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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2020-CP-42-03593
Appellate Case No. 2021-000707

Trina Dawkins,
as Personal Representative of the Estate of William Dawkins,

Respondent,

v.

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

Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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Appellants make the following points in reply to Plaintiff's brief.[1]

ARGUMENT IN REPLY

1. The circuit court did not make any "finding on sanctions" against Appellants.

Plaintiff asserts, "Other than the one-page arbitration agreement, all documents upon which the Appellants rely were improperly withheld by the Facility which led to a finding on sanctions at the Circuit Court level." (Br. of Resp. p. 2 n.1.) This is just not so.

First off, the charge that Appellants "improperly withheld" documents is bogus. Notice how Plaintiff conflates the pre-suit NOI process with the discovery process in litigation. (Br. of Resp. p. 2 n.1 ("The record shows that the Respondent requested arbitration documents on at least three separate occasions: when making a *pre-suit* records request, when the *Notice of Intent to File Suit* was filed, and when Interrogatories and Requests for Production were served.") (emphasis added).)

[1] Shorthand references already defined in Appellants' principal brief are continued in this reply brief (e.g., the "Facility" primarily refers to Defendant/Appellant THI of South Carolina at Spartanburg, LLC, but to the extent necessary also covers the improperly identified Defendant/Appellant "THI of South Carolina at Magnolia Manor-Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg;" the "Other Defendants" are Defendants/Appellants Fundamental Clinical and Operational Services, LLC, Fundamental Administrative Services, LLC, and THI of South Carolina, LLC, collectively; all together, the Facility and the Other Defendants are collectively referred to as "Defendants" or "Appellants;" "Plaintiff" is Plaintiff/Respondent, Trina Dawkins, as Personal Representative of the Estate of William Dawkins; "Mr. Dawkins" is the decedent, William Dawkins; and "Melissa" is Mr. Dawkins's daughter Melissa Dawkins).

Notice, too, how Plaintiff ignores the fact that the NOI process is a separate, statutorily mandated process whereby the parties attempt to resolve the dispute pre-suit via *mediation*, not *arbitration*;[2] how Plaintiff does not assert that the Facility withheld any *medical records* needed to carry out the NOI process; and how Plaintiff does not assert that the Arbitration Agreement, or, for that matter, the Admission Agreement, was needed to carry out the NOI process. Indeed, logically, it was not until that process did not result in a resolution of the dispute that the question of arbitration as a means of dispute resolution even became relevant.

This lawsuit was filed October 14, 2020. (R. pp. 21-29.) The Facility timely answered, subject to and without waiving its right to compel arbitration, on November 19, 2020,[3] and then moved to compel arbitration on February 12, 2021, attaching the Arbitration Agreement to the motion. (R. pp. 102-105.) On March 15, 2021, the day before the March 16, 2021, motions hearing, the Facility filed a memo in support of

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[2] *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 388, 759 S.E.2d 727, 736 (2014) (explaining that there is no waiver of arbitration rights arising out of the participation in or delay occasioned by the NOI process: "We find that Appellants did not delay in filing their demand for arbitration. Rather, Appellants participated in the statutorily required mediation process, and after Respondent filed her formal complaint, Appellants moved to compel arbitration at their first opportunity. Further, even were we to find that Appellants should have filed the motion to compel arbitration immediately after Respondent filed the NOI, rather than after Respondent filed the complaint, Respondent has shown no prejudice or undue burden to her from the four month delay. Thus, we conclude that Respondent's argument that Appellants' waived their right to enforce the Agreement is without merit.").

[3] (R. pp. 30-36.)

its motion to compel arbitration, attaching the Admission Agreement, which, together with the Arbitration Agreement with which it merged, forms the basis of the Facility's merger/equitable estoppel argument. (R. pp. 119-156.) The Facility's memo in support was not untimely under any rule of procedure or court directive, and in any event, Plaintiff was in no way prejudiced by it, as the circuit court allowed Plaintiff's counsel to file a post-hearing memo in reply. (R. pp. 88:22-90:24.)

And regarding the supposed "finding on sanctions," the circuit court's order says absolutely nothing of the sort. Rather, here is what it does say:

