STATE OF SOUTH CAROLINA COUNTY OF FAIRFIELD THOMAS D. KILPATRICK AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF ANTHONY LEMON, Plaintiff, v. PRUITTHEALTH - RIDGEWAY, LLC F/K/A UNIHEALTH POST-ACUTE CARE - TANGLEWOOD, LLC, UNITED HEALTH SERVICES OF SOUTH CAROLINA, INC., PRUITTHEALTH CONSULTING SERVICES, INC., PRUITTHEALTH THERAPY SERVICES, INC. F/K/A UNITED REHAB, INC., PRUITTHEALTH, INC., NEIL PRUITT, JR., THI OF SOUTH CAROLINA AT COLUMBIA, LLC D/B/A MIDLANDS HEALTH AND REHABILITATION CENTER, THI OF SOUTH CAROLINA, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL CLINICAL CONSULTING, LLC, FUNDAMENTAL LONG TERM CARE HOLDINGS, INC., FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, AND HUNT VALLEY HOLDINGS, LLC, Defendants.	IN THE COURT OF COMMON PLEAS CIVIL ACTION NO.: 2023-CP-20-00268 **ORDER DENYING MOTION TO COMPEL ARBITRATION & MOTIONS TO STAY**

This matter came before the Court on February 29, 2024, on a Motion to Compel Arbitration filed by Defendant THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center ("Midlands") pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA") and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure and related motions to stay this litigation pending the outcome of the arbitration that Midlands seeks to compel by Defendants THI of South Carolin, LLC, Fundamental Clinical and Operational Services, LLC, Fundamental

Administrative Services, LLC, and Hunt Valley Holdings, LLC (collectively, the "Motions to Stay").[1] Present at the hearing and arguing on behalf of the moving parties 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 Midlands' Motion to Compel Arbitration for the reasons set forth herein[2] and, in turn, denies the Motions to Stay.

The Court notes that in oral argument, there was no mentionable dispute as to the facts presented by either Plaintiff or Midlands; even to the extent that Plaintiff presented facts that Midlands had not, Midlands did not present competent evidence to dispute Plaintiff's evidence. The Court adopts the following undisputed facts for its ruling. The Plaintiff in this wrongful death and survival action is Thomas D. Kilpatrick, an attorney appointed by Probate who is an unrelated and uninvolved person in the underlying dispute. Mr. Kilpatrick commenced this action by filing a Notice of Intent on April 3, 2023, followed by a Summons and Complaint on August 31, 2023, alleging wrongful death and survival claims as a result of the care and treatment provided to Mr. Lemon while he was a resident at Midlands' assisted living facility. Specifically, Mr. Lemon developed serious pressure injuries and bedsores between June and July of 2020 after being assessed as a high-risk for pressure injuries by Midlands. Mr. Lemon passed away on July 30, 2021. On January 2, 2024, Midlands filed a Motion to

[1] Midlands' Motion to Compel Arbitration and the Motions to Stay were all filed on January 2, 2024, and heard together on February 29, 2024. The Motions to Stay are based on Section 3 of the FAA. 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."); *see also Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) ("[The] FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties."). Accordingly, the success of the Motions to Stay is tied to the success of Midlands' Motion to Compel Arbitration, and the denial of Midlands' Motion to Compel Arbitration requires the denial of the Motions to Stay.

[2] Plaintiff submitted with his Memorandum in Opposition twelve unpublished opinions of the Court of Appeals. The arguments presented to the Court by Midlands' motion are in large part analogous to those presented in the unpublished opinions. The unpublished opinions denied arbitration based on well-established precedent from other published opinions of the S.C. appellate courts which are referenced herein.

Compel Arbitration, relying on an Arbitration Agreement that was signed individually by the mother of Mr. Lemon, Ms. Minnie Gamble dated January 9, 2012. As noted above, Ms. Gamble held no power of attorney for Mr. Lemon and is not a party to the present action.

