to act on behalf of Mr. Ramsey is unsupported by South Carolina law. First, the theory proposed by Defendant has no supporting South Carolina authorities outside of a passing mention of the term in an abrogated case. *See Smith v. Fitton and Pittman, Inc.*, 264 S.C. 129, 212 S.E.2d 925 (1975). If anything, *Smith* makes clear that the inherent agency powers theory finds no support in South Carolina law. *Id.* ("[A]ppellant has offered no authority, and we have found none, that [individual] would have inherent agency power . . ."). Second, South Carolina law is clear that an individual does not have inherent agency powers concerning health care, financial, and other affairs of their family members. *Hinson v. Roof*, 128 S.C. 470, 475, 122 S.E. 488, 490 (1924) ("The marriage relation of the parties . . . is not necessarily enough to establish the fact that the one is the agent of the other. There must be other proof."); S.C. Jur. *Agency* § 6 (1994) ("No presumption arises from the fact of the marital relationship, without more, that [a spouse] is the agent of [the other spouse].") (footnote omitted).

Regardless of whether Plaintiff "held herself out as an agent for her father", there is no evidence that at any point Mr. Ramsey himself made representations, or voluntarily placed Plaintiff in a position, which would indicate a conscious or implied representation that she was authorized to enter arbitration agreements on his behalf. Plaintiff's position and sole authority, if she had any, was derived from the executed power of attorney or the Adult Health Care Consent Act, a statutory construct, neither of which bestowed authority to enter arbitration agreements for

the reasons described above. Despite Defendant's contentions, Mr. Ramsey never consciously held Plaintiff out or represented that she was authorized to act on his behalf in connection with arbitration, and Defendant has produced no evidence supporting its argument, making the Arbitration Agreement invalid and unenforceable. There is no evidence that Plaintiff had actual or apparent authority to enter the Arbitration Agreement.

IV. Plaintiff as personal representative of Mr. Ramsey's estate is not a third-party beneficiary to the Arbitration Agreement.

"A third-party beneficiary is a party that the contracting parties intend to directly benefit." *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). "However, there can be no third-party beneficiary unless a valid contract exists." *Thompson*, 416 S.C. at 57, 784 S.E.2d at 687. Since Plaintiff in her individual capacity was not authorized to execute the Arbitration Agreement on Mr. Ramsey's behalf, there was no valid contract, and neither Plaintiff in her capacity as personal representative of Mr. Ramsey's estate, nor the estate itself, could be the third-party beneficiary of the Arbitration Agreement between Plaintiff and Defendant.

Additionally, a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement. *Thompson*, 426 S.C. at 57, 784 S.E.2d at 687. Plaintiff is not attempting to enforce the Arbitration Agreement on her own behalf or on behalf of the estate; instead, she is asserting tort claims arising from common law duties independent of the Arbitration Agreement and

Admission Agreement. Therefore, Plaintiff in her capacity as personal representative was not a third-party beneficiary to the Arbitration Agreement signed individually by Plaintiff, and it cannot be enforced against her independently of any authority she did not have to enter the agreement.

V. The scope of the Arbitration Agreement does not cover wrongful death claims by Mr. Washington's statutory beneficiaries.

Even if Plaintiff had authority to sign the Arbitration Agreement and it was valid, the wrongful death claims of Mr. Ramsey's statutory beneficiaries would not be subject to arbitration, as they are not within the scope of the Arbitration Agreement. South Carolina law is clear that wrongful death claims belong to the statutory beneficiaries and are distinct and separate from survival claims belonging to the estate. *Bennett v. Spartanburg Ry. Gas and Elec. Co.*, 97 S.C. 27, 81 S.E. 189 (1914). Wrongful death actions are brought by the personal representative of the decedent directly for the benefit of the statutory beneficiaries and include pecuniary loss, mental shock and suffering, grief and sorrow, and loss of companionship. S.C. Code Ann. §§ 15-51-10 and -20; *Self v. Goodrich*, 300 S.C. 349, 351, 387 S.E.2d 713, 714 (Ct. App. 1989). Survival actions, on the other hand, are separate claims for separate injuries, and belong to the estate, not the statutory beneficiaries. *See Bennett*, 97 S.C. at 27, 81 S.E. at 189-90.

The statutory beneficiaries are nonsignatories to the Arbitration and Admission Agreements, regardless of whether the Arbitration Agreement purports to include “any alleged tort, personal injury, negligence, or other claim” “arising out of or relating to Facility’s Admission Agreement.” Therefore, if the Arbitration

Agreement were valid, which it is not, the wrongful death beneficiaries would only be bound to its terms as third-party beneficiaries. As explained above, a third-party beneficiary may only be bound by an arbitration agreement if it is attempting to enforce the contract containing the arbitration agreement. Here, the Arbitration Agreement is a standalone document not contained within the Admission Agreement, and the wrongful death beneficiaries are not attempting to enforce the Admission Agreement or Arbitration Agreement.

Instead, they are seeking to recover under the wrongful death scheme for Defendant's breach of common law duties arising from its care for Mr. Ramsey. Thus, even if the Arbitration Agreement is valid and enforceable, it would only reach the survival claim of the estate, and not any wrongful death claims brought on behalf of the statutory beneficiaries. This conclusion comports with the law of other state jurisdictions. See *FutureCare NorthPoint, LLC v. Peeler*, 143 A.3d 191, 209-10, 213 (Md. App. 2016); *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 494 and n. 1 (Pa. 2016) (citing *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 660 (Pa. Super. 2013)); *Boler v. Sec. Health Care, LLC*, 336 P.3d 468, 477 (Okla. 2014); *Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc.*, 316 P.3d 607, 614 (Ariz. Ct. App. 2014); *Daniels v. Sunrise Sr. Living, Inc.*, 212 Cal. App. 4th 674, 151 Cal. Rptr. 3d 273 (2013); *Carter v. SSC Odin Operating Co, LLC*, 976 N.E.2d 344, 355-58 (Ill. 2012); *Ping v. Beverly Enters., Inc.*, 376 S.W.3d 581 (Ky. 2012); *Woodall v. Avalon Care Center-Federal Way, LLC*, 231 P.3d 1252 (Wash. App. 2010); *Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. 2009); *Bybee*

v. Abdulla, 189 P.3d 40 (Utah 2008); *Peters v. Columbus Steel Castings Co.*, 873 N.E.2d 1258, 1262 (Ohio 2007); *Chapman v. Cardiac Pacemakers, Inc.*, 673 P.2d 385 (Idaho 1983); *see also Strickholm v. Evangelical Lutheran Good Samaritan Soc’y*, Case No. 4:11-CV-00059-BLW, 2011 WL 2532395 (D. Idaho June 24, 2011).

Furthermore, Defendant cannot meet the requirements to show that the wrongful death beneficiaries qualify as third-party beneficiaries to the Arbitration Agreement. Defendant must show the Arbitration Agreement was “made for the benefit of” the family members and the Arbitration Agreement’s terms were intended to provide a “direct, rather than an incidental or consequential” benefit to them. *Fabian v. Lindsay*, 410 S.C. 475, 765 S.E.2d 132 (2014) (quoting *Windsor Green Owners Ass’n v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004)). The only supposed benefit Defendant could argue the statutory beneficiaries receive is the promise that its legal claims will also be subject to arbitration. But, Defendant has not identified any legal claims it could ever have against the statutory beneficiaries. Any legal claims Defendant had against Mr. Ramsey at his death could only be asserted against his estate, not the statutory beneficiaries for his wrongful death claim. S.C. Code Ann. § 15-5-90 (providing that, at a person’s death, legal claims “survive both to and against” the decedent’s personal representative). Since there is not even the possibility of a legal claim by Defendant against the wrongful death beneficiaries, there is no “direct benefit” to support a third-party beneficiary argument.

Additionally, the South Carolina Supreme Court has been ambivalent at best as to whether a third-party beneficiary theory can ever be used to force arbitration on unconsenting non-parties. *Wilson*, 426 S.C. at 338 n. 7, 827 S.E.2d at 174 n. 7 (citing *Comer v. Micor, Inc.*, 436 F.3d 1098, 1102 (9th Cir. 2006) (finding third-party may be able to enforce a contract but “certainly cannot be bound to a contract it did not sign or otherwise assent to”)). This Court has rejected third-party beneficiary arguments to enforce nursing home arbitration contracts on multiple occasions. *Thompson*, 416 S.C. at 57, 784 S.E.2d at 687 (quoting *Dickerson v. Longoria*, 995 A.2d 721, 742 (Md. 2010) (“a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement”)); *see also Hodge*, 422 S.C. at 574, 813 S.E.2d at 308 (nursing home conceded *Thompson* foreclosed third-party beneficiary argument). At best, even if the Arbitration Agreement was valid, it would only reach the estate’s survival claims. However, since it is not valid, it cannot compel arbitration of the wrongful death or survival claims in this action, and Defendant’s motion should be denied.

VI. Additional discovery on the issue of authority is unnecessary and would violate S.C. Code Ann. § 15-48-20.

In the alternative, Defendant has requested that the Court grant additional discovery on the nature of Plaintiff’s agency relationship with her father. S.C. Code Ann. § 15-48-20 only permits a court to “summarily” proceed to the determination of whether arbitration is appropriate when an agreement to arbitrate has been contested. Here, the only relevant and necessary evidence for the Court to make its

determination is already available for the Court's review. Any further discovery with the goal of revisiting the arbitrability of this case would only serve to protract this litigation, offend section 15-48-20's mandate for an expedient determination of arbitrability, waste judicial resources, and increase costs for both parties unnecessarily. The Court should deny Defendant's request for additional discovery.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendant's Motion to Compel Arbitration.

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ATTORNEYS FOR THE PLAINTIFF

May 19, 2022.

Hampton, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	CIVIL ACTION NO.: 2021-CP-18-01410
	)	
Steve Rickenbaker,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
Oakbrook Healthcare, LLC d/b/a	)	
Oakbrook Health and Rehabilitation	)	
Center, Floyd Brace Company, Inc.	)	
Trident Medical Center, LLC d/b/a	)	
Trident Medical Center,	)	
Defendants.	)	

This matter came before the Court on April 13, 2022, on a Motion to Compel Arbitration filed by Defendant Oakbrook Health Care, LLC d/b/a Oakbrook Health and Rehabilitation Center pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. Present at the video conference hearing and arguing on behalf of Defendants was Russell G. Hines. Appearing and arguing on behalf of Plaintiff was Neil E. Alger. After reviewing the submissions of the parties, the pleadings, and hearing the arguments of counsel, the Court denies Defendant's Motion to Compel Arbitration for the reasons set forth herein.

Plaintiff Steve Rickenbaker filed this action on August 9, 2021, in the Dorchester County Court of Common Pleas after a fall in which he fractured his spine and right knee. Rickenbaker alleges that while he was admitted to Oakbrook's facility, an occipital scalp pressure ulcer that originally developed at Trident

Medical Center worsened, and that he sustained a deep tissue wound/ulcer to his sacrum. Eventually, the wound developed into a stage IV ulcer with bone exposure and required debridement and a wound vac. Rickenbaker has alleged claims for negligence and gross negligence against Oakbrook for its conduct while he was being cared for at its facility.

The basis of Oakbrook's Motion is that a valid and enforceable arbitration agreement exists between the parties. The Arbitration Agreement relied upon by Oakbrook was signed by Rickenbaker's wife at the time of his admission to Oakbrook's facility, and it appears that no valid power of attorney had been filed at that time with a register of deeds in South Carolina for Ms. Rickenbaker to make healthcare or financial decisions on Rickenbaker's behalf. Evidence presented by Rickenbaker indicates that he was suffering from dementia and did not have the capacity to sign the facility's Admission Agreement or Arbitration Agreement at the time he was admitted. However, Rickenbaker does not contest that his wife likely had authority to enter the Admission Agreement on his behalf under the South Carolina Adult Health Care Consent Act, S.C. Code Ann. § 44-66-10 *et seq.*

Even if Ms. Rickenbaker had authority under the Act to enter the Admission Agreement as an act in furtherance of Rickenbaker's health care needs, it does not necessarily follow that she had authority to enter a separate Arbitration Agreement under the Act. Therefore, the Court must determine (1) if the Arbitration Agreement merged with and was a part of the Admission Agreement such that Rickenbaker would be equitably estopped from denying the Arbitration Agreement's

validity, and (2) if Ms. Rickenbaker had actual or apparent authority to enter the Arbitration Agreement on behalf of Rickenbaker. The answer to both inquiries is “no”.

While a signed Arbitration Agreement exists in this case, it is not a valid, enforceable agreement for the simple reason that Rickenbaker’s wife, Faye Rickenbaker, did not have any authority to execute the Arbitration Agreement at the time it was entered by the parties. A spouse is authorized to make decisions concerning health care under the Adult Health Care Consent Act. S.C. Code Ann. § 44-66-30(A). In contrast, arbitration is a means of resolving a legal dispute outside of the typical civil litigation process – a definition unrelated to physical or mental condition. *See* Black’s Law Dictionary, 125 (10th ed. 2014).

Therefore, the Act only gave Ms. Rickenbaker authority to consent on behalf of Rickenbaker to the provision of medical care, including placement in Oakbrook, as well as authority to make certain financial decisions on behalf of Rickenbaker which he would be obligated to pay. This authority “extends primarily to traditional health care decisions, and only secondarily to the financial decisions necessitated by those decisions.” *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 353, 755 S.E.2d 450, 454 (2014). Most jurisdictions, including South Carolina, have ruled execution of an arbitration agreement is not a health care decision. *See Johnson v. Kindred Healthcare, Inc.*, 466 Mass. 779, 789-90, 2 N.E.3d 849, 857-58 (Mass. 2014) (collecting cases).

Oakbrook's Arbitration Agreement is optional and separate from its Admission Agreement and contains no provision for medical, nursing, or health care services to be provided to residents, nor does it require any financial commitment to pay for such services. The agreement is separately titled "Facility – Resident/Representative Arbitration Agreement", is paginated as "Page 1 of 1", and contains its own signature lines. The agreement does not contain the name of Rickenbaker anywhere within the document and is signed by Ms. Rickenbaker as "Resident/Representative." Further, the Arbitration Agreement by its very language distinguishes between itself and the Admission Agreement, stating that the Arbitration Agreement will survive any "breach of this Agreement or the Admission Agreement." While the Admission Agreement purports to incorporate admissions materials into itself "by reference herein", when viewed alongside the other details of the agreements, it creates at best an ambiguity as to merger when taken in context of the totality of the circumstances, and "the law is clear that any ambiguity in such a clause is construed against the drafter", i.e., Oakbrook. *See Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

In sum, the Act provides statutory authority for family members to make an incapacitated loved one's health care decisions but leaves the conferral of authority to arbitrate for powers of attorney or other legal instruments outlined in the probate code. Ms. Rickenbaker had no legal authority to sign the Arbitration Agreement, and Oakbrook knew or should have known this fact, as she did not present them with documentation demonstrating power of attorney or

guardianship. Since Ms. Rickenbaker lacked legal authority, the Arbitration Agreement is void and unenforceable.

Further, Rickenbaker cannot be equitably estopped from denying enforcement of the Arbitration Agreement. “Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements.” *Kelly v. Logan, Jolley & Smith*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped acted in a way amounting to a false representation. *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). Oakbrook cannot meet its burden to establish this element. There is no evidence Rickenbaker himself acted in a way amounting to a false representation to Oakbrook regarding Ms. Rickenbaker's status or that Rickenbaker intended for Oakbrook to act in reliance on her conduct. If anything, the evidence shows that, more likely than not, Rickenbaker was not consciously aware of anything that was occurring at the time of his admission. Further, the Admission Agreement and Arbitration Agreement are separate contracts that do not merge. *See Hodge v. UniHealth Post-Acute Care of Bamberg LLC*, 422 S.C. 544, 561-63, 813 S.E.2d 292, 308 (Ct. App. 2018); *Thompson v. Pruitt Corp*, 416 S.C. 43, 50, 784 S.E.2d 679, 683 (Ct. App. 2016); *Coleman*, 407 S.C. at 352, 755 S.E.2d at 450.

Oakbrook's assertion that Rickenbaker is equitably estopped from denying the validity of the Arbitration Agreement seems to hinge on a direct benefits theory of estoppel, i.e., that since Rickenbaker benefited from the terms of the Admission

Agreement, he should be estopped from denying the validity of the Arbitration Agreement. *See Wilson v. Willis*, 426 S.C. 326, 340, 827 S.E.2d 167, 175 (2019). Virtually all of the Circuit Court orders filed by Oakbrook in support of its Motion rely in some form or another on this theory. However, as the Supreme Court explained in *Wilson*, to successfully assert direct benefits estoppel, the arbitration agreement must be a clause within the larger admissions agreement, and the plaintiff must be seeking to assert causes of action that arise from and are created by the contract. Here, as explained above and below, the Admission Agreement and optional Arbitration Agreement are separate documents that did not merge. Second, Rickenbaker does not assert breach of contract, or a violation of contractual duties, and instead has brought his lawsuit under a negligence theory arising from common law duties. *See Wilson*, 426 S.C. at 342, 827 S.E.2d at 176. If anything, Rickenbaker's claims are indirectly related to the Arbitration Agreement, as it was optional, ancillary to, and separate from the Admission Agreement. *See id.* (stating that under direct benefits estoppel a nonsignatory's claim must be directly, not just indirectly, based on the contract containing the arbitration agreement).

Additionally, Ms. Rickenbaker did not have any authority independent of the Adult Health Care Consent Act to enter the Arbitration Agreement. The legal consequences of an agent's actions can only be attributed to the principle when the agent has actual or apparent authority. *Charleston Registry v. Young Clement*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004). South Carolina law requires that to prove apparent authority, the defendant must show that the purported principal

consciously or impliedly represented another to be his agent. *Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). For the reasons mentioned above, the Adult Health Care Consent Act did not bestow Ms. Rickenbaker with the authority to enter the Agreement. The simple fact that Ms. Rickenbaker signed the agreements so that her husband could be admitted to Oakbrook and receive health care in no way indicates a manifestation of authority by Rickenbaker to waive his right to a jury trial or agree to arbitration. There is no evidence that Rickenbaker ever manifested any form of assent establishing Ms. Rickenbaker as his agent, nor could he have in his condition at the time of admission.