> **Sanctions**
>
> During the March 16th, 2021, hearing Plaintiff's counsel requested leave of the Court to file a responsive Memorandum and to supplement the record, on the basis that the Defendants had withheld critical documents and had produced them upon the eve of the hearing. The Court granted this request. Plaintiff's counsel filed a Reply Memorandum on March 18th, 2021, and requested Sanctions pursuant to SCRCP Rule 11, on the basis that the Defendants had withheld documents, and also on the basis that the Defendants motions were frivolous.
>
> Rule 11 of the SCRCP allows a Court to impose an appropriate sanction upon motion or upon its own initiative, if no good ground exists to support a motion. Rule 11, SCRCP. Such sanctions may include reasonable expenses incurred by the defending party. Rule 11, SCRCP. Plaintiff *contends*, as outlined in the procedural history of this case, that Defendants gave no indication that they were pursuing an arbitration defense, despite repeated requests from the Plaintiff. Plaintiff further *contends* that the Defendants also refused to produce critical arbitration documents when requested and did not produce the documents or provide

that this conduct continued for over a year and did not end until less than 24 hours prior to the hearing. At the time the Defendants filed their motion, their position was that a one page Arbitration Agreement should be enforced pursuant to the FAA. Further that Defendants failed to disclose that they intended to pursue merger and estoppel arguments based on the Admission Agreement or apparent or inherent authority agreements based on the Admission Agreement and healthcare consents. Plaintiff *contends* that Defendants were in possession of the aforementioned documents for approximately four years, but had repeatedly refused to disclose them. Plaintiff further *contends* that Defendants waited until the evening before the hearing to file a lengthy Memorandum of Law that included the supporting documents. Plaintiff *alleges* that the Defendants' conduct has caused Plaintiff to incur additional expenses and that the Defendants have prejudiced Plaintiff by causing considerable delay, refusing to participate in discovery, and concealing the grounds for their motions.

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 careful consideration of the record, memoranda, arguments presented, and the applicable law, the Court finds, and it is Ordered:

That Defendants' Four Motions to Stay and Defendant THI of South Carolina at Spartanburg LLC's Motion to Compel Arbitration filed with the Court on February 12th, 2021, are respectfully denied; is further ordered,

That Plaintiff's Motion for Sanctions made pursuant to Rule 11 of the SCRCP is respectfully denied at this time, however said motion may be renewed by Plaintiff and heard by the trial judge in this action.

(R. pp. 11-12 (emphasis added).)

As shown above, the circuit court made no "finding on sanctions" whatsoever. It simply acknowledged the *contentions/allegations* on which Plaintiff sought sanctions, which, of course, Appellants strongly denied and disputed,[4] before expressly *denying* Plaintiff's request for sanctions, at least at this juncture. While the order allows for the possibility that the matter may be raised again in the future, this certainly constitutes no "finding on sanctions." If anything, the circuit court's decision to deny Plaintiff's request for sanctions at this time at least shows that the court is yet to be persuaded that a "finding on sanctions" is warranted.

2. Coupled with the merger of the Admission Agreement and the Arbitration Agreement, equitable estoppel provides a workable theory for enforcement of an arbitration agreement against a nonsignatory.

South Carolina law recognizes the potential for equitable estoppel to be successfully invoked to enforce an arbitration agreement against a nonsignatory. *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) (observing that South Carolina has recognized a number of theories that could bind nonsignatories to arbitration agreements, including estoppel); *see also id.* at 340–45, 827 S.E.2d at 175–77 (favorably discussing the framework of the direct benefits test—which test this Court, following its earlier decision in *Pearson v. Hilton Head Hospital*, 400

[4] (*See* R. pp. 82:25-84:10; R. pp. 262-263 n.6; R. pp. 276-277, n.9; R. p. 291; R. pp. 329-330; *see also* R. p. 30 (stating that answer is made "*subject to and specifically reserving its right to compel this matter to arbitration*") (emphasis in original).)

S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), had applied in the decision that was before the *Wilson* Court on writ of certiorari, and under which test the Facility contends that Mr. Dawkins, or, more precisely, his estate, i.e., Plaintiff, is estopped to deny the validity of the instant Arbitration Agreement where Mr. Dawkins received direct benefits (in the form of room, board, various amenities/services, and the care/treatment he received at the Facility about which Plaintiff does not complain) from the Admission Agreement with which the Arbitration Agreement merged); *id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner's alternative argument based on the application of the state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., "[t]he traditional test referenced by [the] [p]etitioners," "has been analyzed most-often in *non*-arbitration cases") (emphasis added).

3. The key to determining when direct benefits estoppel may be applied is whether benefits to the nonsignatory are direct or indirect.

"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.'" *Wilson*, 426 S.C. at 340, 827 S.E.2d at 175 (quoting *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))). "'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.'" *Id.* "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 . . . .'" *Id.* at 340–41, 827 S.E.2d at 175 (quoting *Belzberg v. Verus Invs. Holdings Inc.*, 21 N.Y.3d 626, 977 N.Y.S.2d 685, 999 N.E.2d 1130, 1134 (2013)).

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.

4. Mr. Dawkins's receipt of direct benefits under the Admission Agreement (with which the Arbitration Agreement merged) cannot reasonably be denied.