The basis of Midlands' Motion is that a valid and enforceable arbitration agreement exists between the parties. The Arbitration Agreement relied upon by Midlands was signed by the decedent's mother, Minnie Gamble, at the time of his admission to Midlands' facility, and it appears that no valid power of attorney was relied on by Midlands. No power of attorney of any sort has been presented in this matter. Evidence presented by Plaintiff indicates that the decedent was suffering from multiple sclerosis which impacted him physically, but the records indicated that he had the mental capacity to sign the facility's Admission Agreement or Arbitration Agreement at the time he was admitted. While the Court recognizes the arguments offered by Midlands for presumptions in favor of arbitration, this Court's analysis begins and ends by answering the threshold inquiry that there is not a legally enforceable arbitration agreement.

At the outset, Ms. Gamble did not have any authority to enter the Admission Agreement and Arbitration Agreements on the decedent's behalf under the South Carolina Adult Health Care Consent Act, S.C. Code Ann. § 44-66-10 *et seq* because it is indicated that Decedent had his cognitive ability. Under the Act, an individual is only authorized to make health care decisions on behalf of an ***incapacitated*** adult. S.C. Code Ann. § 44-66-30. Therefore, based on the evidence before the Court, it appears that Ms. Gamble did not even have authority to make health care decisions on behalf of the decedent at the time of admission, much less the authority to waive his estate's right to a jury trial.

Even if Ms. Gamble had authority under the Act to enter the Admission Agreement 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. Gamble had actual or apparent authority to enter the Arbitration Agreement on behalf of the decedent. The Court finds 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 mother, Ms. Gamble, did not have any authority to execute the Arbitration Agreement at the time it was entered by the parties. When an individual is incapacitated, 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, even if the Act was applied, it only would have given Ms. Gamble authority to consent on behalf of the decedent to the provision of medical care, including placement in Midlands' 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).

Midlands' 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. Gamble 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., Midlands. *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. Thus, the only authority to enter into agreements to arbitrate is reserved for powers of attorney or other legal instruments outlined in the probate code which are not present in this case. As previously stated, the Act is not applicable because it is apparent that Decedent maintained his cognitive ability, but even if it is determined that the Act was applicable, then it is doubtful in this case that there ever was a valid conferral of authority under the Act for executing this Arbitration Agreement. Aside from the Act, Ms. Gamble in her individual capacity had no legal authority to sign the Arbitration Agreement in a representative capacity for the Decedent as she apparently did not possess or present Midlands with documentation demonstrating power of attorney or guardianship. This lack of documentation is clearly indicative that Midlands knew or should have known that Ms. Gamble lacked authority, and there is no evidence in the record that indicates that Midlands made any effort to verify or validate the authority that Midlands is now asserting Ms. Gamble possessed. Since Ms. Gamble 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, Jollev & Smith*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Without any further analysis, Midlands has not carried its burden by presenting this Court with any evidence aside from the Arbitration Agreement and Admission Agreement. Midlands has not submitted any affidavits or competent evidence that carries its burden of proof to factually satisfy this argument asserting equitable estoppel. As a legal matter, Midlands has not and cannot meet its burden to establish these elements, primarily because Midlands cannot prove it lacked 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, Midlands had the ability to determine whether Ms. Gamble had authority to sign an arbitration agreement on Decedent's behalf. In fact, Midlands is a residential care facility that regularly engages in the admission and contract process. First, under the Adult Healthcare Consent Act, Midlands had a duty to undertake and document its efforts to ascertain whether Ms. Gamble or someone else had priority and authority under the Act to make Decedent's health care decisions, and it failed to do so. Second, Decedent had his mental capacity and according to the evidence in the record, he was capable of providing his own acquiescence to these agreements which he did not and Midlands circumvented his own authority by having Ms. Gamble act as a signatory. Midlands is a sophisticated business entity frequently interacting with residents and their families during the rehabilitation center admission process. Midlands is or should be familiar with the legal concepts of guardianship and powers-of-attorney. Midlands had the ability to ask Ms. Gamble whether she was Decedent's attorney-

in-fact, to determine if Decedent had his mental capacity, to determine if some other legal authority existed, and it had the ability to request supporting documentation proving authority. No evidence is in the record that Midlands appropriately complied with these inquiries. Since Midlands has not cited or provided 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.