Oakbrook's assertion that Ms. Rickenbaker held "inherent agency powers" to act on behalf of Rickenbaker is unsupported by South Carolina law. South Carolina law is clear that an individual does not have inherent agency powers concerning health care, financial, and other affairs of their spouse. *Hinson v. Roof*, 128 S.C. 470, 475, 122 S.E. 488, 490 (1924) ("The marriage relation of the parties . . . is not necessarily enough to establish the fact that the one is the agent of the other. There must be other proof."); S.C. Jur. *Agency* § 6 (1994) ("No presumption arises from the fact of the marital relationship, without more, that [a spouse] is the agent of [the other spouse].") (footnote omitted).

In the alternative, Oakbrook has requested that the Court grant additional discovery on the nature of Ms. Rickenbaker's agency relationship with her husband. Here, the only relevant and necessary evidence for the Court to make its determination is already available for the Court's review. Any further discovery

with the goal of revisiting the arbitrability of this case would only serve to protract this litigation, waste judicial resources, and increase costs for both parties unnecessarily.

Based on the foregoing authorities and findings, the Court denies Defendant's Motion to Compel Arbitration.

THEREFORE, it is ORDERED that the Defendant's Motion to Compel Arbitration is DENIED.

IT IS SO ORDERED.

The Honorable R. Markley Dennis, Jr.

_____, 2022.
Moncks Corner, South Carolina



Dorchester Common Pleas

Case Caption: Steve Rickenbaker VS Oakbrook Healthcare Llc , defendant, et al

Case Number: 2021CP1801410

Type: Order/Other

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Electronically signed on 2022-05-10 17:17:05 page 9 of 9

ELECTRONICALLY FILED 2022 May 11 8:59 AM DORCHESTER COMMON PLEAS CASE #2021CP1801410

This matter came before the Court on April 13, 2022, on a Motion to Compel Arbitration filed by Defendant Palmetto Hallmark Operating, LLC d/b/a Hallmark Healthcare Center (Palmetto Hallmark), pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. Present at the video conference hearing and arguing on behalf of Defendants was Russell G. Hines. Appearing and arguing on behalf of Plaintiff was Mario A. Pacella. After reviewing the submissions of the parties, the pleadings, and hearing the arguments of counsel, the Court denies Defendant's Motion to Compel Arbitration for the reasons set forth herein.

Plaintiff Tammy China brought this wrongful death and survival action against Palmetto Hallmark on behalf of the Estate of Emma Lee James. Decedent James died on November 4, 2018. This action was filed on June 9, 2021.

The basis of Palmetto Hallmark's Motion is that a valid and enforceable arbitration agreement exists between the parties. The Arbitration Agreement relied upon by Palmetto

Hallmark was signed by Emma Dunham, decedent's daughter and one of her three children. Palmetto Hallmark attached to its motion a health care power of attorney document that purported to nominate Emma Dunham as power of attorney, but that healthcare power of attorney form was not executed by decedent. Further, Palmetto Hallmark provided an Arbitration Agreement and an Admission Agreement that was signed by Emma Dunham. There is no evidence that at the time these documents were executed by Emma Dunham that she had valid healthcare power of attorney. Further, Emma Dunham did not have legal authority to enter the Admission Agreement on her behalf under the South Carolina Adult Health Care Consent Act, S.C. Code Ann. § 44-66-10 *et seq.*, as she was a minority of the children of decedent. Because Emma Dunham lacked legal authority to enter into legal agreements on behalf of her mother, neither the Arbitration Agreement nor the Admission Agreement can be considered to be valid.

In *Arredondo v. SNH SE Ashley River Tenant, LLC*, 433 S.C. 69 (2021), the South Carolina Supreme Court held that a general durable power of attorney for decisions regarding all types of personal and real property, including “choses in action,” does not provide the agent the authority to sign pre-dispute arbitration agreements requiring arbitration of certain claims by a resident against a facility. *Arredondo*, 433 S.C. at 78-79. The Supreme Court further held that the provision of a general durable power of attorney permitting the agent to enter agreements concerning transfers of property also did not authorize the signing of an arbitration agreement. In this regard, the Supreme Court noted the difference between a property right and a constitutional right. *Arredondo*, 433 S.C. at 79. Thus, unless the general durable power of attorney permitted decisions related to constitutional rights, it would appear that a durable power of attorney does not convey the right to the holder or agent to waive constitutional rights, including the right to a jury trial

under the Seventh Amendment. However, it is clear in this case, Ms. Dunham did not have durable power of attorney.

Moreover, Ms. Dunham did not have healthcare power of attorney, as it was not signed by Decedent. In fact, the signature for principal reflects Ms. Dunham's signature, witnessed by Veronica Gee. Nonetheless, even if this healthcare power of attorney was valid, which it is not, it still would not convey authority to Ms. Dunham to waive Decedent's constitutional rights. *Arredondo* sets forth the standard regarding whether a healthcare power of attorney can convey the authority to waive a principal's constitutional rights. In *Arredondo*, the Supreme Court held that language in a healthcare power of attorney giving the holder the right to make necessary healthcare decisions could not give the right to sign an arbitration agreement unless the arbitration agreement was necessary to the implantation of a health care decision. *Arredondo*, 433 S.C. at 81-84. Further, a healthcare power of attorney authorizing the holder or agent to pursue legal action does not grant the agent the authority to execute an arbitration clause. *Arredondo*, 433 S.C. at 85. Thus, *Arredondo* implies that courts can consider whether the arbitration agreement is necessary for the facility to provide care in making the determination as to the effect of an arbitration agreement.

However, here, Palmetto Hallmark cannot make this argument, as its Memorandum in Support of its Motion to Compel Arbitration states that "[t]he Arbitration Agreement by its plain language was not a precondition of admission to the Facility and simply could not have been an adhesion or "take it or leave it" contract. Ms. Dunham had the option not to enter into the Arbitration Agreement on behalf of her mother". Because Ms. Dunham did not have healthcare power of attorney or general power of attorney conveying the authority to waive constitutional rights, the Arbitration Agreement has no effect as to Decedent, her estate, or her heirs.

Even if Ms. Dunham had authority under the Act to enter the Admission Agreement as an act in furtherance of Decedent James' health care needs, it does not necessarily follow that she had authority to enter a separate Arbitration Agreement under the Act. Therefore, the Court must determine (1) if the Arbitration Agreement merged with and was a part of the Admission Agreement such that Decedent James' estate would be equitably estopped from denying the Arbitration Agreement's validity, and (2) if Ms. Dunham had actual or apparent authority to enter the Arbitration Agreement on behalf of Decedent James. The answer to both inquiries is "no".

While a signed Arbitration Agreement exists in this case, it is not a valid, enforceable agreement for the simple reason that Decedent's daughter, Emma Dunham, did not have any authority to execute the Arbitration Agreement at the time it was entered by the parties. Only a majority of children are authorized to make decisions concerning health care under the Adult Health Care Consent Act. S.C. Code Ann. § 44-66-30(A)(4). Ms. Dunham was only a minority and could not bind Decedent James under the Act. Further, arbitration is a means of resolving a legal dispute outside of the typical civil litigation process – a definition unrelated to physical or mental condition. See Black's Law Dictionary, 125 (10th ed. 2014).

Palmetto Hallmark's Arbitration Agreement is optional and separate from its Admission Agreement and contains no provision for medical, nursing, or health care services to be provided to residents, nor does it require any financial commitment to pay for such services. The agreement is separately titled "Facility – Resident/Representative Arbitration Agreement", and is a one-page document and contains its own signature lines. The agreement is signed by Ms. Dunham as "Resident/Representative." Further, the Arbitration Agreement by its very language distinguishes between itself and the Admission Agreement, stating that the Arbitration Agreement will survive any "breach of this Agreement or the Admission Agreement." While the Admission Agreement

purports to incorporate admissions materials into itself “by reference herein”, when viewed alongside the other details of the agreements, it creates at best an ambiguity as to merger when taken in context of the totality of the circumstances, and “the law is clear that any ambiguity in such a clause is construed against the drafter”, i.e., Palmetto Hallmark. *Coleman v. Mariner Health Care Inc.*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014). Since Ms. Dunham lacked legal authority, the Arbitration Agreement is void and unenforceable.

Further, the Estate of Emma James cannot be equitably estopped from denying enforcement of the Arbitration Agreement. “Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements.” *Kelly v. Logan, Jolley & Smith*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped acted in a way amounting to a false representation. *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). Palmetto Hallmark cannot meet its burden to establish this element. There is no evidence Decedent James herself acted in a way amounting to a false representation to Palmetto Hallmark regarding Ms. Dunham's status or that Decedent James intended for Palmetto Hallmark to act in reliance on her conduct. If anything, the evidence shows that, more likely than not, Decedent James was not consciously aware of anything that was occurring at the time of his admission. Further, the Admission Agreement and Arbitration Agreement are separate contracts that do not merge. *See Hodge v. UniHealth Post-Acute Care of Bamberg LLC*, 422 S.C. 544, 561-63, 813 S.E.2d 292, 308 (Ct. App. 2018); *Thompson v. Pruitt Corp*, 416 S.C. 43, 50, 784 S.E.2d 679, 683 (Ct. App. 2016); *Coleman*, 407 S.C. at 352, 755 S.E.2d at 450.

Palmetto Hallmark’s assertion that the Estate of Emma James is equitably estopped from denying the validity of the Arbitration Agreement seems to hinge on a direct benefits theory of

estoppel, i.e., that since Decedent James benefited from the terms of the Admission Agreement, she should be estopped from denying the validity of the Arbitration Agreement. *See Wilson v. Willis*, 426 S.C. 326, 340, 827 S.E.2d 167, 175 (2019). Virtually all of the Circuit Court orders filed by Palmetto Hallmark in support of its Motion rely in some form or another on this theory. However, as the Supreme Court explained in *Wilson*, to successfully assert direct benefits estoppel, the arbitration agreement must be a clause within the larger admissions agreement, and the plaintiff must be seeking to assert causes of action that arise from and are created by the contract. Here, as explained above and below, the Admission Agreement and optional Arbitration Agreement are separate documents that did not merge. Second, Plaintiff does not assert breach of contract, or a violation of contractual duties, and instead has brought his lawsuit under a negligence theory arising from common law duties. *See Wilson*, 426 S.C. at 342, 827 S.E.2d at 176. If anything, Plaintiff's claims are indirectly related to the Arbitration Agreement, as it was optional, ancillary to, and separate from the Admission Agreement. *See id.* (stating that under direct benefits estoppel a nonsignatory's claim must be directly, not just indirectly, based on the contract containing the arbitration agreement).

Additionally, Ms. Dunham did not have any legal authority to enter the Arbitration Agreement. The legal consequences of an agent's actions can only be attributed to the principle when the agent has actual or apparent authority. *Charleston Registry v. Young Clement*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004). South Carolina law requires that to prove apparent authority, the defendant must show that the purported principal consciously or impliedly represented another to be his agent. *Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). For the reasons mentioned above, the healthcare power of attorney document that Decedent never signed did not provide Ms. Dunham with the authority to enter the Agreement.

The simple fact that Ms. Dunham erroneously and without authority signed the agreements so that her mother could be admitted to Palmetto Hallmark and receive health care in no way indicates a manifestation of authority by Ms. Dunham waive her mother's right to a jury trial or agree to arbitration. There is no evidence that Decedent James ever manifested any form of assent establishing Ms. Dunham as her agent.

Palmetto Hallmark's assertion that Ms. Dunham held "inherent agency powers" to act on behalf of Decedent James is unsupported by South Carolina law or Palmetto Hallmark's brief. Palmetto Hallmark concedes that its inherent agency argument requires some authorized conduct on the part of the agent. Here, as explained above, Decedent James did not convey to Ms. Dunham any authority to transact business, healthcare or otherwise, for Decedent James. A simple review of the healthcare power of attorney attached to Palmetto Hallmark's motion easily shows that Decedent James never signed it.

In the alternative, Palmetto Hallmark has requested that the Court grant additional discovery on the nature of Ms. Dunham's agency relationship with her mother. Here, the only relevant and necessary evidence for the Court to make its determination is already available for the Court's review. Any further discovery with the goal of revisiting the arbitrability of this case would only serve to protract this litigation, waste judicial resources, and increase costs for both parties unnecessarily.

Based on the foregoing authorities and findings, the Court denies Defendant's Motion to Compel Arbitration.

THEREFORE, it is ORDERED that the Defendant's Motion to Compel Arbitration is DENIED.

IT IS SO ORDERED.

The Honorable R. Markley Dennis, Jr.

_____, 2022.
Moncks Corner, South Carolina



Dorchester Common Pleas

Case Caption: Tammy China , plaintiff, et al VS Palmetto Hallmark Operating Llc ,
defendant, et al
Case Number: 2021CP1801030
Type: Order/Compel

R. Markley Dennis Jr., 2060

R. Markley Dennis Jr., 2060

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ELECTRONICALLY FILED 2022 MAY 04 9:34 AM DORCHESTER COMMON PLEAS CASE #2021CP1801030

2018 WL 6831844 (S.C.Com.Pl.) (Trial Order)

Court of Common Pleas of South Carolina.

Horry County

Orveletta ALSTON, et al.,

v.

CONWAY MANOR, LLC, et al.

No. 2017CP261351.

January 17, 2018.

Order

Larry B. Hyman, Jr., Judge.

*1 This matter comes before the Court on Defendants Conway Manor, LLC, Raymond Tiller, and John and Jane Does 1-10's Motion to Stay Action and Compel Arbitration and for Protective Order. Based on the Court's review of the parties' written submissions and oral arguments during a hearing on November 1, 2017, the Court **DENIES** the Defendants' motion.

BACKGROUND

The Defendants operate a nursing home, licensed by the South Carolina Department of Health and Environmental Control, R.61-17, *Standards for Licensing Nursing Homes*. Willie Earl Alston, Sr. was admitted to the Defendant's nursing home facility on or about December 17, 2015. Upon admission, Mr. Alston was documented to return home with his wife after short-term rehabilitation. At all relevant times, it was documented that Mr. Alston suffered from dementia. Plaintiff alleges that while Mr. Alston was a resident, he developed pressure ulcers. Willie Earl Alston, Sr. died on April 22, 2016.

When Mr. Alston arrived at the Defendants' nursing home, Defendant's staff approached Mr. Alston's daughter, Kimberly Alston-Wood. Ms. Alston-Wood was not Mr. Alston's guardian, conservator, or attorney in fact. The documents included an Admission Agreement which included a clause with an **Arbitration Agreement**. Mr. Alston's wife, Orveletta Alston, was appointed as Personal Representative of the Estate of Willie Earl Alston, Sr. on May 27, 2016 and filed this action on his behalf, alleging that the Defendants breached their duty in caring for Mr. Alston. On June 21, 2017, Defendants' filed a Motion to Stay Action and Compel Arbitration and for Protective Order. Oral arguments were heard on November 1, 2017.

ANALYSIS

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 Cove Homeowner's Ass'n v. Trident Constr. Co., Inc.*, 355 S.C. 605, 612, 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 Kimberly Alston-Wood lacked the capacity to contract on behalf of her father.**

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). While the Plaintiffs did not expressly argue apparent authority, Ms. Alston-Woods authority status was raised by both parties, therefore the Court shall analyze both actual and apparent authority.

*2 Here, Defendants argue in their motion that because Mr. Alston suffered dementia prior to and at the time of his admission, he did not have capacity to enter into a binding contract. Therefore by Defendants' own admission, Mr. Alston could not explicitly authorize, hold out, or knowingly permit Ms. Alston-Wood 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 informed them that Ms. Alston-Wood did not have authority by way of a Power of Attorney to bind her father. Ms. Alston-Woods, did not indicate at any time on the Admission Agreement that she had any authority to enter the contract on behalf of her father.

Additionally, Ms. Alston-Wood possessed no statutory, legal authority to bind Mr. Alston into a contract. The Adult Health Care Consent Act ("AHCCA") does not confer legal authority to Ms. Alston-Wood to enter into a contract on behalf of her father. *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... (5) an adult child 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 legal contracts waiving a person's right to a jury trial. Even if it did, Ms. Alston-Wood lacked priority under the statute because Mr. Alston's wife was alive and making his health care decisions. The purpose of the AHCCA is to enable contracting parties in a healthcare situation to enter into a binding agreement when express authority has not been conferred upon an agent for that purpose. "However the [AHCCA] does not confer such authority with respect to an **Arbitration Agreement**...." *Thompson*, at 52. Additionally, neither party argued under *S.C. Code Ann. § 44-66-30(D)* that Mr. Alston's wife, who had top priority, was not reasonably available, unwilling to make decisions, or unable to make healthcare decisions for Mr. Alston.

Furthermore, the S.C. Bill of Rights for Resident of Long-Term Care Facilities does not confer legal authority to Ms. Alston-Wood to enter into a contract on behalf of her father. Under the Bill of Rights, a "representative" is defined as a "resident's legal guardian, committee, or next of kin or other person acting as agent of a resident who does not have a legally appointed guardian." *S.C. Code Ann. §44-81-30(3)*. Mr. Alston did not have a legally appointed guardian or attorney in fact at the time of his admission. Therefore, the Bill of Rights would grant Mr. Alston's wife, as next of kin, as his representative, not Ms. Alston-Wood.

This Court finds the Supreme Court of South Carolina's decision in *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2 450 (2014) is very similar to 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 AHCCA did give the resident's sister "authority to make 'healthcare decision' 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.* The Court reasoned that the Act only extends authority to surrogates to make traditional health care decisions and financial decisions that arise out of those decisions. The Court further addressed this in *Thompson v. Pruitt Corp.*, 416 S.C. 43, holding that an **arbitration agreement** was separate from the admission agreement. In *Thompson*, the Court found that while the resident's son was authorized to execute an admission agreement under the AHCCA, the Act did not convey any authority for the son to sign an **arbitration agreement** on behalf of his father. The Court specifically addressed the fact that the terms of the Admission Agreement indicate that it either incorporated, or merged with, the **Arbitration Agreement**, but declined to merge the two. *Id.* at 52. Simply stated, an **Arbitration Agreement** is a legal document which does not concern health care related decisions.

Likewise, an Admission agreement is a medical document which does not concern legal related decisions. One cannot simply be contained in the other and its health care or legal distinction is masked by the other.

*3 In accordance with the foregoing, Ms. Alston-Wood lacked the actual or apparent authority, pursuant to statute, to make health care decisions on behalf of Mr. Alston as his agent. She furthermore lacked the actual or apparent authority to make legal decisions on behalf of Mr. Alston, which includes the **agreement** to **arbitrate** disputes by arbitration. Ms. Alston-Wood had no legal authority whatsoever to sign the **Arbitration Agreement**. Absent legal authority or at least some measure of apparent authority, the **Arbitration Agreement** is void and unenforceable.

2. Willie Alston, Sr. was not a third-party beneficiary to the **Arbitration Agreement** because Kimberly Alston-Wood did not have capacity to bind him to the contract.