Undoubtedly, Mr. Dawkins received direct benefits (in the form of room, board, various amenities/services, and the care/treatment he received at the Facility about which Plaintiff does not complain) from the Admission Agreement with which the Arbitration Agreement merged. 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 Plaintiff's complaint does not go nearly so far as that. (*See generally* R. pp. 23-29.) And any resort to the sort of skepticism expressed in *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018) (finding it difficult to conclude a nursing home resident benefited from a nursing home admission marked (*allegedly*) negligent care that (*allegedly*) caused her death), is misplaced. To rely on this sort of reasoning is to improperly prejudge Plaintiff's allegations as true—and indeed to expand/exaggerate those allegations so as to wholly discredit every single aspect of the residency where not even Plaintiff herself does so.

5. It does not make sense that the parties would have intended the Admission Agreement and the Arbitration Agreement to be separate contracts.

(a) The fact that the Arbitration Agreement was not a condition of or prerequisite to Mr. Dawkins's admission to the Facility lends no support whatsoever to the idea that the Admission Agreement and the Arbitration Agreement do not merge.

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,"[5] as indeed the Admission Agreement and the Arbitration Agreement were here, there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the instruments were intended to be considered and 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.

While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: the Admission Agreement is

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[5] *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014).

indeed necessary to the Arbitration Agreement. So 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.

As explained in the Facility's principal brief, it matters not whether the Arbitration Agreement was a condition of admission, only that it was 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. Dawkins's relationship with the Facility.

(b) The formatting and structure of the Admission Agreement and the Arbitration Agreement provide no evidence of intention contrary to merger.

The mere fact that the Admission Agreement and the Arbitration Agreement are separate instruments evidences no intention contrary to merger. As explained in the Facility's principal brief, for the issue of merger to even arise to begin with, there have to be separate instruments. Indeed, otherwise there is nothing to *merge*.

Moreover, the formatting/structure of the Admission Agreement and the Arbitration Agreement is indeed *pro*-merger. As explained in the Facility's principal brief, while the Admission Agreement does contain an "Entire Agreement" clause, it does not reference the Arbitration Agreement as a separate contract, and indeed, it expressly contradicts the idea of its "separatedness" (in the parlance of the *Coleman* Court) by expressly stating that "other Admissions materials"—the Arbitration Agreement among them—are made a part of it by reference. (*See* Br. of App. p. 15 (citing *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)).) And, again, as explained elsewhere, it does not make sense that the parties would have intended the Admission Agreement and the Arbitration Agreement to be separate contracts given that the Arbitration Agreement only makes

sense together with the Admission Agreement, which is its (the Arbitration Agreement's) sole reason for being.

6. The fact that Mr. Dawkins did not himself sign the Arbitration Agreement is beside the point.

It is, of course, true that Mr. Dawkins did not himself sign the Arbitration Agreement, but the Facility has never argued otherwise. Without question, the Facility seeks to enforce the Arbitration Agreement against a *nonsignatory*, and again, South Carolina law recognizes several theories under which this may be done. *Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 ("South Carolina has recognized several theories that could bind *nonsignatories* to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel.") (emphasis added).

To be sure, Mr. Dawkins is a nonsignatory to the Arbitration Agreement. The Facility makes no argument to the contrary. Rather, the Facility's argument is that, even as a nonsignatory, Mr. Dawkins, and in turn Plaintiff (his estate), is bound by the Arbitration Agreement. Thus, where Plaintiff does no more than point out that Mr. Dawkins is a nonsignatory to the Arbitration Agreement, she misses the Facility's point.

7. The survival of the Arbitration Agreement is no evidence of "separatedness" (in the parlance of the *Coleman* Court[6]).

To be clear, the survival of the Arbitration Agreement beyond any termination of the Admission Agreement is not evidence of separatedness. As explained elsewhere, 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. There is nothing inconsistent about this. 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.").

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[6] 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).

8. The phrase "other Admissions materials" does not give rise to ambiguity.

To be clear, there is no ambiguity about whether the Arbitration Agreement is among the "other Admissions materials" that the "Entire Agreement" clause refers to as being deemed a part of the Admission Agreement: it is. It must be remembered that when all the requirements for the presumption of merger are present—as they are here—*merger is presumed to be what the parties intended* unless there is evidence of a contrary intention. *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455. Indeed, the only logical inference that can be derived from the "Entire Agreement" clause's express inclusion of other "other Admissions materials" is *supportive* of merger. Again, in *Stott*, this Court expressly referred to an arbitration agreement as "admission documentation." 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).

As explained elsewhere, to say that the Arbitration Agreement was not required for admission, which it was not, is not to say that it was not intended to be part of the admissions materials in the event it was agreed to, which it was, by Melissa on Mr. Dawkins's behalf. The hand-in-glove relationship between the Admission Agreement and the Arbitration Agreement is proof of the Arbitration Agreement's *connectedness* to the Admission Agreement. Though not a *condition* of admission, the Arbitration

Agreement certainly 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. Dawkins's relationship with the Facility. (*Compare* R. pp. 157-168 (setting forth the terms of Mr. Dawkins's admission) *with* R. p. 105 (providing for arbitration of disputes arising out of Mr. Dawkins's admission).)

