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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

J. Derham Cole, Circuit Court Judge

Case No. 2021-CP-42-03701
Appellate Case No. 2023-000432

The Estate of Jo Eva Rice, deceased,
by her Personal Representative Sonya Lovett,

Respondent,

v.

Fundamental Clinical and Operational Services, LLC;
Fundamental Administrative Services, LLC; and
THI of South Carolina at Magnolia Place–Spartanburg, a/k/a
Physical Rehab and Wellness of Spartanburg,

Appellants.

RECORD ON APPEAL

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¹ The "Facility" refers to Defendant/Appellant THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Physical Rehabilitation and Wellness Center of Spartanburg (misidentified in this action as "THI of South Carolina at Magnolia Place–Spartanburg, a/k/a Physical Rehab and Wellness of Spartanburg").

² "FAS" refers to Defendant/Appellant Fundamental Administrative Services, LLC.

³ "FCOS" refers to Defendant/Appellant Fundamental Clinical and Operational Services, LLC.

⁴ "Defendants" or "Appellants" refers to the Facility, FAS, and FCOS, collectively.

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⁵ “Plaintiff” refers to Plaintiff/Respondent, The Estate of Jo Eva Rice, deceased, by her Personal Representative Sonya Lovett.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C.A. No.: 2021-CP-42-03701
	)	
The Estate of Jo Eva Rice, deceased,	)	
by her Personal Representative Sonya	)	
Lovett,	)	
	)	
Plaintiff,	)	
	)	
	)	ORDER
v.	)	
	)	
Fundamental Clinical and Operational	)	
Services, LLC; Fundamental	)	
Administrative Services, LLC; and	)	
THI of South Carolina at Magnolia	)	
Place – Spartanburg, a/k/a Physical	)	
Rehab and Wellness of Spartanburg,	)	
	)	
Defendant(s).	)	
	)	

These matters came before the Court on April 1, 2022, on:

- 1) Defendant THI of South Carolina at Magnolia Place - Spartanburg, LLC, d/b/a Physical Rehabilitation and Wellness Center of Spartanburg's Motion to Compel Arbitration;
- 2) Defendant Fundamental Administrative Services, LLC's Motion to Stay; and
- 3) Fundamental Clinical and Operational Services, LLC's Motion to Stay.

Present for the Defendants was Russell Hines of Clement Rivers, LLP and W. Harold Christian Jr. of Christian & Christian, LLC for the Plaintiffs.

After considering all evidence of record, memoranda, exhibits, and arguments presented by counsel for the parties, the Court hereby denies Defendants Defendant THI of South Carolina at Magnolia Place - Spartanburg, LLC, d/b/a Physical Rehabilitation and

Wellness Center of Spartanburg's Motion to Compel Arbitration, Defendant Fundamental Clinical and Operational Services, LLC's Motion to Stay, and Defendant Fundamental Administrative Services, LLC's Motion to Stay.

PROCEDURAL BACKGROUND

On May 24, 2021, Plaintiff's filed a Notice of Intent to File Suit pursuant to South Carolina Code §15-79-125. The parties engaged in a mediation as required by this section, and the mediation was unsuccessful. Plaintiff then timely filed a Summons and Complaint. Plaintiff has alleged in the Complaint causes of action for nursing home negligence, ordinary negligence, negligent misrepresentation, corporate negligence for the underfunding and understaffing of the nursing home, all contending damages in a Survival Action on behalf of the Estate of Jo Eva Rice, and a Wrongful Death Action for the Wrongful Death Beneficiaries of Jo Eva Rice. Accordingly, Plaintiff filed the Summons and Complaint on October 28, 2021, and subsequently served all Defendants. Defendants subsequently and timely filed their Answers. Thereafter, Defendants filed the Motion to Compel Arbitration and Motions to Stay on February 1, 2022.