Defendants' argument that Willie Alston, Sr. is bound by the **Arbitration Agreement** executed by his daughter as a third-party beneficiary is without merit. Mr. Alston did benefit from the Admissions Agreement to the facility, however Ms. Alston-Wood lacked authority under the AHCCA and the S.C. Bill of Rights to execute on his behalf. Along the same lines, Ms. Alston-Wood did not have authority to legally bind her father to the **Arbitration Agreement** contract for the reasons set forth above in *Coleman and Thompson*, because the **Arbitration Agreement** and Admission Agreement did not merge together. As such, this Court finds Willie Alston, Sr. 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 also argue that Plaintiff should be equitably estopped from denying enforcement of the **Arbitration Agreement** and that under the doctrine of **equitable estoppel** a party should not be permitted to sue under certain provisions of a contract while disclaiming provisions of the same contract. **Equitable estoppel** is a contract defense and the party asserting this defense bears the burden of proving all of its elements.” *Kelly v. Logan, Tolley & Smith*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). **Equitable estoppel** requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conduct be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting the estoppel must lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on the conduct of the party to be estopped. *Id.*

Defendant has not met its burden to establish these elements. There is no evidence Ms. Alston-Wood acted in a way amounting to a false representation to Defendants regarding Mr. Alston's status or that Ms. Alston-Wood intended for Defendant to act in reliance on her conduct. Mr. Alston's diminished capacity prevented him from forming the required intent for Defendants to rely on his conduct. Additionally, the evidence shows Defendants cannot meet its burden to show they lacked knowledge or the means of knowledge of the truth of the facts in question. This element requires Defendants to show it did not know Mr. Alston lacked authority to sign the **arbitration agreement** on her father's behalf and Defendant lacked the ability to make this determination. Equitable doctrines such as estoppel favor diligent parties who actively endeavor to protect their rights. A person cannot claim to have been misled and cannot rely on **equitable estoppel** if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

*4 Defendants had the capacity to determine whether Ms. Alston-Wood had authority to sign an **arbitration agreement** on Mr. Alston's behalf. Defendants are a sophisticated business entity frequently interacting with residents and their families during the nursing home admission process. Defendants are familiar with the legal concepts of guardianship and powers-of-attorney. Defendants had the ability to ask Ms. Alston-Wood whether she was Mr. Alston's guardian or attorney-in-fact and had the

ability to request supporting documentation. Since Defendants have not cited or provided evidence on all required elements of **equitable estoppel**, Plaintiff is not equitably estopped from denying the **arbitration agreement**.

Furthermore, while typically the Defendants argument that **equitable estoppel** would prevent a party from cherry picking certain provisions to rely upon while disavowing other, there is an exception in cases such as these circumstances. As stated above, Mr. Alston was suffering from dementia prior to being admitted to Conway Manor, thus he was prevented from having the requisite intent and knowledge to assent to the **Arbitration Agreement**. Therefore, there must be some legal authority for Ms. Alston-Woods to sign on behalf of her father. The Admissions **Agreement** and the **Arbitration Agreement** were signed at the same time, in the course of the same transaction. The Agreements, however, do not merge. The two agreements are independent of one another, as reflected in the language of the Admission Agreement, indicating the execution of the Admission agreement was not contingent upon an Optional Arbitration Clause. The Optional Arbitration Clause stated:

“Any action, dispute, claim, or controversy, of any kind (tort, contract, equitable or statutory, including but not limited to claims of violation of resident's rights(now existing or hereafter arising between the parties, in anyway arising form or relating to this Agreement governing the Resident's stay a[t] the Facility, shall be resolved by binding arbitration.... **OPTIONAL: if the parties do not agree to this Arbitration Clause, please mark with an X to void this clause only.**”

As previously stated the AHCCA provides for the health and wellbeing of an incapacitated adult, an **Arbitration agreement** is a legal document not for the care of an incapacitated adult, and is outside of the scope of the AHCCA. Therefore, because the Court finds that the two documents did not merge and there was no legal authority for Ms. Alston-Woods to sign on Mr. Alston's behalf, **equitable estoppel** does not apply to the **Arbitration agreement**.

4. The FAA does not mandate the enforcement of the **Arbitration Agreement**

Under the Federal **Arbitration Agreement** (“FAA”), **arbitration** is required when there is a valid **arbitration agreement** and a dispute exists which is within the scope of the agreement. Under the arbitration clause, neither prong is satisfied. As discussed in the sections above, there is no valid **arbitration agreement** because Ms. Alston-Wood did not have the legal authority to execute a valid **arbitration agreement** or health care admission agreement. Accordingly, the FAA does not apply.

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

<<signature>>

The Honorable Larry B. Hyman, Jr.

1 - 11, 2018

Conway, South Carolina

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2020 WL 12904662 (S.C.Com.Pl.) (Trial Order)

Court of Common Pleas of South Carolina.

Sumter County

Andrietta ATKINSON and Debra Clyburn-Wilson, individually and as
Personal Representatives of the Estate of Willie Mae Clyburn, Plaintiffs,

v.

SSC SUMTER EAST OPERATING COMPANY, LLC d/b/a Sumter
East Health and Rehabilitation Center and Paul Granger, Defendants.

No. 2017-CP-43-1740.

June 25, 2020.

Order Denying Motion to Compel Arbitration

Kristi F. Curtis, Judge.

*1 This matter was before the Court in Sumter County, South Carolina, upon Defendant SSC Sumter East Operating Company, LLC d/b/a Sumter East Health and Rehabilitation Center's [Sumter East] Motion to Dismiss and Compel Arbitration. Defendant's Motion to Dismiss and Compel Arbitration is DENIED.

BACKGROUND

Willie Mae Clyburn [Clyburn] was admitted to the Sumter East on October 13, 2016. Sumter East is a skilled nursing facility licensed by the South Carolina Department of Health and Environmental Control. While a resident at Sumter East, Plaintiff contends Clyburn developed pressure sores, resulting in her decline and eventual death. Clyburn died on February 5, 2018. Andrietta Atkinson filed the original action as Power of Attorney for Clyburn on September 20, 2017. After Clyburn's death, Clyburn's daughters, Andrietta Atkinson and Debra Clyburn-Wilson, were appointed as Personal Representatives of her estate, and were substituted as Plaintiffs in this action. Plaintiffs thereafter filed an amended complaint which included causes of action for Wrongful Death and Survivorship. The parties agreed to conduct limited discovery and mediate this matter without waiver of Sumter East's arbitration rights. Following the parties' inability to resolve this matter at mediation, Sumter East filed this Motion to Dismiss and Compel Arbitration. Plaintiffs contend that the **Arbitration Agreement** is unenforceable under state law.

STANDARD OF REVIEW

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

In determining whether an **agreement** to **arbitrate** exists, “the court should apply ‘ordinary state-law principles that govern the formation of contracts.’” Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999). Arbitration is available only when the parties contractually agree to arbitrate. Id. South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989).

*2 The present case is very similar to three cases where the South Carolina Court of Appeals and Supreme Court addressed the issue of **arbitration agreements** in skilled nursing facilities: Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292, 304 (Ct. App. 2018); and Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d, 679 (Ct. App. 2016). In all three of these cases, our Courts have found **Arbitration Agreements** to be unenforceable where a family member signed an **Arbitration Agreement** near the time of admission to a skilled nursing facility for the Decedent and did not have authority to do the same. In all three cases, the Courts found that neither implied authority nor estoppel applied.

ANALYSIS

THE **ARBITRATION AGREEMENT** IS NOT ENFORCEABLE BECAUSE WILSON WAS NEVER CLYBURN'S LEGAL GUARDIAN OR ATTORNEY IN FACT AND LACKED ACTUAL OR APPARENT AUTHORITY TO SIGN THE **ARBITRATION AGREEMENT** FOR CLYBURN.

Wilson executed documents on behalf of Clyburn upon her entry to Sumter East on October 13, 2016, including an **Arbitration Agreement** titled “Dispute Resolution Program” [hereinafter referred to as “**Arbitration Agreement**”]. The **Arbitration Agreement** states:

YOUR PARTICIPATION IN DRP IS VOLUNTARY. BY SIGNING THIS AGREEMENT, YOU AGREE TO PARTICIPATE IN THE DISPUTE RESOLUTION PROGRAM. THIS AGREEMENT MAY BE REVOKED BY SENDING A WRITTEN NOTICE OF REVOCATION WITHIN THIRTY (30) DAYS FROM THE DATE OF ADMISSION OR THE DATE ON WHICH THIS AGREEMENT IS SIGNED, WHICHEVER OCCURS LATER. A DECISION TO REVOKE THIS AGREEMENT WILL IN NO WAY ADVERSELY AFFECT THE RESIDENT'S STATUS AT THE FACILITY. WE WILL NOT REFUSE TO ADMIT, ATTEMPT TO DISCHARGE THE RESIDENT OR TAKE ANY OTHER ADVERSE ACTION AGAINST THE RESIDENT BASED ON A REVOCATION OF THE OPPORTUNITY TO PARTICIPATE IN A DRP.

The **Arbitration Agreement** is separately paginated from the Admissions Agreement, and each document contains its own signature lines. At the bottom of the **Arbitration Agreement** there is a signature line for the resident, another line for the signature of a Representative to sign when a “mentally competent resident is unable to physically execute the Agreement and authorizes a Representative to sign Agreement on the Resident's behalf.” Both of these lines were left blank. The next signature line states, “If resident is judged incompetent, complete this section ... I am the spouse, responsible party, legal guardian or power of attorney of the resident and have the authority to sign the agreement on his/her behalf. In signing this Agreement, the Legal Representative or Family Member binds both the Resident and themselves Individually.” Wilson signed the Agreement under this section.

A. Wilson lacked the actual authority to bind Clyburn's estate to an **Arbitration Agreement**.

Sumter East argues that Wilson's signature on the **Arbitration Agreement** binds Clyburn' estate. The court disagrees. The mere fact that an **arbitration agreement** exists does not automatically refer any dispute to **arbitration**. The **agreement** must be valid, enforceable, and signed by the parties who had the express and legal authority to do so. 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, 359 S.C. 635, 598 S.E.2d 717 (Ct. App. 2004). Moreover, 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, 323 S.C. 240, 473 S.E.2d 865 (Ct. App. 1996). The evidence shows Wilson was not the legal guardian of Clyburn, nor was she the attorney in fact.

*3 Wilson also lacked the capacity to bind Clyburn under the South Carolina Adult Health Care Consent Act ("AHCCA"). The AHCCA governs the placement or removal of an individual from a facility that provides intermediate or skilled nursing care. S.C. Code Ann. § 44-66-20(1). Under the AHCCA, a party may consent to health care on behalf of a patient if the patient is deemed unable to consent to treatment after two licensed physicians have examined the patient and certify an inability to consent. S.C. Code Ann. § 44-66-20(8) (emphasis added). S.C. Code Ann. § 44-66-30 lists the appropriate persons who may make health care decisions for a patient who is unable to consent and provides an order of priority for who may make those decisions. It reads:

(A) Where a patient is unable to consent, decisions concerning his health care may be made by the following persons in the following order of priority:

(1) a guardian appointed by the court pursuant to Article 5, Part 3 of the South Carolina Probate Code, if the decision is within the scope of the guardianship;

(2) an attorney-in-fact appointed by the patient in a durable power of attorney executed pursuant Section 62-5-501, if the decision is within the scope of his authority;

(3) a person given priority to make health care decision by another statutory provision;

(4) a spouse of the patient unless the spouse and the patient are separated pursuant to one of the following:

a. entry of a pendent lite order in a divorce or separate maintenance action;

b. formal signing of a written property or marital settlement agreement; or

c. entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties;

(5) an adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation;

(6) a parent of the patient;

(7) an adult sibling of the patient; or if the patient has more than one adult sibling, a majority of the adult siblings who are reasonably available for consultation;

(8) a grandparent of the patient; or if the patient has more than one grandparent, a majority of the grandparents who are reasonably available for consultation;

(9) any other adult relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship with the patient, or if the patient has more than one other adult relative, a majority of those adult relatives who are reasonably available for consultation.

Defendant has put forth insufficient evidence to demonstrate that Clyburn herself was unable to consent or that two licensed physicians certified her inability to consent, as required by the statute, which would trigger the AHCCA and allow a family member to make health care decisions for her.

Additionally, even if Wilson had actual authority under the AHCCA, her authority under the Act would extend only to health care decisions and would not give her the authority to sign an **Arbitration Agreement**. The AHCCA only deals with health care related decisions, not legal decisions. Nowhere in the entire AHCCA is the word “legal” or “arbitration” used. Clearly the legislature intended this Act to govern only those decisions related to health care. The South Carolina Supreme Court addressed this issue squarely in [Coleman v. Mariner Heath Care](#) 407 S.C. 346, 755 S.E.2d 450 (2014). In [Coleman](#), a nursing home resident's sister was authorized to make health care decisions under the AHCCA because her sister was unable to consent within the meaning of the Act and she was an individual with statutory priority to represent her sister. The court held that her authority under the AHCCA did not give her the capacity to bind her sister to a voluntary **arbitration agreement**. According to the Court, the AHCCA specifically limited the representative's authority to making health care decisions and associated financial arrangements. The Court held arbitration is not a health care or related financial decision, and thus the decision to engage in arbitration exceeds the authority granted by the AHCCA. [Id.](#) at 351-52, 755, S.E. 2d at 453.

*4 Sumter East argues that the Admissions **Agreement** and **Arbitration Agreement** signed by Wilson should be merged into one document, which Wilson had authority to sign. This court disagrees and finds the Admissions **Agreement** and **Arbitration Agreement** were not merged and should be treated as two separate documents.

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

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

[Coleman v. Mariner Health Care, Inc.](#), 407 S.C. 346, 354, 755 S.E.2d 450, 454 (2014).

The Court reached similar holdings in [Thompson v. Pruitt Corp.](#), 416 S.C. 43,50, 784 S.E.2d 679, 683 (Ct. App. 2016) and [Hodge v. UniHealth Post-Acute Care of Bamberg, LLC](#), 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) (“The Act confers authority on a health care surrogate to consent on the patient's behalf ‘to the provision or withholding of health care’ and to make financial decisions obligating the patient to pay for the medical care provided.” (quoting [Coleman](#), 407 S.C. at 351-52, 755 S.E.2d at 453)).

In this case, as in [Coleman](#), the Admission **Agreement** and **Arbitration Agreement** were separate documents, each with its own separate pagination and signature lines. Furthermore, in this case the Admissions Agreement contains language indicating that the Admissions Agreement is the “entire agreement and understanding between the parties.” In addition, the **Arbitration Agreement** could be revoked within thirty days, whereas the Admissions Agreement contained no revocation provision. The **Arbitration Agreement** states that a resident's decision to revoke the document has no bearing on whether or not the resident would be admitted to the facility. The language of Sumter East's own document suggests that even Sumter East treated these as entirely separate agreements.

Sumter East cannot meet its burden to prove **merger**. The Admission **Agreement** and **Arbitration Agreement** are distinct and should not be construed as a unit. Therefore, even if Wilson had the actual authority to sign the Admissions Agreement, that authority did not extend to the **Arbitration Agreement**.

B. Wilson did not have the apparent authority to bind Clyburn's Estate.

South Carolina law requires that to prove apparent authority, the Defendant must show “(1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment.” *Cowburn v. Leventis*, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. *Young v. S.C. Department of Disabilities and Special Needs*, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent, but the relationship between the principal and the third party. *Vereen v. Liberty Life Insurance Company*, 306 S.C. 423, 412, S.E.2d 425 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists. *Id.*

*5 Sumter East places much emphasis on the behavior and deposition testimony of Wilson as to her apparent authority to act for Clyburn. The case law, however, suggests that it is Clyburn's actions which dictate whether she held Wilson out as her agent. This Court finds that the present case is nearly identical to *Hodge and Thompson*. In *Hodge*, the South Carolina Court of Appeals discussed a Maryland case, *Dickerson v. Longoria*, 414 Md. 419, 995, A.2d 721, 743 (2010). The Court specifically stated, “‘This limited range of acts performed on the [decedent]'s behalf suggest, at most [he] may have conferred on [the personal representative] the authority to make health care and financial decisions on his behalf, but no more than that.’” *Hodge* at 567. Further, in *Thompson*, the Court determined that “‘The authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial.’” *Thompson* at 686.

The only evidence that suggests Clyburn held Wilson out as having authority to sign an **Arbitration Agreement** on Clyburn's behalf is the fact that she remained at the facility for some five months and never repudiated the **Arbitration Agreement**. However, by its very terms her residence at Sumter East was not effected by the **Arbitration Agreement**. Clyburn's silence on the issue is not a sufficient basis from which to infer apparent authority.

PLAINTIFFS ARE NOT EQUITABLY ESTOPPED FROM DENYING THE **ARBITRATION AGREEMENT**

Sumter East argues that Plaintiffs should be equitably estopped from denying enforcement of the **Arbitration Agreement**. **Equitable estoppel** is a contract defense and the party asserting this defense bears the burden of proving all of its elements. *Kelly v. Logan, Tolley & Smith*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). **Equitable estoppel** requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conduct be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. *Strickland v. Strickland* 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting the estoppel must (1) lack knowledge and the means of attaining the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on the conduct of the party to be estopped. *Id.*

Defendant has not met its burden to establish these elements. There is insufficient evidence Wilson acted in a way amounting to a false representation to Sumter East regarding her authority to act for Clyburn. Additionally, Sumter East cannot meet its burden to show they lacked knowledge or the means of attaining the truth of the facts in question. Equitable doctrines such as estoppel favor diligent parties who actively endeavor to protect their rights. A person cannot claim to have been misled and cannot rely on **equitable estoppel** if the party, by the exercise of reasonable diligence, could have determined the truth of the facts in question. *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

In this case, Sumter East had the capacity to determine whether Wilson had authority to sign the **Arbitration Agreement** on Clyburn's behalf. Sumter East is - or should be - familiar with the legal concepts of guardianship and powers-of-attorney. Sumter East had the ability to simply ask Wilson whether she was Clyburn's guardian or attorney-in-fact and to request supporting documentation.