9. Unless the merger doctrine is to be rendered meaningless, "anything indicating a contrary intention" must be at least evidence capable of supporting a reasonable, non-speculative inference that the parties' intention was contrary to merger.

It must be remembered that the presumption of merger arises only where the four elements of time, parties, purpose, and transaction coincide—as the all 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, as explained in the Facility's principal brief, 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."). 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.

10. The Arbitration Agreement is supported by sufficient consideration and otherwise valid on its face.

The Arbitration Agreement is supported by sufficient consideration and otherwise valid on its face, i.e., there is nothing within the four corners of the document itself that calls its validity into question.

The Arbitration Agreement sets forth all necessary terms. It contains the parties' mutual and concurrent promises to submit a certain defined scope of "Disputes" to binding arbitration,[7] before an arbitrator who is either agreed upon by the parties themselves or selected by the Court, in a proceeding to be conducted pursuant to the South Carolina ADR Rules, which will result in a decision that is enforceable in a court of competent jurisdiction. To require more just because the contract in issue is an arbitration agreement would violate the FAA's requirement

[7] Contrary to Plaintiff's contention otherwise (*see* Br. of Resp. pp. 16–17), there is no question about whether the Arbitration Agreement is supported by sufficient consideration: it is. The parties' mutual and concurrent promises to arbitrate constitute sufficient consideration. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997) ("A mutual promise to arbitrate constitutes sufficient

that arbitration agreements be placed on equal footing with all other contracts. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) ("[C]ourts must place arbitration agreements on equal footing with other contracts . . . .").

Moreover, the Arbitration Agreement is signed by Melissa, who expressly represented her authority to sign on Mr. Dawkins's behalf, and it is duly countersigned by the Facility's director of admissions, Ms. Milner. There is no question raised here as to Melissa's competency, and she is thus "presumed to have read, understood, and assented to [the] terms" of the Arbitration Agreement,[8] including, of course, the terms whereby she represented herself to the Facility as having authority to act on Mr. Mr. Dawkins's behalf. Moreover, there is an implied covenant of good faith and fair dealing in every contract,[9] and Melissa is no less bound by this covenant than the Facility. And here again, 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. *See Concepcion*, 563 U.S. at 339.

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consideration for this arbitration agreement.") (citing *Rickborn v. Liberty Life Insurance Co.*, 321 S.C. 291, 468 S.E. 292 (1996)).

[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.").

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

Further still, the Arbitration Agreement is not unconscionable. Unconscionability is a two-part test. 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 that no reasonable person would make them and no fair and honest person would accept them. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007). Neither of these is present here.

The first part of the test (absence of meaningful choice) is undermined by the express acknowledgement in the Arbitration Agreement itself that the "Resident/Representative is not required to use the . . . Facility for Resident's healthcare needs and . . . there are numerous other health care providers in the State where Facility is located that are qualified to provide such care to Resident." As for the second part of the test (unreasonably oppressive terms), the 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." *Id.* at 24, 644 S.E.2d at 668. And there is nothing about the Arbitration Agreement 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.").

Lastly, Plaintiff's contention about there being a violation of federal law relating to Medicare and/or Medicaid reimbursements fails of its essential premise. According to Plaintiff, "Any nursing home facility that accepts Medicare or Medicaid funds for resident care is *expressly forbidden* from accepting any other money, benefit or other consideration as a precondition for admitting a patient to the facility or as a requirement for continued stay in a facility." (Br. of Rep. p. 17 (italics in original) (underline added).) Because, again, the Arbitration Agreement is *not* a precondition for admission, Plaintiff's argument in this regard is simply misplaced from the start.

CONCLUSION

For the foregoing reasons, together with those already set forth in their principal brief, Appellants ask this Honorable Court to reverse the circuit court—as to its rulings on the Motion to Compel Arbitration and the Motions to Stay—and to stay this lawsuit in favor of arbitration between Plaintiff and the Facility (or to remand the case to the circuit court with instructions for it to do so) or, alternatively, to remand the case to the circuit court for it to engage in or allow any such other proceedings (including, without limitation, discovery) as may be necessary to properly determine and/or enforce the Facility's rights under the Arbitration Agreement, as well as to address the Other Defendants' Motions to Stay.

[Signature on next page]

Respectfully submitted,

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APPELLANTS' CERTIFICATION FOR FINAL REPLY BRIEF

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I, Russell G. Hines, do hereby certify that the **Final Reply Brief of Appellants** complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

Respectfully submitted,

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