Midlands' 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 Decedent 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 Midlands 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. Incidentally, 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 non-signatory's claim must be directly, not just indirectly, based on the contract containing the arbitration agreement).

Additionally, Plaintiff did not have any 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). 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). Once again, Midlands has not provided this Court with any competent evidence that is persuasive for establishing common law agency. The simple fact that Ms. Gamble signed the agreements so that her son could be admitted to Midlands' facility and receive health care in no way indicates a manifestation of authority by Decedent to waive his right to a jury trial or agree to arbitration. Neither the Admission Agreement, nor the Arbitration Agreement, offer any probative evidence indicating Decedent's intention. Midlands has not come forward with any evidence that Decedent ever manifested any form of assent establishing Ms. Gamble as his agent and accordingly, Midlands has failed to meet its burden of proof.

Midlands' 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 mother or extended 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).

Based on the tenants of contract law, this Court is not convinced that this agreement is enforceable. The necessary elements of a contract are an offer, acceptance, and valuable consideration. *Sauner v. Pub. Serv. Auth. Of S.C.*, 354 S.C. 397, 406 (2003). Consideration is a promise to do something that a party has no legal obligation to do or to forbear from doing something it has a legal right to do. This Arbitration Agreement has no direct mention of consideration. Midlands has argued that the arbitration agreement is a bilateral contract and consideration is provided through the exchanging of promises to enter into arbitration. The S.C. Supreme Court held long ago:

> A promise may constitute the consideration for another promise. But a promise is not a good consideration for a promise unless there is absolutely ***mutuality of the engagement***, so that each party has the right to hold the other to a positive agreement. ***In case the promise of one of the parties impose no legal duty upon the party making it, such promise furnishes no consideration for a promise***.

Int'l Shoe Co. v. Herndon, 135 S.E. 202, 205 (1926) (emphasis added) (*citing* Elliott on Contracts, vol. 1, § 231). Although Midlands has argued that both parties are forfeiting their right to trial by jury for binding arbitration, the reality is that the obligation and detriment falls almost exclusively on the resident. *Id.* The reality is that no duty is owed by the resident to the nursing home facility other than to pay one's bills which happens to be exclusively related to the admission agreement, not the arbitration agreement; the two agreements do not merge. Midlands is unable to articulate or provide this court with any evidence of consideration for the Arbitration Agreement, and therefore, the arbitration agreement fails as a matter of law.

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 non-signatories 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.

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 Midlands' breach of common law duties arising from its care for Decedent. 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). However, since it is not valid, this Court will not compel arbitration of the wrongful death or survival claims in this action.

Based on the foregoing authorities and findings, the Court denies Midlands' Motion to Compel Arbitration. This Court's denial of Midlands' motion is based entirely on South Carolina law and the failure of Midlands to meet its burden of persuasion for the enforceability of the contract that has been presented to this Court. In recognition of its contractual origins and limitations, Section 2 of the FAA dictates that arbitration agreements "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. (emphasis added). This Court's ruling in no way relies on or contravenes any presumption or the auspices of the FAA, but rather, as the FAA directs on the basis of law and equity, the Court finds that this Arbitration Agreement is not valid or enforceable.

And having thus determined that Midlands' Motion to Compel Arbitration should be denied, the Motions to Stay must be denied, too.

THEREFORE, IT IS ORDERED that the Midlands' Motion to Compel Arbitration and the Motions to Stay are DENIED.

IT IS SO ORDERED.

3/14/24

The Honorable Patrick C. Fant, III
Presiding Court Judge

Fairfield Common Pleas

Case Caption:	Thomas D Kilpatrick , plaintiff, et al VS Pruitthealth Ridgeway L L C , defendant, et al
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So Ordered

Patrick C. Fant, III