Sumter East also fails to show any direct benefit Clyburn received by virtue of the **Arbitration Agreement**. As stated above, the Admissions **Agreement** and **Arbitration Agreement** were separate documents, and Clyburn's admission to Sumter East was never conditioned upon her signing the **Arbitration Agreements**. Sumter East cannot point to any other "direct benefit" Clyburn received from entering into the **Arbitration Agreement** which would support its claim that she be equitably estopped from denying the Agreement. See Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (noting nursing home's "equitable estoppel argument is premised on [the home's] contention that, under state law, the admission **agreements** and the [**arbitration agreements**] merged"); Thompson, 416 S.C. at 59-60, 784 S.E.2d at 688 (any benefit of admission "is of no moment" for the application of **equitable estoppel** to a separate arbitration contract).

*6 Further, so long as the admission and arbitration contracts are separate documents, any alleged misrepresentations made by a resident's family member when signing the contracts would not equitably estop the resident's attorney-in-fact from challenging the family member's authority to bind the resident to arbitration. A family member who signs an arbitration contract without legal authority to bind the resident acts in their individual capacity and their misrepresentations, if any, would have no bearing on claims against the nursing home by the resident even if the misrepresenting family member is also the attorney in-fact for the resident. Thompson, 416 S.C. 43, 62, 784 S.E.2d 679 (Ct. App. 2016) (finding nursing home "may not hold [resident's] estate responsible for any possible misrepresentations Son or Daughter may have made in their individual capacities"). Since the agreements were not merged, Defendant's **equitable estoppel** argument must be denied. See Coleman 407 S.C. at 355-56, 755 S.E.2d at 455 (rejecting estoppel argument by finding no **merger**).

THE **ARBITRATION AGREEMENT WAS NOT RATIFIED BY WILLIE MAE CLYBURN.**

Clyburn's continued residency Sumter East did not act as a ratification of the **Arbitration Agreement**. To establish a ratification of the **Arbitration Agreement** Sumter East must show (1) acceptance by the principal of the benefits of the agent's acts, (2) the principal's full knowledge of the facts, and (3) circumstances or an affirmative election demonstrating the principal's intent to accept the unauthorized arrangement. Lincoln v. Aetna Gas. & Sur. Co., 300 S.C 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989).

Clyburn's presence at the facility alone cannot constitute an affirmative representation. See Hodge (rejecting the notion that a nursing home resident represents his/her family member has authority to enter an **arbitration agreement** on the resident's behalf simply by failing to object to the family member's signature).

Sumter East argues Clyburn accepted the benefits of the **Arbitration Agreement** and relies on this as proof of ratification. However, the only alleged benefit Sumter East can cite is admission to the facility, which the terms of the Arbitration Agreement show were not impacted by the signing or refusing of the Agreement. The Court of Appeals' ruling in Thompson speaks directly on this point, stating, "any possible benefit emanating from the [**arbitration agreement**] alone is offset by the [**arbitration agreement's**] requirement that [resident] waive her right to access the courts and her right to a jury trial." 416 S.C. at 60, 784 S.E.2d at 688. As there is no clear benefit that Willie Mae Clyburn derived from the **Arbitration Agreement**, and her presence alone does not constitute an affirmative representation to accept the **Arbitration Agreement**, this Court finds that the **Arbitration Agreement** was not ratified.

CONCLUSION

For the foregoing reasons the Defendant's Motion to Dismiss and Compel Arbitration is DENIED.

IT IS SO ORDERED.

Kristi Curtis, Circuit Court Judge

June ____, 2020

Sumter, South Carolina

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

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ELECTRONICALLY FILED - 2022 May 19 8:43 AM - COLLETON - COMMON PLEAS - CASE#2021CP1500657

2020 WL 12919118 (S.C.Com.Pl.) (Trial Order)

Court of Common Pleas of South Carolina.

Richland County

Vermeil DANIELS as Personal Representative of The Estate of Annie Porter, Plaintiff,

v.

THI OF SOUTH CAROLINA AT COLUMBIA, LLC d/b/a Midlands Health & Rehabilitation Center, Defendant.

No. 2019-CP-40-02295.

February 21, 2020.

Order

L. Casey Manning, Judge.

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

PROCEDURAL HISTORY

Annie Porter was admitted to the Defendant's skilled nursing facility in December of 2017. The Defendant operates a skilled nursing facility, licensed by the South Carolina Department of Health and Environmental Control, R.61-17, *Standards for Skilled Nursing Facilities*. Plaintiff alleges that while a resident in the Defendant's facility, Ms. Porter was allowed to develop pressure sores, which resulted in her decline and eventual death. Annie Porter died on March 28, 2018. Vermeil Daniels, Annie Porter's daughter and Plaintiff in this matter was appointed as Personal Representative of the Estate of Annie Porter on August 18, 2018 by the Kershaw County Probate Court, and filed this action on her behalf, including causes of action for Wrongful Death and Survivorship. Plaintiff filed the Notice of Intent to file suit on October 23, 2018. The parties participated in pre-suit mediation, which resulted in an impasse. Plaintiff filed her Summons and Complaint on April 25, 2019. Defendant THI of South Carolina at Columbia, LLC d/b/a Midlands Health & Rehabilitation Center filed its Motion to Dismiss and Compel Arbitration on June 5, 2019. This Court reviewed submissions and heard oral arguments by counsel at a hearing on August 26, 2019. This Court entered an Order Denying the Defendant's Motion to Dismiss and Compel Arbitration on November 6, 2019. Defendant filed a Motion to Alter, Amend, and/or Reconsider Order Denying Motion to Compel Arbitration on November 18, 2019. Oral arguments were held at a hearing February 13, 2020.

FACTUAL BACKGROUND

This matter arises out of a nursing home negligence case where Plaintiff alleges Ms. Porter was injured as a result of the Defendants' negligence allowing her to develop pressure ulcers. Ms. Porter was admitted to the Defendants' facility on or about January 5, 2018. Defendant has represented that agreeing to arbitrate was not a prerequisite to admission to the facility or a condition for admission. It is undisputed that Annie Porter did not sign the **Arbitration Agreement**. No power of attorney existed at the time of the admission into the nursing home on January 5, 2018. Vermeil Daniels is Annie Porter's daughter. Vermeil Daniels signed the **Arbitration Agreement**. At no point in time did Vermeil Daniels have Power of Attorney or any other legal authority that would have given Ms. Daniels the legal authority to bind Ms. Porter to arbitration. Plaintiff provided

an affidavit from Daniels that stated: “ I was never asked by any Midlands Health and Rehabilitation employee if I was Annie Porter's legal guardian, nor if I had legal authority to bind her to arbitration, which I did not.” Defendants have never offered any evidence to contradict the affidavit, nor provide any affidavits to the contrary.

STANDARD OF REVIEW

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

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

ANALYSIS

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

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

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

of Attorney, nor Court Appointed Guardianship to bind her mother, nor did she ever indicate that she had any apparent authority to enter in to contracts on behalf of her mother. The Adult Health Care Consent Act (“AHCCA”) does not confer legal authority to Ms. Daniels to enter into contracts on behalf of her mother, nor does the South Carolina Bill of Rights for Residents of Long-Term care Facilities.

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

For agency situations, the legal burden is on the party asserting that an agency exists. Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996). In this case, Defendant must show all necessary elements of an agency relationship are “clearly established” by the facts. Id. A party dealing with an agent has a duty to use due care to ascertain the scope of the agent’s authority to act. Id. An agency may not, however, be established solely by the declarations and conduct of an alleged agent. Muller v. Myrtle Beach Golf & Yacht Club, 303 S.C. 137, 142-143, 399 S.B.2d at 433 (Ct. App. 1990) overruled on other grounds by Mvrtle Beach Hosp., Inc. v. City of Mvrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000)). South Carolina law requires that to prove apparent authority the Defendants must show: 1) that the purported principal consciously or impliedly represented to another to be his agent, 2) that there was reliance upon the representation, and 3) that there was a change of position to the relying party’s detriment. Cownburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance Company, 306 S.C. 423, 412, S.E.2d 425 (Ct. App. 1991). Defendant has failed to provide any evidence beyond Vermeil Daniells’ signature to suggest she was Ms. Porter’s agent. The fact that Daniels signed documents so that Ms. Porter could be admitted to the facility and receive medical care in no way indicates a manifestation of authority by Ms. Porter to waive her right to a jury trial or agree to arbitration. There has been no evidence that Ms. Porter ever manifested any form of assent establishing Daniels as her agent.

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

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

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

In Coleman, the circuit court refused to compel arbitration because the sister of a nursing home resident who signed the **arbitration** and admission **agreements** lacked authority to bind her sister to the **arbitration agreement**. In affirming the circuit

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

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

Defendants also argue that Plaintiff should be equitably estopped from denying enforcement of the **Arbitration Agreement**. **Equitable estoppel** is a contract defense and the party asserting this defense bears the burden of proving all of its elements.” Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). **Equitable estoppel** requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conduct be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting the estoppel must lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on the conduct of the party to be estopped. Id.

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

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

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

As discussed above briefly, there were two separate agreements signed on the day of the admission, and they were not merged. By their own terms, the Admission Agreement indicated an intent that the common law doctrine of **merger** not apply. The Admission Agreement's “Entire Agreement” provision shows that one contract constituted “the entire agreement and understanding between the parties” concerning admission to the Facility and prohibits merging the two separate agreements. An admission contract with an “Entirety of Agreement” provision is separate “on its face” from an arbitration contract where the provision identifies the two contracts distinctly--i.e. “this [Admission] Agreement or in the **Arbitration Agreement**.” Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added). Even if the “Entire Agreement” clause creates an ambiguity as to **merger**,

the law is clear that any ambiguity must be construed against the drafter, in this case, Defendants. 11 Since there was no **merger** here, Defendants' **equitable estoppel** argument must be denied. See Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455 (rejecting estoppel argument by finding no **merger**).

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

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

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

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

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

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

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

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

Defendants argued Ms. Porter accepted the benefits of the contracts. It is doubtful that the resident received a benefit from the **Arbitration Agreement**. Hodge was skeptical of the notion that admission was a benefit to the resident considering Complaint allegations that the nursing home's acts during the admission caused the resident's death. 422 S.C. at 563, 813 S.E.2d at 303 (“we find it difficult to find [resident] benefitted even from being admitted”).

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

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

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

CONCLUSION

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

IT IS SO ORDERED.

<<signature>>

Honorable L. Casey Manning

February 18, 21 2020

Columbia, South Carolina

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2019 WL 10783906 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina,
Seventh Judicial Circuit.
Spartanburg County

The ESTATE OF Mary SOLESBEE, by her Personal Representative Connie Bayne, Plaintiff,
v.
FUNDAMENTAL CLINICAL & OPERATIONAL SERVICES, LLC; Fundamental Administrative
Services, LLC; and THI of South Carolina At Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-
Inman; Impatient Consultants of North Carolina, P.C.; and Angela Brown, ACNP, Defendant/s.

No. 2018-CP-42-04405.
September 11, 2019.

*1 Hearing Date: August 16th, 2019, at 9:30 a.m.
Court Reporter: Michael R. Watts

Order

Matthew W. Christian, for plaintiff.

Russell G. Hines, for defendant/s.

Grace Gilchrist Knie, Judge.

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

PROCEDURAL BACKGROUND:

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

FACTUAL BACKGROUND:

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

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

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

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

LAW & ANALYSIS:

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

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

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

The legal consequences of an agent's actions can only be attributed to the principle when the agent has actual or apparent authority. [Charleston Registry v. Young Clement](#), 359 S.C. 635, 642, 598 S.E.2d 717 (Ct. App. 2004). Apparent authority is based on “representations made by the principal to the third party and reliance by the third party on those representations.” [Young v. S.C. Department of Disabilities and Special Needs](#), 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). Apparent authority

exists when the principal is bound by the acts of its agent after the principal has placed the agent in such a position that “a person of ordinary prudence, reasonably familiar with business usages and custom is led to believe the agent has certain authority and in turn, deals with the agent based on the assumption.” Muller v. Myrtle Beach Golf and Yacht Club, 303 S.C. 137, 142, 399 S.E.2d 430, 433 (Ct. App. 1990), *rev'd on other grounds*, citing Fernander v. Thigpen, 278 S.C. 140, 293 S.E.2d 424 (1982); Watkins v. Mobil Oil Corp., 291 S.C. 62, 352 S.E.2d 284 (Ct. App. 1986).

South Carolina law requires that to prove apparent authority, the Defendant must show “... (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment.” Cowburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance Company, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists. *Id.*

*3 The present case is very similar to Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 567, 813 S.E.2d 292, 304 (Ct. App. 2018); and Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d, 679 (Ct. App. 2016). In all three of these cases, either the South Carolina Supreme Court or the South Carolina Court of Appeals found **Arbitration Agreements** to be unenforceable where a family member signed an **Arbitration Agreement** near the time of admission to a skilled nursing facility for the Decedent and did not have any actual authority to do such. In all three cases, the Courts found that no implied authority and that no estoppel applied. As the Court noted in Thompson and in Hodge, there was no evidence that the resident being admitted to the nursing home took any action to create an agency relationship for Son. See Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d, 679 (Ct. App. 2016); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 567, 813 S.E.2d 292, 304 (Ct. App. 2018). The present case is nearly identical to Hodge and Thompson.

In Hodge, the Court discussed a Maryland case, Dickerson v. Longoria, 414 Md. 419, 995 A.2d 721, 743 (2010). The Court specifically stated, “‘This limited range of acts performed on the [decedent]'s behalf suggest, at most, [he] may have conferred on [the personal representative] the authority to make health care and financial decisions on his behalf, but no more than that.’” Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 567, 813 S.E.2d 292, 304 (Ct. App. 2018). As further noted by the South Carolina Court of Appeals in Hodge, the Dickerson Court, and The Supreme Court of Nebraska quoted in Hodge, “...a son who had authority to sign health care documents on behalf of his mother did not have authority to sign an **arbitration agreement** on her behalf.” Hodge, 813 S.E.2d at 305, citing Dickerson, 995 A.2d at 738, also citing Koricic v. Beverly Enterprises-Nebraska, Inc., 773 N.W.2d 145, 149-52 (2009). The Hodge court also relied upon the Court of Appeals' decision in Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d, 679, 686 (Ct. App. 2016), *cert. denied*, S.C. Sup. Ct. Order dated Dec. 2, 2016. The Thompson Court determined, “‘The authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial.’” Hodge, 813 S.E.2d at 307, quoting Thompson at 784 S.E.2d at 686.

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

2013) (Observing **equitable estoppel** should be used sparingly to compel arbitration and noting it ‘is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration’); 28 Am. Jur. 2d Estoppel and Waiver §29 (2011) (stating **equitable estoppel** should be used with restraint and only in exceptional circumstance).” Wilson, 426 S.C. at 345.

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

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

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

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

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

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

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

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

direct benefits— may have their tort claims against the parties swept up into the contract's arbitration provisions merely by being mentioned in the contract as potential claimants. This is what Beverly purports to do. Arbitration is a matter of contract, however; it is something the contracting parties, or their proxies, must agree to. It is not something that one party may simply impose upon another. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” Citation and internal quotation marks omitted). Since Beverly's theory would allow just that, i.e., would allow one party merely by referring to someone else in an arbitration clause to thereby bind that other person to arbitration as a “third party beneficiary” of the **arbitration agreement**, we reject it out of hand.” *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 599-600 (K.Y. 2012).

*5 The wrongful death claims are separate claims apart from the Decedent's claims.

According to South Carolina's Wrongful Death Act:

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

The wrongful death beneficiaries are as follows:

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

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

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

If the defendant has a defense that would completely bar the decedent's claim had the decedent survived, then the wrongful death beneficiaries may not bring a claim under the statute. *Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 699 S.E.2d 143 (2010). For instance, in *Stokes*, the statute of limitations had run on the decedent's claim, and the wrongful death beneficiaries were accordingly barred from pursuing their claims under the statute. *Id.* The Supreme Court cited the following from United States District Court case of *Ouattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939 (D.S.C. 1988): “anything that would have defeated the decedent's recovery had he survived the accident, ‘such as contributory negligence, a

valid release, or similar acts on his part,' would defeat the right of recovery on behalf of his family in case of his death." The Court held, "Ouattlebaum was correctly decided and adheres to the principle that a decedent's estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived." [Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.](#), 389 S.C. 343, 349, 699 S.E.2d 143, 146 (2010). Here, however, the claim would not have failed had Decedent survived; therefore, it does not fail for the Decedent's beneficiaries.

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

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

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

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

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

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

ARGUMENTS OF COUNSEL:

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

the Plaintiff's action, or stay these proceedings, and compel this matter to arbitration. In the alternative, Defendant requests the ability to conduct additional discovery regarding the **Arbitration Agreement**.

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

CONCLUSION:

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

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

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

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

IT IS SO ORDERED.

/s/ Grace Gilchrist Knie

Honorable Grace Gilchrist Knie

Resident Judge, Seventh Judicial Circuit

September 9, 2019

Spartanburg, South Carolina

IT IS SO ORDERED.

S/GRACE GILCHRIST KNIE - 2760

2018 WL 7892466 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina.
Lexington County

Jewel Susan HANNA as Personal Representative of the Estate of Jewel Rawls Dawson, Plaintiff,

v.

EMERITUS CORPORATION d/b/a Brookdale Lexington, Emeritus, LLC, Brookdale Senior Living Communities, Inc., Brookdale Senior Living, Inc., Brookdale Senior Housing, LLC, West Columbia BG OPCO, LLC d/b/a Lexington Place, Assisted Living Concepts, LLC, and Gary Tyson, Defendants.

No. 2018-CP-32-01644.

October 19, 2018.

Order denying defendants' Motion to Dismiss and/or Compel Arbitration

Walton J. McLeod, Judge.

*1 This matter comes before the Court on Defendants Emeritus Corporation d/b/a Brookdale Lexington, Emeritus, LLC, Brookdale Senior Living Communities, Inc., Brookdale Senior Living, Inc., Brookdale Senior Housing, LLC, and Gary Tyson's Motion to Dismiss and/or Compel Arbitration ("Motion"). Based on the Court's review of the parties' written submissions and oral arguments during a hearing on October 10, 2018, the Court **DENIES** the Defendants' Motion.

BACKGROUND

At all times relevant to the Plaintiff's Complaint, the Defendants operated an assisted living facility licensed by the South Carolina Department of Health and Environmental Control pursuant to [S.C. Code Reg. 61-84](#), *Standards for Licensing Community Residential Care Facilities*. The State of South Carolina required Defendants to ensure that individuals seeking admission shall be identified as appropriate for the level of care, services, or assistance offered. Defendants' facility ("Brookdale" or "Brookdale Lexington") was required to establish admission criteria that were consistently applied and complied with local, state, and federal laws and regulations. State law dictates that persons not eligible for admission/retention to an assisted living facility include any person who is likely to endanger him/herself or others as determined by a physician or other authorized healthcare provider; any person needing hospitalization or nursing home care; or treatment of stage 2, 3, or 4 decubitus ulcers, or multiple pressure sores. [S.C. Code Reg. 61-84.801](#). Although a prospective resident must be certified as appropriate for admission by his or her physician, each prospective resident must additionally be assessed by the facility to determine whether any additional services are necessary and to determine the prospective resident's suitability for admission. *Id.* Plaintiff does not challenge Ms. Dawson's appropriateness for admission. Jewel Dawson was admitted to the Defendants' nursing facility on or about April 1, 2015. At the time of her admission, Ms. Dawson was eighty-eight (88) years old.