FACTUAL BACKGROUND

On January 5, 2018, Jo Eva Rice (hereinafter Ms. Rice) was admitted to THI of South Carolina at Magnolia Place – Spartanburg, LLC, a/k/a Physical Rehab and Wellness of Spartanburg for rehabilitation after being discharged from the hospital following a stroke. At that time Ms. Rice's daughter Sonya Lovett (hereinafter Ms. Lovett) was presented with numerous documents to be signed and executed on behalf of her mother. At the time of signing the documents, Ms. Lovett had not been appointed as conservator, guardian, or power of attorney and consequently had not been provided authority to act on

behalf of her mother. Furthermore, there is no evidence that Ms. Rice was not competent or able to sign any documents on her own behalf. That Further, Ms. Lovett, as Personal Representative alleges that during Ms. Rice's admission to the facility, that the faculty failed to properly assess and care for Ms. Rice's needs. Subsequently, while a resident, Ms. Rice experienced severe seizures, and was transported to the hospital where she died on June 19, 2018. That, thereafter, Sonya Lovett, as Personal Representative of the Estate of Jo Eva Rice filed this lawsuit by which she claims that the facility was negligent in the care and treatment provided, and that the facility Co-defendants were also negligent by underfunding and understaffing the facility.

The Defendants allege that the documents signed by Sonya Lovett, Ms. Rice's daughter, included an Arbitration Agreement, and a Resident Admission Agreement (hereinafter "Admission Agreement"). It is based upon these documents that Defendants pursue the above-referenced motions. Plaintiff contends there is no valid Arbitration Agreement.

STANDARD OF REVIEW/ANALYSIS

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008). It is well established that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place." If no agreement is found to exist, the court must deny any application to arbitrate. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 667 (S.C.

2007) (internal citation omitted). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67,78,749 S.E.2d 139, 144 (Ct. App. 2013).

Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007) (“General contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause.”). Arbitration agreements must satisfy the basic tenets and requirements of contract law. Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844, (Ct. App. 1999). Section 2 of the Federal Arbitration Act dictates that arbitration agreements are enforceable except “upon such grounds as exist at law or equity for the revocation of any contract”. 9 U.S.C. §2. The courts, not arbitrators, are charged with deciding certain “gateway matters” including whether the parties have a valid arbitration agreement or whether the arbitration clause applies to a certain type of controversy. New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 629, 667 S.E.2d 1, 5 (Ct. App. 2008). Thus, unless there is a valid and enforceable contract, the Federal Arbitration Act does not even apply.

Further, the party seeking enforcement of the agreement bears the burden to prove a valid arbitration agreement exists that is enforceable, knowing, voluntary, and intentional. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008); Hinson-Barr, Inc. v. Pinckard, 292 S.C. 267, 268, 356 S.E.2d 115, 116 (1986). “A motion to compel arbitration pursuant to the FAA is akin to the burden on summary judgment.” Thomas v. Progressive Leasing, Civ. No. 17-1249, 2017 WL 4805235, at (D.

Md. Oct. 25, 2017)(internal quotation marks omitted) (quoting Galloway v. Santander Consumer USA, Inc., 819 F.3d 79, 85 (4th Cir. 2016)). Therefore, the burden is on the moving party to demonstrate the absence of any genuine dispute of material fact, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970), and that the movant is “entitled to judgment [compelling arbitration] as a matter of law.” Burrell v. 911 Restoration Franchise Inc., 2017 WL 5517383, at (D. Md. November 17, 2017) (citing Fed. R. Civ. P. 56(a)). Further, “there is, however, no public policy – federal or state – favoring arbitration.” Simmons v. Benson Hyundai, LLC, 2022 S.C. App. LEXIS 37, 22WL791174 quoting Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021). “...A presumption against arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate.” Wilson v. Willis, 426 S.C. 326 at 339, 827 S.E.2d 167 (2019)

Because Ms. Lovett maintained she had no actual agency/authority to act on behalf of Jo Eva Rice, argument was heard as to whether Ms. Lovett was the apparent agent of Jo Eva Rice and/or that Sonya Lovett is estopped from denying the Arbitration Agreement. However, for the reasons set forth hereinbelow, the Court does not find these arguments persuasive. This Court finds that a valid and enforceable contract or agreement to arbitrate does not exist.