While Ms. Dawson was a resident, she allegedly suffered multiple falls and developed ulcers. Ms. Dawson was ultimately transferred to a skilled nursing facility when her physician determined that the level of care she needed exceeded that which Defendants could provide. Ms. Dawson later died on January 5, 2018. Ms. Dawson's daughter, Jewel Susan Hanna, was appointed Personal Representative of the Estate of Jewel Rawls Dawson on February 1, 2018, and filed this action on her behalf, including causes of action for wrongful death and survivorship.

During the admission of Ms. Dawson, Brookdale Lexington staff and Ms. Dawson's adult daughters, Ms. Hanna and Ansley Roberts, purportedly completed all necessary intake paperwork prior to Ms. Dawson's acceptance to the facility. Defendants'

Exhibit submitted during hearing with leave of Court (hereinafter “Defs. Hearing Ex.”) at 1-2. At all relevant times, neither Ms. Hanna nor Ms. Roberts were Ms. Dawson's guardian, conservator, or attorney in fact. Execution of the Residency Agreement, which contained an arbitration provision, was required for admission to the facility. Plaintiff's Exhibit A of Motion to Dismiss/ Compel **Arbitration** (hereinafter “Residency **Agreement**”). The Residency Agreement set forth services and accommodations, the resident's responsibilities and representations, rates, the term of the agreement, and included an arbitration clause and specifically provided for the provision of goods and services in interstate commerce. Section V. of the Residency Agreement set forth an arbitration provision (hereinafter “Arbitration Provision” or “**arbitration agreement**”), which in pertinent part stated:

V. AGREEMENT TO ARBITRATE

A. ARBITRATION PROCEEDINGS

***2** 1. Any and all claims or controversies arising out of, or in any way related to, this Agreement or any of your stays at the Community, excluding any action for involuntary transfer or discharge or eviction, and including disputes regarding interpretation, scope, enforceability, unconscionability, waiver, preemption, and/or violability of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties, irrespective of the basis for the duty or the legal theories upon which the claim is asserted, shall be submitted to binding arbitration, as provided below, and shall not be filed in a court of law. The parties to this Agreement further understand that a judge and/or jury will not decide their case.

2. The parties hereby expressly agree that this Arbitration Provision, the Residency Agreement and the Resident's stay at the Community substantially involve interstate commerce, and stipulate that the Federal Arbitration Act (“FAA”) shall exclusively apply to the interpretation and enforcement of this Agreement

4. The arbitration proceedings shall take place in the county in which the Community is located, unless agreed to otherwise by mutual consent of the parties.

7. Discovery in the arbitration proceeding shall be governed by the South Carolina Rules of Civil Procedure. However discovery may be modified by agreement of the parties

9. The arbitrator shall apply the South Carolina Rules of Evidence and South Carolina Rules of Civil Procedure in the arbitration proceeding except where otherwise stated in this Agreement. Also, the arbitrator shall apply, and the arbitration decision shall be consistent with, South Carolina law

14. This Arbitration provision binds third parties not signatories to this Arbitration Provision, including any spouse, children, heir, representatives, agents, executors, administrators, successors, family members, or other persons claiming through the Resident, or persons claiming through the Resident's estate, whether such third parties make a claim in a representative capacity or a personal capacity.

...

B. BENEFITS OF ARBITRATION

You and/or your legal representative understand that other long term care companies' Agreements may not contain an arbitration provision.... The undersigned acknowledges that he or she has been encouraged to discuss this Agreement with an attorney. The parties to this Agreement further understand that a judge and/or a jury will not decide their case.

The Residency Agreement concluded with the following:

We believe it is important to disclose all services and fees to the best of our ability and in accordance with the law. We recommend that you consult with legal counsel to ensure understanding of this [Residency] Agreement before signing.

During the Defendants' assessment process, Defendants apparently relied upon information provided by Ms. Hanna, who purportedly represented her authority as legally responsible for all healthcare decisions. Ms. Dawson's Resident Information/Emergency Contact Sheet dated March 28, 2016, expressly listed Ms. Hanna as the party legally responsible for Ms. Dawson's healthcare decisions. Defs. Hearing Ex. at 1-2. The Residency Agreement was presented and required to be executed in return for admission to the facility. The Residency Agreement was signed by Ms. Hanna, dated March 30, 2016, so that Ms. Dawson could be admitted to Brookdale Lexington.

On April 1, 2016, Senior Health Associates physician, Dr. Floyd Ashton Cribbs, evaluated Ms. Dawson. Dr. Cribbs diagnosed Ms. Dawson with unspecified dementia without behavioral disturbance likely from Parkinson's, noting it to be progressive. Defs. Hearing Ex. at 10-12. Approximately one (one) year later, on or about April 5 and 12, 2017, Ms. Dawson was evaluated by David Miller, GNP. Defs. Hearing Ex. at 3-9. Mr. Miller noted altered mental status, unspecified and vascular dementia with behavioral disturbance. Defs. Hearing Ex. at 4-5. Approximately six (6) weeks later, on or about May 30, 2017, Ms. Dawson executed a durable power of attorney designating her adult daughters, Ms. Roberts and Ms. Hanna as agent and alternate agent, respectively. Plaintiff's Exhibit A. of Memorandum in Opposition at 1-14.

ANALYSIS

*3 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 Cove Homeowner's Ass'n v. Trident Constr. Co., Inc.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003). However, an **arbitration agreement** is not enforceable when a party to the contract lacks the capacity to contract. “[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.” *Aiken v. World Fin. Corp.*, 373 S.C. 144, 149, 644 S.E.2d 702, 708 (2007) (internal citation omitted). Arbitration will be denied if a court determines no **agreement** to **arbitrate** existed. S.C. Code Ann. § 15-48-20(a).

1. The Arbitration Provision is not enforceable because Jewel Susan Hanna lacked the capacity to contract on behalf of her mother.

Whether Ms. Hanna possessed the requisite authority to enter into **arbitration agreement** was raised by both parties, leading this Court to analyze whether Ms. Hanna possessed the authority to bind Ms. Dawson to the Residency **Agreement** containing the **Arbitration** Provision. In South Carolina, 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*, 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996). Actual authority is expressly conferred upon the agent by the principal. *Roberson v. S. Fin. Of South Carolina, Inc.*, 365 S.C. 6, 9, 615 S.E.2d 112, 115 (2005). “The doctrine of apparent authority focuses on the principal's manifestation to a third party that the agent has certain authority.” *R & G Const., Inc. v. Lowcountry Regional Transp. Authority*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000) (internal citation omitted). Further the Court of Appeals of South Carolina provided the following:

[a]pparent authority occurs when the principal by written or spoken words or any other conduct, when reasonably interpreted, causes a third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him. Apparent authority must be established based upon manifestations by the principal, **not the agent**. The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent, but on that between the principal and the third party. Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or he should realize his conduct is likely to create such belief. To establish apparent agency, a party must prove the purported principal has represented another to be his agent by

either affirmative conduct or conscious and voluntary inaction. The crux of apparent agency is that the principal holds out to a third party the agent is acting on his or her behalf.

Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 577, 813 S.E.2d 292, 310 (Ct. App. 2018), rearing denied, May 2, 2018, cert. denied, August 21, 2018 (internal citations and quotations omitted) (emphasis added).

In the present case, the Residency **Agreement** containing the **Arbitration** Provision was signed only by Ms. Hanna. It was not signed by Ms. Dawson. According to the Resident Information/Emergency Contact Sheet dated March 28, 2016, Ms. Dawson was previously diagnosed with “Parkinson’s”, and according to a Clinical Summary on file and dated April 1, 2016, Dr. Cribbs diagnosed Ms. Dawson with unspecified dementia. Defs. Hearing Ex. at 2, 3-9. This may explain why Ms. Dawson did not sign the Residency Agreement herself. However, a review of the documents signed by Ms. Hanna would have informed the Defendants that Ms. Hanna did not have authority by way of a power of attorney or a court-appointed guardianship or conservatorship to bind Ms. Dawson to arbitration. Further, Defendants’ intake sheet notes to “obtain [a] copy” of the documentation evidencing a guardianship or a power of attorney. Defs. Hearing Ex. at 1. No such document is in the record, further showing no manifestation by Ms. Dawson of any authority delegated to either Ms. Roberts or Ms. Hanna. As such, there is no evidence that Ms. Dawson manifested to Defendants that Ms. Hanna had the authority to enter into the Residency **Agreement** or the **arbitration agreement** contained therein. Therefore, this Court concludes that Ms. Hanna did not have the actual or apparent authority to enter into the Residency **Agreement** or the **arbitration agreement** contained therein.

*4 Next, the Court determined whether the Adult Health Care Consent Act (“AHCCA”) provided Ms. Hanna the authority enter into the Residency Agreement. This Court finds the Supreme Court of South Carolina’s decision in *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 353-54, 755 S.E.2 450, 454 (2014) is similar and applicable to 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 AHCCA did give the resident’s sister “authority to make ‘healthcare decision’ 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.* The Court reasoned that the AHCCA only extends authority to surrogates to make traditional health care decisions and financial decisions that arise out of those decisions.

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

Id. at 353, 755 S.E.2 at 454.

The Court of Appeals of South Carolina further addressed this in *Thompson v. Pruitt Corp.*, 416 S.C. 43, 52-53, 784 S.E.2d 679, 685-85 (Ct. App. 2016) holding that an **arbitration agreement** was separate from the admission agreement. In *Thompson*, the Court of Appeals found that while the resident’s son was authorized to execute an admission agreement under the AHCCA, the AHCCA did not convey any authority for the son to sign an **arbitration agreement** on behalf of his father. The Court specifically addressed the fact that the terms of the admission agreement indicate that it either incorporated, or merged with, the **arbitration agreement**, but declined to merge the two. *Id.* at 52, 784 S.E.2d at 684.

The AHCCA confers legal authority to Ms. Hanna to enter into a contract concerning health care on behalf of her mother. S.C. Code Ann. § 44-66-30(A) (providing that “where a patient is unable to consent, decisions concerning health care may be made by the following persons in order of priority ... (5) an adult child of the patient”). The statute 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 legal contracts waiving a person's right to a jury trial. Although the AHCCA granted Ms. Hanna the authority to execute the Residency Agreement, the AHCCA did not grant Ms. Hanna to enter into the **arbitration agreement** found within the Residency Agreement. Absent legal authority or at least some measure of apparent authority, the Arbitration Provision is void and unenforceable.

2. The FAA does not mandate the enforcement of the **Arbitration Agreement**.

Under the Federal **Arbitration Agreement** ("FAA"), **arbitration** is required where there is a valid **arbitration agreement** and a dispute exists which is within the scope of the agreement. Under the arbitration clause, neither prong is satisfied. As discussed in the paragraphs above, there is no valid **arbitration agreement** because Ms. Hanna did not have the legal authority to execute a valid **arbitration agreement**. Accordingly, the FAA does not apply.

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

So Ordered

<<signature>>

s/Walton J. McLeod, 2765

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2018 WL 11033620 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina,
Sixteenth Judicial Circuit.
York County

Teresa MURPHY, as Personal Representative for the Estate of Isaac Strong, Plaintiff,

v.

HUNT VALLEY HOLDINGS, LLC f/k/a Fundamental Long Term Care Holdings, LLC; Fundamental Clinical and Operational Services, LLC; Fundamental Consulting, LLC; Fundamental Administrative Services, LLC; THI of Baltimore, Inc.; THI of South Carolina, LLC; THI of South Carolina at Rock Hill, LLC d/ b/a Magnolia Manor of Rock Hill; and Amisub of S.C., Inc. d/b/a Piedmont Medical Center, Defendants.

No. 2018-CP-46-01459.

December 17, 2018.

Order

William A. McKinnon, Circuit Judge.

*1 This matter came before the Court on Defendant THI of South Carolina, LLC d/b/a Magnolia Manor Rock Hill's ("THI") Motion to Dismiss and Compel Arbitration or, Alternatively, to Compel Arbitration and Stay Proceedings. A hearing was held on August 30, 2018. After considering the parties' written submissions and oral arguments and for the reasons stated below, THI's motion is **DENIED**.¹

FACTS

Plaintiff's Complaint alleges Isaac Strong was admitted to Magnolia Manor of Rock Hill ("Facility") on December 22, 2014, following a multi-week hospitalization in Piedmont Medical Center related to a stroke that caused persistent weakness along his right side. (Compl. ¶¶ 25, 28). Four days before Mr. Strong was transferred to the Facility, his daughter Teresa Murphy was presented with two contracts. The first was an "Admission Agreement" that governed the type of care Mr. Strong would receive at the Facility and Mr. Strong's financial obligation to pay for those services. On the Admission Agreement's final page, labeled as "Page 12 of 12," there was an "Entire Agreement" provision indicating these 12 pages constituted "the entire agreement and understanding between the parties" concerning Mr. Strong's admission to the Facility. Ms. Murphy signed the Admission Agreement on the "Signature of Representative" line. Ms. Murphy was not Mr. Strong's conservator, guardian, or attorney-in-fact.

On the same day, Ms. Murphy signed a contract called "**Arbitration Agreement**." 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 Mr. Strong, provides for alternative dispute resolution for any claim a party may bring against another arising out of Mr. Strong's admission in the Facility. Ms. Murphy signed the **Arbitration Agreement** on the line labeled "Resident/Representative Signature." THI informed the Court that Mr. Strong agreeing to arbitrate was not a prerequisite to his admission at the Facility.

When Mr. Strong arrived in the Facility on December 22, 2014, he had a pressure ulcer and was at an elevated risk of developing new ulcers. (Compl. ¶ 28). Orders were entered requiring that Mr. Strong be turned or repositioned ever two hours. (Compl. ¶ 26). However, over the next couple weeks, Mr. Strong's pressure ulcer worsened, becoming infected and then septic. (Compl.

¶¶ 31-33). Mr. Strong's condition grew increasingly severe over the following months requiring hospitalizations and procedures before his passing away on September 5, 2015. (Compl. ¶¶ 34-46). On May 14, 2018, Ms. Murphy initiated this action as the personal representative for Mr. Strong's estate. The Complaint alleges wrongful death and survival claims arising from Defendants' failure to properly treat Mr. Strong's skin condition while at PMC and the Facility. On July 17, 2018, THI filed a Motion to Compel Arbitration and Petition to Stay State Court Proceedings. Relying on the **Arbitration Agreement** that Mr. Strong did not sign, THI argues Plaintiff must arbitrate rather than litigate her claims.

***2 LEGAL REASONING**

I. There is no valid **agreement to **arbitrate** claims stated in Plaintiff's Complaint.**

Plaintiff's Complaint alleges causes of action for negligence (wrongful death and survivor actions). The survival claim relates to duties established and breached during Isaac Strong's life and damages sustained during his life. This claim belongs to Mr. Strong. Plaintiff Teresa Murphy (Mr. Strong's personal representative) presents this claim on Mr. Strong's behalf. See S.C. Code Ann. § 15-5-90 (stating that claims “survive both to and against the personal or real representative...of a deceased person”). Accordingly, THI must show a valid and enforceable **arbitration agreement** between Mr. Strong and THI to prevail on its motion. Defendants' motion, memorandum, and attached documents do not meet this burden.

Basic contract law holds that a contract binds only those parties who show an “objective manifestation of... assent at the time the contract was made.” Laser Supply & Services, Inc. v. Orchard Park Assoc., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009). Mr. Strong did not sign the **Arbitration Agreement** or personally give any other objective manifestations of assent to this contract. THI contends Mr. Strong is bound to the agreement through the signature of Teresa Murphy, whom THI asserts was acting as Mr. Strong's agent. Defs.' Mem. at 6-9. For agency situations, the legal burden is on the party asserting that an agency exists. Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996). In this case, THI must show that all necessary elements of an agency relationship are “clearly established” by the facts. Id. A party dealing with an agent has a duty to use due care to ascertain the scope of the agent's authority to act. Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996).

A. The Admission **Agreement and **Arbitration Agreement** are Separate Contracts that do not Merge.**

As discussed below, THI argues the **Arbitration Agreement** signed by Teresa Murphy is valid because, even though she had no actual authority to sign it on Mr. Strong's behalf, she was Mr. Strong's apparent agent or, in the alternative, Mr. Strong's estate is estopped from contesting her alleged authority. These arguments have a common premise. Defendants stake both arguments to the notion that the **Arbitration Agreement** and Admission Agreement merge into a single contract that must be construed as a unit. For example, THI argues Mr. Strong created an agency relationship to support arbitration because he “accepted” admission. (Defs.' Mem. at 8). THI then argues Plaintiff is estopped from denying authority to bind Mr. Strong to arbitration because she does not deny authority to admit him to the Facility. (Defs.' Mem. at 12). Accepting **merger** is a prerequisite to accepting Defendants' arguments. However, recent case law governing nursing home arbitration contracts reject THI's argument. 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).

*3 South Carolina law states that contracts signed at the same time by the same parties and for the same purpose will be construed together “in the absence of anything indicating a contrary intention.” Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (quoting Klutts Resort Realty, Inc. v. Down'round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)). Coleman refused to apply the **merger** doctrine because language in the contracts “recognize[d] the ‘separateness’ of the admission and **arbitration agreements**.” 407 S.C. at 355, 755 S.E.2d at 455. Thompson and Hodge applied Coleman and provided further examples of

factors demonstrating “separateness” and preventing **merger**. 416 S.C. at 52, 784 S.E.2d at 684; 422 S.C. at 563, 813 S.E.2d at 302.

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**.” Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added). 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 “indicat[e] the parties' intent for it to stand by itself as an independent contract.” Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302. Separateness is further demonstrated when the nursing home makes clear that agreeing to arbitrate is not required to gain admission to the home. Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

Many of these same factors are present here. The “Admission Agreement” presented to Ms. Murphy contains an “Entire Agreement” provision stating that “this Agreement represents the entire agreement” related to Mr. Strong's 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 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. Moreover, THI's counsel argued at the hearing that agreeing to arbitrate was not required for Mr. Strong to be admitted to Defendants' facility. To the extent there are any ambiguities in this contract language, they must be resolved against **merger**. 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). THI 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, THI cannot meet its burden to prove **merger**. The Admission **Agreement** and **Arbitration Agreement** are distinct and should not be construed as a unit.

B. Teresa Murphy was not Mr. Strong's Actual or Apparent Agent.

Agency is a “fiduciary relationship that results from the manifestation of consent by one person to another to be subject to the control of the other and to act on his behalf.” Peoples Fed. Savs. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 145, 425 S.E.2d 764, 773 (Ct. App. 1992) (citing Restatement (Second) of Agency § 1 (1958)). An agency relationship may be established with clear evidence of actual or apparent authority conferred by the purported principal on the purported agent. Cowburn v. Leventis, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). Actual authority is “expressly conferred upon the agent by the principal.” Richardson v. PV, Inc., 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009). 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. Dep't of Disabilities & Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). To prove apparent authority, a party must show (1) purported principal consciously or impliedly represented another to be his agent; (2) reliance on the representation by a third party; and (3) change in position by third party in reliance on the representation. Cowburn, 366 S.C. at 39-40, 619 S.E.2d at 448.

*4 South Carolina law provides that an agency relationship cannot be established solely by the words and actions of the purported agent, Id. For apparent authority to exist, “[e]ither the principal must intend to cause the third person to believe the agent is authorized to act for him, or he should realize his conduct is likely to create such belief.” R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000), THI has not identified any conduct by Mr. Strong showing he intended to cause THI to believe Teresa Murphy was authorized to act for him. In fact, THI argued at the hearing Mr. Strong suffered from serious health issues that may have affected his ability to understand events occurring during his admission.

THI then argues Mr. Strong represented Teresa Murphy had authority to waive his jury trial right simply by his continued residency in the Facility. Defs.' Mem. at 8. The Court rejects this argument for several reasons. First, Defendants conclude Mr. Strong's presence alone can constitute an affirmative representation. Defs.' Mem. at 7-8 (citing Carraway v. Beverly Enters. Ala., Inc., 978 So.2d 27, 30-31 (Ala. 2007)). Carraway is not binding precedent in this Court and its expansive view of apparent agency was rejected in Hodge, where the court rejected the notion that a nursing home resident represents his/her family member has authority to enter an **arbitration agreement** on the resident's behalf simply by failing to object to the family member's signature. 422 S.C. at 573-74, 813 S.E.2d at 308 (noting home argued resident "represented" her husband had authority by "allowing him to procure her admission" but still finding "no evidence ... that [the resident], as the principal, represented husband was her agent"). THI makes a similar argument to the one Hodge rejected. Defs.' Mem. at 8 (suggesting Mr. Strong created apparent agency relationship "by allowing Ms. Murphy to procure Mr. Strong's admission to the Facility").

Second, even accepting THI's recently rejected premise, any representation Mr. Strong's presence conveyed could only cover admission and not arbitration. As THI argued during the hearing, Mr. Strong's admission was in no way contingent on agreeing to arbitrate disputes. Third, THI's argument conflates the Admission **Agreement** and **Arbitration Agreement** in another important way. THI argues Mr. Strong "accept[ed] the benefits of the contracts." Defs. Mem. at 8. However, the only "benefit" THI cites is admission itself, a benefit THI has admitted to be separate from arbitration. THI never attempts to explain what supposed "benefit" of the independent **Arbitration Agreement** Mr. Strong derived during his time as a resident in Defendants' facility. Any such attempt 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." 416 S.C. at 60, 784 S.E.2d at 688. Since Mr. Strong made no affirmative representations that Ms. Murphy had authority to sign the **Arbitration Agreement** on his behalf, the Court rejects THI's actual and apparent agency arguments.

C. Plaintiff is not Estopped from Challenging the **Arbitration Agreement's** Validity.

THI argues Plaintiff is equitably estopped from opposing enforcement of the **Arbitration Agreement**. **Equitable estoppel** is a contract defense for which the asserting party "bears the burden of establishing all the elements." Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). **Equitable estoppel** requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conducted be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on conduct of the party to be estopped. *Id.*

*5 THI briefly mentions some of these elements but make no effort to apply them. Defs. Mem. at 10 (citing Boyd v. BellSouth Tele. Tele. Co., Inc., 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006)). Instead, THI suggests an alternative **equitable estoppel** standard and rely on federal cases. Defs.' Mem. at 17-18. THI contend their contract-based argument is subject to federal law rather than the law of South Carolina, the state where the alleged contract was signed and its alleged parties resided. The Court rejects this argument as at odds with U.S. Supreme Court precedent. An arbitration contract concerning interstate commerce are governed by the FAA but its provisions apply state law to enforceability questions such as the application of **equitable estoppel**. 9 U.S.C. § 2 (requiring enforcement of arbitration contract "save upon such grounds as exist at law or in equity for the revocation of any contract"). The FAA does not "alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." Arthur Anderson LLP v. Carlisle, 556 U.S. 624, 630 (2009). Arthur Andersen specifically applied this principle to **equitable estoppel** arguments. *Id.* at 632 (noting question on remand was "whether the relevant state contract law recognizes **equitable.estoppel**"). At least eight federal circuits² along with multiple district³ and state courts⁴ have cited Arthur Andersen with multiple courts modifying or overruling precedent to comply with the Supreme Court's ruling.

Moreover, the Court finds THI could not prevail even if its **equitable estoppel** argument was governed by federal law. THI relies primarily on International Paper Co. v. Schwabedissen Maschinen & Anlae GmbH, 206 F.3d 411, 417-18 (4th Cir. 2000) which held that a party may be estopped from denying arbitration when he has received a “direct benefit” from a contract containing an arbitration clause. THI then argues Mr. Strong's admission to the Facility was the required “direct benefit.” In doing so, THI tie their estoppel argument inextricably to their flawed **merger** argument. See Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (noting nursing home's “**equitable estoppel**” argument is premised on [the home's] contention that, under state law, the admission **agreements** and the **[arbitration agreements]** merged”). Admission can be the “direct benefit” that forces Plaintiff to arbitrate only if admission and arbitration are governed by the same contract. For the reasons outlined above, the two contracts are separate, they do not merge, and Mr. Strong's admission does not support **equitable estoppel**.

*6 Again, precedent is decisive on this point. Citing International Paper, the Court of Appeals recently held in Thompson that any benefit of admission “is of no moment” for the application of **equitable estoppel** to a separate arbitration contract. 416 S.C. at 59-60, 784 S.E.2d at 688; see also Coleman, 407 S.C. at 354-55, 755 S.E.2d at 455. Hodge cited and reaffirmed Thompson's estoppel analysis. 422 S.C. at 558-59, 813 S.E.2d at 300.⁵ Since admission is unavailable as a “direct benefit” to support estoppel, THI would be required to point to some benefit Mr. Strong received from the **Arbitration Agreement** alone. However, Mr. Strong and his estate derived no benefit from the **Arbitration Agreement**. Hodge, 422 S.C. at 563, 813 S.E.2d at 302 (finding family members, resident, and resident's estate “received no benefit from the **Arbitration Agreement**”). Even if they had, “any possible benefit emanating from the **[Arbitration Agreement]** alone is offset by the **[Arbitration Agreement's]** requirement that [Mr. Strong] waive [his] right to access the courts and [his] right to a jury trial.” Thompson, 416 S.C. at 60, 784 S.E.2d at 688.

THI then makes a broader argument that it would be “manifestly inequitable” for Plaintiff to pursue a tort claim based on the Admission Agreement while denying Ms. Murphy's authority to sign the **Arbitration Agreement**. Defs.' Mem. at 18. Defendants misunderstand the legal distinction between health care and dispute resolution decisions. It is not unusual for a family member to have authority to admit a loved one to a nursing home while lacking authority to waive the loved one's jury trial right. That is what the Adult Health Care Consent Act permits. It provides statutory authority for family members to make an incapacitated loved one's “health care” decisions but leaves the conferral of authority to arbitrate for powers of attorney or other legal instruments outlined in the probate code. Coleman, 407 S.C. at 353, 755 S.E.2d at 454 (finding statutory power to make “health care” decisions limited to nursing home admission and related financial decisions). Plus, Plaintiff is not asserting any claim based on the Admission Agreement; she alleges only common-law negligence claims. See Hodge, 422 S.C. at 563, 813 S.E.2d at 302 (“because [resident and estate] are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement” and are not estopped from challenging the **Arbitration Agreement**).

In sum, THI's **equitable estoppel** argument is rejected under South Carolina and federal law as interpreted in Thompson and Hodge.⁶

D. Ms. Murphy did not have Inherent Agency Power to Bind Mr. Strong or his Estate to Arbitration.

*7 THI next ask the Court to find a binding agency relationship even if Ms. Murphy lacked actual or apparent authority to admit Mr. Strong to the Facility. Def s. Mem. at 12-13. THI cites just one South Carolina case in support of this proposition. Smith v. Fitton & Pittman, Inc., 264 S.C. 129, 212 S.E.2d 925 (1975). Smith was later overruled but, even on its own, Smith does not support THI's theory because the only reference to agency in the whole opinion was the court rejecting the inherent agency theory. Id. at 134, 212 S.E.2d at 927 (“appellant has offered no authority, and we have found none, that [individual] would have inherent agency power ...”). There is no basis for inherent agency in South Carolina law for nursing home arbitration contracts.

E. The South Carolina Bill of Rights for Residents of Long-Term Care Facilities did not Authorize Ms. Murphy to Bind Mr. Strong to Arbitration.

Finally, the Court rejects Defendants' argument that a statute designed to protect nursing home residents' dignity and personal integrity actually paves the way for a resident to lose his right to litigate claims for nursing home neglect. (Defs.' Mem. at 13-14). The "Bill of Rights" for nursing home residents is intended to help residents "retain their individuality and personal freedom" and to support residents' "need for self-determination." *S.C. Code Ann. § 44-81-20*. To make these rights meaningful, the statute requires nursing homes to provide a written explanation of each right to the resident or his representative and provides a grievance procedure to address alleged violations. *S.C. Code Ann. §§ 41-81-40, -60*. Defendants cite this statute to suggest that, because Ms. Murphy may have been the "representative" who received a copy of Mr. Strong's explanation of the Bill of Rights, she then gained legal authority to "bind him to arbitration. However, the Bill of Rights makes no mention of arbitration, and the Court finds neither the statute's language nor its legislative purpose support arbitration in this case.

F. THI is not Entitled to Depose Ms. Murphy or to Conduct Other Discovery before the Court Rules on its Motion.

Finally, THI argued at the hearing that it should be allowed to depose Ms. Murphy or conduct additional discovery to support its agency and estoppel arguments before the [Court rules on arbitration](#). [Hodge recently rejected a similar argument](#). *422 S.C. at 575, 813 S.E.2d at 309*. As discussed above, agency depends on the representations of the purported principal (i.e. Mr. Strong) and cannot be formed based on the representations of the purported agent (i.e. Ms. Murphy). Accordingly, Ms. Murphy's deposition "would not add anything to [the agency] determination." *Id. at 578, 813 S.E.2d at 310*. Moreover, while THI argues on reply that it needs additional discovery on Mr. Strong's mental capabilities when the arbitration contract was signed, records documenting Mr. Strong's mental faculties at admission lie within THI's own medical records. The Court finds no need for additional discovery to rule on the issues raised in THI's motion.

CONCLUSION

For all these reasons, THI's motion to dismiss/compel arbitration is **DENIED**. In light of this ruling, the motions to stay filed by Defendants Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, and THI of South Carolina, LLC are **DISMISSED AS MOOT**.

IT IS SO ORDERED

William A. McKinnon

Circuit Court Judge, 16th Judicial Circuit

October ____, 2018

So Ordered

/s/ William A. McKinnon, #2761, Circuit Judge

Footnotes

- 1 Defendants Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, and THI
of South Carolina, LLC also filed motions to stay Plaintiff's claims against them pending resolution of THI's motion to
compel arbitration. In light of the Court's ruling denying to compel arbitration, the motions to stay are dismissed as moot.
- 2 Richmond Health Facilities v. Nichols, 811 F.3d 192, 195 (6th Cir. 2016) (citing Arthur Andersen) (“in determining the
enforceability of an **arbitration agreement**, we apply state law of contract formation”); Crawford Prof 1 Drugs, Inc.
v. CVS Caremark Corp., 748 F.3d 249, 255 (5th Cir. 2014) (holding “state contract law” applied to **equitable estoppel**
issue and noting prior decisions “based on federal common law, rather than state contract law ... have be modified to
conform with Arthur Andersen”); Kramer v. Toyota Motor Corp., 705 F.3d 1122, 1128 (9th Cir. 2013) (citing Arthur
Andersen and applying California law to the **equitable estoppel** analysis); Awuah v. Coverall N. Am., Inc., 703 F.3d
36, 41-42 (1st Cir. 2012) (same for Massachusetts law); The Republic of Iraq v. BNP Paribas USA, 472 Fed. Appx.
11, 13-14 (2d Cir. 2012) (same for New York law); Lenox MacLaren Surgical Corp. v. Medtronic, Inc. 449 Fed. Appx.
704, 708 n. 2 (10th Cir. 2011) (finding Arthur Andersen “made it clear that state law governs who maybe bound to an
arbitration clause”); Lawson v. Life of the S. Ins. Co., 648 F.3d 1166, 1172 (11th Cir. 2011) (holding that “to the extent
any of our earlier decisions indicate to the contrary, those indications are overruled or at least undermined to the point of
abrogation by [Arthur Andersen]”); Donaldson Co. v. Burroughs Diesel, Inc., 581 F.3d 726, 732 (8th Cir. 2009) (“The
Supreme Court has ruled that state contract law governs the ability of nonsignatories to enforce arbitration provisions”).
- 3 MacDonald v. Unisys Corp., 951 F. Supp. 2d 729, 736-38 (E.D. Pa. 2013) (“Post-Arthur Andersen, it is incontrovertible
that state law governs the **equitable estoppel** and third-party beneficiary determinations”); Hospira, Inc. v. Therabel
Pharma N.V., Case No. 12-C-8544, 2013 WL 3811488 * 11-14 (N.D. Ill. July 19, 2013) (citing Arthur Andersen and
applying state law to **equitable estoppel** analysis); FR 8 Singapore Pte. Ltd. v. Albacore Maritime Inc., 794 F. Supp.
2d 449, 455 (S.D.N.Y. 2011) (“the question of who was bound by **arbitration agreement** was treated as a question
of state law”).
- 4 See e.g., Carter v. TD Ameritrade Holding Corp., 721 S.E.2d 256, 261-62 (N.C. Ct. App. 2012) (citing Arthur Andersen
and considering ratification argument under state law).
- 5 Hodge was also skeptical of the notion that admission was a benefit to the resident considering Complaint allegations
that the nursing home's acts during the admission caused the resident's death. 422 S.C. at 563, 813 S.E.2d at 303 (“we
find it difficult to find [resident] benefitted even from being admitted”).
- 6 THI assert “agency by estoppel” as a separate basis for compelling arbitration (Def s. Mem. at 10-12) but the arguments
in that section are subsumed by THI's other arguments. THI cites a sentence from R & G Construction holding that a
principal is estopped from denying the existence of an agency relationship. However, that same sentence makes clear
that estoppel only applies if the principal has acted in a way to create an agency relationship. For the reasons stated in
Section 2(B), there is no agency relationship here. THI then cite Boyd v. BellSouth Tele. Tele. Co., Inc., 369 S.C. 410,
422, 633 S.E.2d 136, 142 (2006), but the elements cited there are for **equitable estoppel**. Finally, THI relies heavily
on McCutcheon v. THI of S.C. at Charleston, LLC, an unreported federal district court. No. 2:11-cv-02861, 2011 WL
6318575 (D.S.C. Dec. 15, 2011). Any value McCutcheon may have held is significantly undercut by the facts that the
McCutcheon reviewed merged contracts and that this (at best) persuasive authority preceded the binding rulings in
Coleman, Thompson, and Hodge.

2015 WL 12567394 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina.
Greenville County

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 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).

No. 2014-CP-23-06975.

December 11, 2015.

**Order Denying Defendants' Motion to Compel Arbitration and Motion
for Protective Order and Granting Plaintiff's Motion to Compel Discovery**

Edward W. Miller, Judge.

PROCEDURAL HISTORY

*1 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 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 Plaintiffs 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.

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.

*2 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 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*.

*3 Furthermore, as argued by Plaintiff's counsel, the nursing home 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 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 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

*4 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 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.

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.

*5 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. 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 & 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

*6 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.E.2d 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;
- (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.

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.

*7 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.

IT IS SO ORDERED.

<<signature>>

The Honorable Edward W. Miller

Presiding Judge Thirteenth Judicial Circuit

Greenville, South Carolina

Date: 12/9, 2015

Footnotes

- 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**.

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2017 WL 11543658 (S.C.Com.Pl.) (Trial Order)

Court of Common Pleas of South Carolina,
Ninth Judicial Circuit.
Charleston County

Mary Frances SMITH, as Personal Representative of the Estate of Cecil Smith, Sr., Plaintiff,

v.

SANDPIPER REHAB & NURSING-DELAWARE, LLC, Sandpiper Rehab & Nursing,
LLC, Premier Senior Living, LLC and Premier Senior Living-Delaware, LLC, Defendants.

No. 2017-CP-10-0470.

July 7, 2017.

Order

Honorable J.C. Nicholson, Jr., Judge.

***1** This matter came before the Court on Defendants' Motion to Stay and Compel Arbitration.

This is a nursing home negligence action. The essence of Plaintiff's claim is that Defendants, nursing home owners/operators, failed to provide adequate care to Cecil Smith, Sr., deceased, ("decendent") resulting in his developing a deep sacral pressure ulcer and complications related thereto. Subsequent to the filing of this action, Defendants' filed this motion to stay and to compel arbitration.

Decedent was admitted to Defendants' nursing home ("the nursing home") on July 30, 2015. At that time Plaintiff, decedent's surviving spouse, purportedly signed on decedent's behalf an admission agreement and a separate **agreement to arbitrate** any disputes that may arise from decedent's residency at the nursing home. The agreements made clear that the signing of the **arbitration agreement** was not a pre- condition to decedent's admission to the nursing home. Decedent was discharged from the nursing home to Roper Hospital from August 23, 2015 to August 27, 2015. Decedent was re-admitted to the nursing home on August 27, 2015. At that time, Plaintiff was presented the same admission and **arbitration agreements** that Plaintiff previously signed and was asked to initial and date the agreements. Plaintiff did so.

The record reflects, and Defendants did not dispute, that decedent was mentally competent at the time of both his initial admission to the nursing home on July 27, 2015 and upon decedent's re-admission to the nursing home on August 30, 2015. There is no evidence in the record that Decedent verbalized to anyone that Plaintiff had authority to sign either the admission **agreement** or the **arbitration agreement** on his behalf. There is no evidence in the record that decedent was present when Plaintiff signed the agreements nor that he did anything to indicate his assent to the agreements. Decedent did not execute a General Power of Attorney document in which he gave anyone permission to sign the documents on his behalf. There is no evidence in the record that decedent did anything by his actions to lead Defendants to believe Plaintiff had authority to execute the agreements on his behalf, thus there can be no apparent agency. *Fronenberger v. Smith*, 406 S.C. 37, 47, 784 S.E.2d 625, 630 (Ct. App. 2013).

Decedent did sign a Health Care Power of Attorney ("Health Care POA") document during his hospitalization at Roper Hospital on August 26, 2015, apparently authorizing his wife to make "health care decisions" on his behalf during any period of his incompetence. Because the Court finds that decedent was competent at the times the agreements were initially signed and subsequently initialed by Plaintiff, Plaintiff would have had no authority pursuant to the Health Care POA to sign the agreements on decedent's behalf. Likewise, Plaintiff would have had no authority to act on decedent's behalf pursuant to the Adult Health

Care Consent Act (“Act”), S.C. Code of Laws 44-66-10 et seq., as the authority granted to a patient's “surrogate” under the Act to make decisions concerning the patient's medical care and financial decisions concerning payment for such medical care is triggered only when the patient is incapacitated. See *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014) cert. denied 2014 U.S. Lexis 7615 (U.S. Supreme Ct. 2014). Defendants, in any event, did not dispute that the Health Care POA was ineffective nor the inapplicability of the Act to the facts of this case. Accordingly, the Court concludes, as Plaintiff contends, that Plaintiff did not have authority to sign and bind the decedent to the agreements.

*2 Defendants did argue at the hearing of this matter that the doctrines of third-party beneficiary and equitable estoppel apply here and that those doctrines require that the Court enforce the purported arbitration agreement. Both doctrines were considered and rejected in the nursing home negligence case context in *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016) rehearing denied 2016 Lexis S.C. 85 (Ct. App. 2016). As to the third-party beneficiary doctrine, it has no application here, as the *Thompson* court noted, because “there can be no third-party beneficiary unless a valid contract exists.” *Id.* Because the Court finds no valid contract exists here, Defendants' third-party beneficiary argument must fail. As to the equitable estoppel argument, that doctrine also does not apply because there is no evidence in the record to indicate that decedent intended to mislead Defendants nor is there any evidence that Defendants relied on any representation made by decedent that resulted in Defendants changing their position to their detriment. See *id.* (discussing elements of equitable estoppel). Accordingly, the doctrines of third-party beneficiary and equitable estoppel are of no avail to Defendants.

For the reasons set forth above, Defendants' motion is denied.

AND IT IS SO ORDERED.

<<signature>>

The Honorable J.C. Nicholson, Jr.

Circuit Court Judge

July 5, 2017

Charleston, South Carolina

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2018 WL 9991009 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina.
Greenville County

Marlene WILSON, et al.,
v.
NHC HEALTHCARE/MAULDIN, LLC, et al.

Nos. 2018-CP-23-00119, 2018-CP-23-00120.
June 21, 2018.

Order

Michael Nettles, Judge.

*1 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 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 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

*2 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 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*.

*3 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.

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.

*4 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.

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

that, i.e., would allow one party merely by referring to someone else in an arbitration clause to thereby bind that other person to arbitration as a “third party beneficiary” of the **arbitration agreement**, we reject it out of hand.

*5 *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 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).

*6 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 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.

*7 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: _____

So Ordered

s/ Michael Nettles

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ELECTRONICALLY FILED - 2022 May 19 8:43 AM - COLLETON - COMMON PLEAS - CASE#2021CP1500657

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF COLLETON	)	CASE NO. 2021-CP-15-00657
JENNIFER RAHN,	)	
as Personal Representative	)	
of the Estate of Robert Ramsey,	)	
	)	
Plaintiff,	)	THE FACILITY'S¹
	)	MOTION TO ALTER, AMEND, AND/OR
vs.	)	RECONSIDER ORDER DENYING
	)	MOTION TO COMPEL ARBITRATION
PRIORITY HOME CARE, LLC, and	)	
ST. GEORGE HEALTH CARE, LLC,	)	
d/b/a St. George Healthcare Center,	)	
	)	
Defendants.	)	

TO: THE HONORABLE BENTLEY D. PRICE, Presiding Judge, and LEE D. COPE, ESQUIRE, and JOHN E. PARKER, JR., ESQUIRE, of PARKER LAW GROUP, LLP, and L. SCOTT HARVIN, ESQUIRE, of HARVIN LAW FIRM, Attorneys for Plaintiff

NOW COMES the Facility, by and through its undersigned counsel, pursuant to Rule 59(e), SCRCP, and, on the grounds set forth below, hereby moves this Honorable Court to alter, amend, and/or reconsider its Order filed June 29, 2022, denying the Facility's motion to compel arbitration (the "Subject Order").

¹ The "Facility" refers to Defendant St. George Health Care, LLC, d/b/a St. George Healthcare Center.

1. **The Facility asks the Court to (re)consider and expressly rule on each and every distinct issue/argument it raised in support of the Underlying Motion,² i.e., each and every distinct issue/argument set forth in the Underlying Motion itself, in the Memo in Support of the Underlying Motion,³ and/or via oral argument, all of which is/are hereby incorporated herein by reference.**

See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (“[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.”) (emphasis in original).

² The “Underlying Motion” refers to the motion that was decided via the Subject Order, i.e., the Facility’s motion to compel arbitration, which motion was filed March 7, 2022, and heard May 19, 2022, at the Colleton County Courthouse.

³ The “Memo in Support of the Underlying Motion” refers to the Facility’s supporting memorandum filed May 18, 2022.

2. **The merger/equitable estoppel analysis in the Subject Order is erroneous, to include, without limitation, the Court's citation to irrelevant authority that pertains to the wrong test for equitable estoppel. The Court should have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Mr. Ramsey⁴ effectively embraced and directly benefitted from the Admission Agreement, he and, in turn, Plaintiff (his estate) is estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.**
 - (a) **The Subject Order reflects the Court's misapprehension of the Facility's merger/equitable estoppel argument, as evidenced by the following incorrect and/or inapplicable statements therein:**
 - (i) **"The basis of [the Facility's] Motion is that a valid and enforceable arbitration agreement exists between the parties."⁵**
 - (ii) **"Since Ms. Rahn lacked legal authority, the Arbitration Agreement is void an unenforceable."⁶**
 - (iii) **"[T]he Court must determine (1) if the Arbitration Agreement merged with and was a part of the Admission Agreement such that Plaintiff in her capacity as personal representative would be equitably estopped from denying the Arbitration Agreement's validity, and (2) if Ms. Rahn had actual or apparent authority to enter the Arbitration Agreement on behalf of [Mr. Ramsey]."⁷**

The Facility's merger/equitable estoppel argument is a standalone argument. It does not depend on any showing of authority (actual or apparent or otherwise) on the part of Ms. Rahn or otherwise on the existence of any valid and enforceable agreement between the parties. *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) ("South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including . . . estoppel."); *see also Coleman v. Mariner Health Care, Inc.*,

⁴ "Mr. Ramsey" refers to Plaintiff's decedent, Robert Ramsey. "Ms. Rahn" is Mr. Ramey's daughter, Jennifer Rahn. "Plaintiff" refers to Plaintiff, Jennifer Rahn, as Personal Representative of the Estate of Robert Ramsey.

⁵ (Subject Order p. 2.)

⁶ (Subject Order p. 5.)

⁷ (Subject Order p. 3.)

407 S.C. 346, 354–55, 755 S.E.2d 450, 455 (2014) (acknowledging the possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel); *id.* (explaining that “Appellants’ equitable estoppel argument,” which “[wa]s premised on [Appellants’] contention that, under state law, the admission agreements and the [arbitration agreements] merged,” as follows: “Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] . . . , she is nevertheless *equitably estopped to deny the [arbitration agreement’s] enforceability.*”) (emphasis added).

Conceptually, the Facility’s merger/equitable estoppel argument is *not* an argument for the *enforceability* of the Admission Agreement/Arbitration Agreement *but rather* an argument for *Mr. Ramsey and, in turn, Plaintiff (his estate) to be estopped to deny the enforceability* of the Admission Agreement/Arbitration Agreement. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and Mr. Ramsey having effectively embraced and directly benefitted from the Admission Agreement, his estate is now estopped to deny the enforceability not only of the Admission Agreement but also the Arbitration Agreement merged therewith. And by its very nature, i.e., because the Facility’s argument in favor of direct benefits estoppel is based on the direct benefits Mr. Ramsey received under the Admission Agreement (with which the Arbitration merged), this argument applies with equal force to estop Plaintiff, i.e., Mr. Ramsey’s estate, from denying the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.

Accordingly, as to the Facility’s merger/equitable estoppel argument, any analysis by the Court regarding the Admission Agreement/Arbitration Agreement’s supposed lack of enforceability—e.g., that Ms. Rahn lacked authority to sign the Admission Agreement/Arbitration

Agreement on behalf of Mr. Ramsey under the law of agency⁸ and/or under the South Carolina Adult Health Care Consent Act (the “AHCCA”), S.C. Code Ann. §§ 44-66-10 to -80,⁹ and/or because Ms. Rahn lacked power of attorney or guardianship over Mr. Ramsey¹⁰—is beside the point and unavailing to refute the Facility’s merger/equitable estoppel argument, which, again, turns not on the question of whether the Arbitration Agreement is enforceable but whether Mr. Ramsey and, in turn, Plaintiff (his estate) is estopped to deny its enforceability.

(b) The Court’s merger analysis is erroneous.

In *Coleman*, even though our Supreme Court found against merger on the *particular facts* then before it, the Court nonetheless confirmed the validity of the general proposition of *law* on which the *Coleman* appellants based their merger/equitable estoppel argument:

Appellants contend that even if Sister lacked capacity to execute the AA under the Act, she is nevertheless equitably estopped to deny the AA’s enforceability. The circuit court held there was no estoppel here, and we agree.

Appellants’ equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the AAs merged. In South Carolina,

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 courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.

Klutts Resort Realty, Inc. v. Down’Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).

⁸ (See Subject Order pp. 8–9 (regarding principles of agency).)
⁹ (See Subject Order pp. 2–6, 8–9 (regarding the AHCCA).)
¹⁰ (See Subject Order pp. 2, 5–8 (regarding power of attorney and guardianship).)

Here, the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.

407 S.C. at 354–355, 755 S.E.2d at 455 (emphasis added).

Here, the Court has erred in rejecting the Facility’s merger argument, failing to recognize material differences between the facts and arguments involved in the instant case and those that controlled (or were simply not addressed in) *Coleman* and its progeny, *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

The Subject Order wrongfully concludes that the Admission Agreement and the Arbitration Agreement are separate contacts that do not merge. (Subject Order pp. 4, 8–9.) The merger question examines whether, “where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,”¹¹ as indeed the Admission Agreement and the Arbitration Agreement were here,¹² there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the contracting parties intended the instruments to be construed together as effectively one contract. This is a question of the parties’ intention. *Id.* at 355, 755 S.E.2d at 455 (“in the absence of anything indicating a contrary *intention* . . .”) (emphasis added). And “in attempting to ascertain th[e] [parties’] intention,” our courts “endeavor to

¹¹ *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

¹² To be clear, *Coleman* unequivocally answers the question of whether the instant Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. As the *Coleman* Court expressly observed regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), “the documents were [indeed] executed at *the same time, by the same parties, for the same purposes, and in the course of the same transaction.*” 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

determine the situation of the parties, as well as their purposes, at the time the contract was entered into.” *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

For the merger presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties’ intention was contrary to merger. *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). No such inference can be drawn here. Indeed, it does not even make sense that the parties would have intended the Admission Agreement and the Arbitration Agreement not to merge.

Unlike the arbitration agreements at issue in *Coleman*, *Hodge*, and *Thompson*, all of which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), the instant Arbitration Agreement has no such disclaimer/revocation provision. (*See* Arbitration Agreement.) Moreover, while the instant Admission Agreement does contain an “Entire Agreement” clause, it does not reference the Arbitration Agreement as a separate contract. (Admission Agreement p. 12.) Indeed, directly contradicting the idea of “separatedness” (in the parlance of the *Coleman* Court¹³), the “Entire Agreement” clause in the instant Admission Agreement expressly states that “other Admissions materials” are part of the Admission Agreement, thereby expressly contemplating the

¹³ 407 S.C. at 356, 755 S.E.2d at 455 (explaining how, in *Coleman*—unlike the instant case—the “Entire Agreement” clause expressly referred to a separate arbitration agreement and, thus, “recognize[d] the ‘separatedness’ of the [arbitration agreement] and the admission agreement, not a merger of the two contracts.”) (emphasis added).

lack of its own supposed “separatedness.” (Admission Agreement p. 12.) Without question, the Arbitration Agreement is among these other Admissions materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) (“The same day as Decedent’s admission to White Oak, Stott, acting as Decedent’s authorized representative, signed White Oak’s *admission documentation—including the Arbitration Agreement.*”) (emphasis added) (internal footnote omitted); *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 (“Her husband . . . executed various documents *related to her admission*, including an *Arbitration Agreement* and an *Admission Agreement.*”) (emphasis added)). The Court’s conclusory finding that there is ambiguity in this regard¹⁴ is unsupported and erroneous.

To be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required to gain admission to the Facility. But all this means is that it did not have to be agreed to for Mr. Ramsey to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was in fact agreed to. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

Moreover, while it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: The Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the

¹⁴ (Subject Order p. 4 (“While the Admission Agreement purports to incorporate admissions materials into itself ‘by reference herein’, when viewed alongside the other details of the agreements, it creates at best an ambiguity as to merger when taken in context of the totality of the circumstances . . .”).)

Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement’s) sole reason for being. (See Arbitration Agreement (providing for arbitration of “any controversy or dispute between the parties arising out of or relating to Facility’s Admission Agreement, or breach thereof, or relating in any way to Resident’s stay at Facility, or to the provisions of care or services to Resident”); *id.* (“This [Arbitration] Agreement shall remain in effect for all care rendered at Facility”).)

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Mr. Ramsey’s relationship with the Facility: the Admission Agreement setting forth the terms of his admission, the Arbitration Agreement providing for arbitration of disputes arising out of his admission. (*Compare* Admission Agreement (setting forth the terms of Mr. Ramsey’s admission to the Facility) *with* Arbitration Agreement (providing for arbitration of disputes arising out of Mr. Ramsey’s admission to the Facility).)

Also absent here is the type of discrepancy the *Hodge* Court pointed out with respect to the respective provisions of the admission and arbitration agreements before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare* Admission Agreement p. 10 (providing “This Agreement will be governed by and construed in accordance with applicable Federal regulations

and those laws of the State in which Facility is located.”) *with* Arbitration Agreement (providing that, “because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action;” but also providing that arbitration shall be “as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules”).) Essentially, both instruments provide that South Carolina law applies except where displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, and contrary to the view expressed in the Subject Order,¹⁵ the survival of the Arbitration Agreement is no evidence of “separatedness.” The only reason for the Arbitration Agreement is the Admission Agreement, i.e., the Arbitration Agreement covers disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) (“Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.”).

The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an

¹⁵ (Subject Order p. 4 (“Further, the Arbitration Agreement by its very language distinguishes between itself and the Admission Agreement, stating that the Arbitration Agreement will survive any ‘breach of this Agreement or the Admission Agreement.’”).)

intent contrary to merger. Respectfully, to point to such things, as the Subject Order does,¹⁶ is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger.

And—besides the fact, explained elsewhere, that there is no ambiguity in regard to the merger of the Admission Agreement and the Arbitration Agreement—to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that *merger is the default position*, i.e., it is presumed, and that this presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our courts will consider and construe the documents together *unless* there is evidence of a contrary intention. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence “indicating [(i.e., affirmatively showing)] a contrary intention.” 407 S.C. at 355, 755 S.E.2d at 455. To allow the merger presumption to be upset based on evidence that is merely ambiguous—i.e., that does not even go so far as to clearly indicate a contrary intention, but at most might (or might not) reflect a contrary intention—is to allow the exception to devour the rule.

¹⁶ (Subject Order p. 4.)

Respectfully, the Court's finding against merger relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties' intent. It must be remembered that the presumption of merger arises only where all the four elements of time, parties, purpose, and transaction coincide—as they do here. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. If even one of these is lacking there is no merger. This is why, for the merger presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties' intention was contrary to merger. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130 (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). The merger presumption is “earned,” so to speak, by the fact that for it even to arise in the first place there must be, as there is here, a concurrence of particular circumstances (same time, parties, purpose, and transaction). It is the very rarity of this concurrence that both safeguards against the overzealous application of the merger doctrine and justifies ascribing to it (the concurrence) the presumptive intent of merger.

The Court should have found that the Arbitration Agreement merged with the Admission Agreement. The instruments were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, the whole of which related to Mr. Ramsey's admission to the Facility and would not have been done at all but for his admission to the Facility. Any finding against merger improperly relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties' intent.

(c) The Court’s equitable estoppel analysis is erroneous.

(i) Direct benefits estoppel applies.

The view of equitable estoppel reflected in the Subject Order misapprehends our Supreme Court’s decision in *Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 (observing that South Carolina has recognized a number of theories that could bind nonsignatories to arbitration agreements, including estoppel). The *Wilson* Court favorably discussed the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals’ earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which the Facility contends Mr. Ramsey and, in turn, Plaintiff (his estate) is estopped from refusing to comply with the Arbitration Agreement here, where Mr. Ramsey received direct benefits (in the form of his admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement was merged. *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner’s alternative argument based on the application of the state’s “traditional” six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., “[t]he traditional test referenced by [the] [p]etitioners,” “has been analyzed most-often in *non*-arbitration cases”) (emphasis added). In other words, *Wilson* supports the use of the direct benefits test to answer the question of equitable estoppel in an arbitration case like this, without any resort to another test for equitable estoppel, such as that addressed in the *Kelly* and *Binkley* cases cited in the Subject Order. (Subject Opinion p. 5 (“Further, Plaintiff cannot be equitably estopped from denying enforcement of the Arbitration Agreement. ‘Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements.’ *Kelly v. Logan*,

Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). [The Facility] has not and cannot meet its burden to establish these elements, primarily because [the Facility] cannot demonstrate that Mr. Ramsey’s estate made any false representations as far as the subject power of attorney is concerned”); *id.* at 6 (“A person cannot claim to have been misled and cannot rely on equitable estoppel if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 70–71, 558 S.E.2d 902, 908–09 (Ct. App. 2001).”).¹⁷

Moreover, the Subject Order incorrectly interprets *Wilson* as follows:

[A]s the Supreme Court explained in *Wilson*, to successfully assert direct benefits estoppel, the arbitration agreement must be a clause within the larger admissions agreement, and the plaintiff must be seeking to assert causes of action that arise from and are created by the contract. Here, as explained above and below, the Admission Agreement and optional Arbitration Agreement are separate documents that did not merge. Second, Plaintiff does not assert breach of contract, or a violation of contractual duties, and instead has brought her lawsuit under a negligence theory arising from common law duties.

(Subject Order pp. 7–8.)

What *Wilson* actually explains is that the key to determining when direct benefits estoppel may be applied is not whether the claims at issue rely on contract terms to impose liability but whether benefits to the nonsignatory are direct or indirect. *Wilson*, 426 S.C. at 340–41, 827 S.E.2d at 175 (“Under direct benefits estoppel, [a] nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration

¹⁷ To be clear, neither *Kelly* nor *Binkley* was an arbitration case, and both cases relied on the traditional six-factor test for estoppel, not the direct benefits test. *Kelly*, 383 S.C. at 638, 682 S.E.2d at 7; *Binkley*, 348 S.C. at 70, 558 S.E.2d at 09; *id.* at n. 15.

clause. In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. Stated another way, [u]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement") (internal citations and quotation marks omitted); *id.* at 343, 827 S.E.2d at 176 ("It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.") (internal citations omitted). Direct benefits estoppel simply recognizes, and remedies, the patent inequity that would result if a party were able to enjoy direct benefits under an agreement containing an arbitration clause (which is the case here because the Admission Agreement and the Arbitration Agreement merge) while at the same time denying that the arbitration clause is enforceable.

Here, Mr. Ramsey was a direct beneficiary. To deny his receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of his residency: every night's stay, every meal, every amenity/service provided, every instance of care/treatment, essentially every moment at the Facility—even his complaint does not go nearly so far as that. (*See Compl.*)

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Mr. Ramsey received the benefit of his admission to the Facility, including, without limitation, the

room, board, care, and treatment he received therein. Respectfully, the Court should have found that the Arbitration Agreement merged with the Admission Agreement and that Mr. Ramsey and, in turn, Plaintiff (his estate) is estopped to deny the Admission Agreement/Arbitration Agreement's enforceability, Mr. Ramsey having effectively embraced the contract with the Facility for the purpose of his admission and receipt of the benefits thereof.

- (ii) **The Subject Order violates the FAA's "equal footing" rule by charging the Facility with a heightened duty to determine the existence Ms. Rahn's authority that does not exist under South Carolina's general contract law and, at the same time, disregards applicable state law in respect of the legal significance of Ms. Rahn's act of signing the Arbitration Agreement and her duty of good faith and fair dealing.**

The Subject Order states, "Ms. Rahn in her individual capacity had no legal authority to sign the Arbitration Agreement, and [the Facility] knew or should have known this fact, as she did not present [it] with documentation demonstrating power of attorney or guardianship." (Subject Order p. 5; *see also id.* at 5 ("[The Facility] had the ability to determine whether [Ms. Rahn] had authority to sign an arbitration agreement on Mr. Ramsey's behalf. It should be clear to health care entities such as [the Facility] that a daughter without a recorded general durable power of attorney at best only has authority to make healthcare decisions and does not have authority to waive other rights when a potential resident lacks capacity."); *id.* at 6 ("[The Facility] is a sophisticated business entity frequently interacting with residents and their families during the rehabilitation center admission process. [The Facility] is or should be familiar with the legal concepts of guardianship and powers-of-attorney.")) This violates the FAA's "equal footing" rule by charging the Facility with a heightened duty to determine the existence Ms. Rahn's authority that does not exist under South Carolina's general contract law. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (Under the FAA, "courts *must* place arbitration agreements

on *equal footing with other contracts . . .*”); *Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (While a court may invalidate an arbitration agreement based on “generally applicable contract defenses,” it may not do so based on legal rules that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”) (citing *Concepcion*, 563 U.S. at 339); *Allied–Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) (“States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause ‘upon such grounds as exist at law or in equity for the revocation of any contract.’ What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal ‘footing,’ directly contrary to the Act’s language and Congress’ intent.”) (emphasis added) (internal citations omitted)).

At the same time, the Subject Order disregards applicable state law in respect of the legal significance of Ms. Rahn’s act of signing the Arbitration Agreement and her duty of good faith and fair dealing. The Arbitration Agreement itself reflects (by virtue of her signature upon it) Ms. Rahn’s express representation to the Facility that she had all due authority to sign it for Mr. Ramsey. (Arbitration Agreement (“By . . . her signature below, the executing party [(i.e., Ms. Rahn)] represents that . . . she has the authority to sign on [Mr. Ramsey’s] behalf so as to bind [Mr. Ramsey] as well as [herself].”).) There is no question raised as to Ms. Rahn’s competency. She is thus “presumed to have read, understood, and assented to [the] terms” of the Arbitration Agreement,¹⁸ including, of course, the terms whereby she represented herself to the Facility as

¹⁸ *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) (“[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms.”).

having authority to act on Mr. Ramsey's behalf. Moreover, the covenant of good faith and fair dealing implied in every contract¹⁹ is no less binding on Ms. Rahn than the Facility.

¹⁹ *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995) (South Carolina law implies a covenant of good faith and fair dealing in every contract).

3. The Court erroneously asserts that, at most, the Arbitration Agreement would be enforceable as to the survival claim and would not be enforceable as to the wrongful death claim.²⁰

The Arbitration Agreement applies with equal force to the wrongful death claim. A wrongful death claim does not belong to the wrongful death beneficiaries. It belongs to the decedent's personal representative, and a specific rule prohibiting enforcement of otherwise valid agreements to arbitrate wrongful death claims would violate the FAA's requirement that arbitration agreements be placed on equal footing with other contracts,²¹ as indeed our Supreme Court has already recognized in *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 389, 759 S.E.2d 727, 737 n.3 (2014) (“[C]ourts *may not* refuse to compel arbitration simply because a wrongful death claim is involved.”) (emphasis added).

“The right of action for wrongful death is purely statutory and did not exist at common law” *Glenn v. E. I. DuPont Nemours & Co.*, 254 S.C. 128, 133, 174 S.E.2d 155, 157 (1970). Per the plain language of the wrongful death statute, a wrongful death claim must be a claim that, had the decedent lived, they could have maintained themselves. S.C. Code Ann. § 15-51-10 (“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.”) (emphasis added); *see also Maxey v. Sauls*, 242 S.C. 247, 250, 130 S.E.2d 570, 572 (1963) (“[T]he right to maintain the [wrongful death] action is based upon the condition that ‘the act, neglect or default’ must be ‘such as would, if death had not ensued, have

²⁰ (Subject Order pp. 9–11.)

²¹ *See Concepcion*, 563 U.S. at 339.

entitled the person injured to maintain an action and recover damage in respect thereof.’ In other words, ‘*if the deceased never had a cause of action, none accrues under the wrongful death statute.*’”) (discussing prior statutory language that is identical to that in present § 15-51-10) (quoting *Scott v. Greenville Pharmacy*, 212 S.C. 485, 489, 48 S.E. 324, 326 (1948) (emphasis added). Accordingly, a claim of wrongful death is derivative in nature, in that it derives from (and does not arise without) a cause of action arising in favor of the *decedent*. See *Id.*; see also 26 S.C. Jur. Limitation of Actions § 32 (“A wrongful death action is derivative in nature”); *Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939, 942 (D.S.C. 1988) (“If the decedent never had a cause of action, none accrues under the wrongful death statute. Furthermore, anything that would have defeated the decedent’s recovery had he survived the accident, such as contributory negligence, a valid release, or similar acts on his part, would defeat the right of recovery in behalf of his family in case of his death. It follows logically that the decedent’s failure to file a timely claim . . . is an act, or omission, on his part which should defeat the right of recovery of his personal representative.”) (internal citations and quotation marks omitted); *Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 349, 699 S.E.2d 143, 146 (2010) (“*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.”).

“[T]he substantive right to bring . . . a wrongful death action . . . is determined by the Probate Code.” *Fisher on behalf of estate of Shaw-Baker v. Huckabee*, 422 S.C. 234, 240, 811 S.E.2d 739, 742 (2018); see also *id.* at 242, 811 S.E.2d at 743 (“The Probate Code defines who may act on behalf of the estate of a deceased person. The Probate Code, therefore, is the substantive law by which the identity of the ‘*real party in interest*’ is determined for all civil actions brought on behalf of the estate of a deceased person.”) (emphasis added). “Under the

Probate Code . . . *wrongful death actions must be brought by the personal representative . . .*” *Id.* (emphasis added); *see also* S.C. Code Ann. § 15-51-20 (“Every [wrongful death] action shall be brought by or in the name of the executor or administrator of [the] person [whose death was wrongfully caused].”);²² *Glenn*, 254 S.C. at 134, 174 S.E.2d at 158 (“If an action for wrongful death is instituted by one other than the personal representative of a decedent, duly appointed by the Probate Court, it should be dismissed.”).

Even though it is for their “benefit,” a wrongful death claim does not belong to the wrongful death beneficiaries themselves. It is a claim that is brought on behalf of the estate of the deceased person. The substantive right to bring the claim belongs to decedent’s personal representative, who must bring the claim and is the real party in interest under South Carolina law. Consistent with Judge Anderson’s correct analysis in *Quattlebaum* (which explains that anything that would have defeated the decedent’s recovery had he survived, such as, for instance, a valid release, will apply to the wrongful death claim), it follows logically that a valid arbitration agreement must also apply to the wrongful death claim, and the Subject Order erroneously states otherwise.

²² As explained by the *Fisher* Court, “Under the Probate Code . . . the terms ‘executor’ and ‘administrator’ do not have separate meaning, but are included within the defined term ‘personal representative.’” 422 S.C. at 240, 811 S.E.2d at 742 (citing S.C. Code Ann. § 62-1-201(33) (defining “Personal representative” to “include[] executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.”)). “Therefore, wrongful death actions must be brought by the personal representative, despite the language ‘shall be brought by . . . the executor or administrator’ that still appears in section 15-51-20.” *Id.*

4. **The Subject Order incorrectly states—in conclusory fashion, without actually citing any legal or factual support—that “the only relevant and necessary evidence for the Court to make its determination is already available for the Court’s review. Any further discovery with the goal of revisiting the arbitrability of this case would only serve to protract this litigation, waste judicial resources, and increase costs for both parties unnecessarily.”²³**

A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg’l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). “Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal's behalf and subject to the principal’s control.” *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)). “An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties.” *Peoples Fed. Sav. & Loan Ass’n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145–46, 425 S.E.2d 764, 773 (Ct. App. 1992).

These principles relating to the law of agency may potentially provide an additional, independent basis on which to grant the Underlying Motion. Their application is fact dependent; therefore, it cannot be said “that the only relevant and necessary evidence for the Court to make its determination [thereon] is already available for the Court’s review” such that “further discovery with the goal of revisiting the arbitrability of this case would only serve to protract this litigation, waste judicial resources, and increase costs for both parties unnecessarily.” Indeed, as the Subject Order itself recognizes, there is “some evidence that power of attorney documents had been

²³ (Subject Order p. 11.)

executed by Mr. Ramsey naming Ms. Rahn as his attorney in fact.” (Subject Order p. 3 n.1.) The allowance of discovery into Mr. Ramsey and Ms. Rahn’s course of dealing and the potential creation of an agency relationship between them is only reasonable.

WHEREFORE, for the foregoing reasons—and, again, for that matter, for all of the reasons previously advanced to the Court in and in support of the Underlying Motion, in writing and/or via oral argument, all of which the Facility incorporates by reference herein and asks the Court to (re)consider and expressly rule upon in full—the Facility asks that the Court alter, amend, and/or reconsider the Subject Order in favor of an order granting the Underlying Motion.

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

Respectfully submitted,
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St. George Healthcare Center

Charleston, South Carolina

July 11, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	CIVIL ACTION NO.: 2021-CP-15-00657
	)	
Jennifer Rahn, as Personal	)	
Representative of the Estate of	)	
Robert Ramsey,	)	
	)	
Plaintiff,	)	
	)	
v.	)	MEMORANDUM IN OPPOSITION TO
	)	MOTION TO RECONSIDER
Priority Home Care, LLC and St.	)	
George Health Care, LLC, d/b/a St.	)	
George Healthcare Center,	)	
	)	
Defendants.	)	

Defendant St. George Health Care, LLC, d/b/a St. George Healthcare Center has moved the Court to reconsider its June 29, 2022 Order denying St. George's Motion to Compel Arbitration. St. George asserts that the Court has misapprehended its arguments and failed to distinguish between its estoppel argument and the argument as to whether the arbitration agreement at issue was valid and enforceable. This is not what the Court's Order accomplishes, and the Order clearly explains how at the time of admission Ms. Rahn did not have any authority to enter the arbitration agreement. More importantly, the Order clearly explains how Ms. Rahn in her capacity as personal representative of the decedent's estate is not estopped from denying the arbitration agreement's validity, regardless of its validity or whether Ms. Rahn had authority. Further, the Court's Order clearly explains its rationale as to Defendant's direct benefits theory of estoppel, and Defendant's request for further discovery on the issues of actual or apparent

authority. These findings represent separate, independent grounds for denying St. George's motion, any one of which constitutes sufficient reason for not dismissing this action in favor of arbitration.

St. George has not made any new arguments or introduced any new evidence as to why the arbitration agreement and admission agreement in this case merged, how the decedent represented to Defendant that his daughter had authority to waive his right to a jury trial, how the decedent has received a direct benefit from the optional arbitration agreement, or how further discovery would change the Court's decision. SCRCP Rule 59(e) is only a proper avenue for Defendant to ask the Court to consider an issue that has been raised, but not ruled on by the Court. SCRCP Rule 59(e) preserves issues for appellate review when rulings are omitted, overlooked, or not included in a Court's decision. SCRCP Rule 59(e) is not an avenue to ask this Court to "reconsider" its prior rulings for identical arguments, or for asserting new issues that Defendant could have raised prior to the ruling but did not. *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990); *see also Bailey v. Segars*, 346 S.C. 359, 365, 550 S.E.2d 910,913 (Ct. App. 2001).

In this instance, Defendant's present Motion to Reconsider has repeated identical arguments on the issues of merger. These identical arguments were raised in its prior Memorandum of Support and in oral argument at the hearing that occurred on May 19, 2022. Defendant's Memorandum in Support of this Motion to Reconsider has not raised a single issue that was not already raised, nor ruled on by the Court. This Court has thoroughly considered, analyzed, and ruled on all the

issues that were originally presented and that are being repeated once again. Accordingly, Defendant's Motion to Reconsider pursuant to SCRCP Rule 59(e) should be denied.

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ATTORNEYS FOR THE PLAINTIFF

July 19, 2022
Hampton, South Carolina

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

Appeal from Colleton County

Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2021-CP-15-00657

Jennifer Rahn,

as Personal Representative of the Estate of Robert Ramsey,

Respondent,

v.

Priority Home Care, LLC, and

St. George Health Care, LLC, d/b/a St. George Healthcare Center,

Defendants,

Of which St. George Health Care, LLC, d/b/a St. George
Healthcare Center is

Appellant.

NOTICE OF APPEAL

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*Attorneys for Defendant
Priority Home Care, LLC*

Defendant/Appellant St. George Health Care, LLC, d/b/a St. George Healthcare Center (“St. George”), hereby appeals the following orders of the Honorable Bentley D. Price, Circuit Court Judge:

- **Order [Denying St. George’s Motion to Compel Arbitration]**, filed June 29, 2022, and
- **Order Denying Defendant’s Motion to Reconsider**, filed August 3, 2022.

Copies of the appealed orders are attached hereto and incorporated herein by reference. St. George received written notice of entry of the most recent order on August 3, 2022.

Respectfully submitted,
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September 2, 2022

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

Appeal from Colleton County
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2021-CP-15-00657

Jennifer Rahn,
as Personal Representative of the Estate of Robert Ramsey,
Respondent,

v.

Priority Home Care, LLC, and
St. George Health Care, LLC, d/b/a St. George Healthcare Center,
Defendants,

Of which St. George Health Care, LLC, d/b/a St. George
Healthcare Center is

Appellant.

PROOF OF SERVICE

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Attorneys for Appellant

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellant, hereby certify that Appellant's **NOTICE OF APPEAL** was served on Respondent and on Defendant Priority Home Care, LLC, on September 2, 2022, by emailing (see attached) a copy of the same to their following counsel of record:

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Attorneys for Defendant

Priority Home Care, LLC

I also certify that a copy of Appellant's **NOTICE OF APPEAL** was today, September 2, 2022, E-Filed with the lower court (which also, i.e., in addition to service by email, effected service of the notice today on the above-identified counsel of record via the E-Filing System).

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Russell G. Hines
Russell G. Hines (SC Bar No. 72100)
Attorneys for Appellant

Charleston, South Carolina

September 2, 2022

Hines, Russell

From: Hines, Russell
Sent: Friday, September 2, 2022 2:37 PM
To: Lee Cope; 'Jay Parker'; 'sharvin@lowcountry.com'; mdc@barnwell-whaley.com; 'Summers Clarke'
Cc: Davis, Jay; 'Brown, Steve'; Gandy, III, James D. (Tripp); Phillips, Ashton; Dotterer III, Gaillard T. (Gilly); Wakeham, Rebecca (Becky); Peterson, Susan; Justman, Aimee; Bell, Pollyana (Polly)
Subject: Rahn v. Priority Home Care (St. George Health Care) -- Case No. 2021-CP-15-00657 -- Notice of Appeal
Attachments: Rahn v. Priority (St. George) -- Notice of Appeal.pdf; Appealed Order 1 -- 2022 06-29 -- Order Denying MTCA.pdf; Appealed Order 2 -- 2022 08-03 -- Order Denying MTR Order Denying MTCA.pdf

Attached regarding the above-referenced matter, please find St. George Health Care, LLC, d/b/a St. George Healthcare Center's **Notice of Appeal**, which includes the attached copies of the appealed orders.

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CERTIFICATE OF COUNSEL

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

Respectfully submitted,
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September 18, 2023