I. No Apparent Agency/Authority

Without actual agency, Defendants argue that Ms. Lovett had apparent authority/agency to enter into the Arbitration Agreement on behalf of Jo E. Rice. Apparent authority is based on “representations made by the principal to the third party and reliance by the third party on those representations”. Young v. S.C. Department of Disabilities and

Special Needs, 374 S.C. 360, 367, 649, S.E.2d 488, 491 (2007). Apparent authority exists when the principal is bound by the acts of its agent after the principal has placed the agent in such a position that a person of ordinary prudence, reasonably familiar with business, usages and custom, is led to believe the agent has certain authority and in turn, deals with the agent based on the assumption. Muller v. Myrtle Beach Golf and Yacht Club, 303 S.C. 137, 399 S.E.2d 430 (Ct. App. 1990), *rev'd on other grounds*.

South Carolina law requires that to prove apparent authority, the Defendants must show "... (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." Cowburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The Defendant fails to prove those elements. The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance, Company, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists.

In the present case, there is no evidence Jo Eva Rice represented to Defendants that Ms. Lovett had the authority to enter into the Arbitration Agreement on her behalf. There is no evidence that the facility asked Ms. Lovett if she held power of attorney, in fact the only evidence in this case is that she did not tell them that she held power of attorney for her mother Ms. Rice (Exhibit 1 Affidavit of Sonya Lovett). The Arbitration Agreement

does not state that she held power of attorney (Exhibit 2 Arbitration Agreement). Ms. Rice never signed any document or contract entitled “Arbitration Agreement”, nor did the Defendants present such evidence, nor any evidence of apparent agency. In addition, as noted in Hodge, when the Arbitration Agreement does not merge with the Admission Agreement, as in the present case, facility cannot show that they changed their position for the worse, as is required to invoke apparent agency.

The Defendants did not produce any Evidence to show Ms. Rice’s Daughter (Sonya Lovett) had the authority either expressed or implied, to bind her mother (or her estate) to the Arbitration Agreement. In fact, evidence produced by the Plaintiff shows the contrary. Affidavit of Sonya Lovett confirms she did not even make an affirmative representation of authority to bind her mother or her estate. Moreover, when the Arbitration Agreement does not merge with the Admission Agreement, as in this case, the facility cannot show it changed its position for the worse as required to establish apparent agency.

II. No Estoppel

Defendants argue that even if Ms. Lovett lacked authority to sign the Arbitration Agreement, the Arbitration Agreement and Admission Agreement should be construed together, or merged, and Ms. Rice’s estate should therefore be estopped to deny the Arbitration Agreement’s enforceability. Defendants’ equitable estoppel argument is premised on its contention that the Admission Agreement and Arbitration Agreement merged. Therefore, finding a merger is required for the Court to reach the equitable estoppel argument. Hodge v. Unihealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

“Under South Carolina law, 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, 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 354, 755 S.E.2d at 454 (quoting Clutts Resort Realty, Inc. v. Down’ Round Dev., Corp., 232 S.E.2d 20, 24 (S.C. 1977)).¹ However, in Coleman the South Carolina Supreme Court found “by their own terms, the contracts between the parties indicated an intent that the common law doctrine of merger not apply.” Id. Evidence of the parties’ intent to keep the two agreements separate included language in the Admission Agreement that recognized the “separateness” of the two documents. The Court also found that the ability to disclaim the Arbitration Agreement within thirty (30) days but not the Admission Agreement “evidenced an intention that each contract remains separate.” Id. “Finally, the Court stressed that even if the language of the Admission Agreement created an ‘ambiguity as to merger, the law is clear that any ambiguity in such a clause is *construed* against drafter, in this case, [the Facility]’”. Thompson, 416 S.C. at 56-58, 784 S.E.2d at 687 (quoting Coleman, 755 at 455) (emphasis and alterations in original).

After Coleman, the South Carolina Court of Appeals considered additional cases discussing evidence of the intent to keep healthcare facility admission agreements and arbitration agreements separate. In Thompson, the Court discussed the fact that signing the arbitration agreement was not a pre-condition to admission to the facility as evidence of intent to keep the arbitration agreement and admission agreement separate. 784 S.E.2d at 685. In Hodge v. Unihealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), the Court also noted the fact that the admission agreement and arbitration agreement were “separately paginated and each had its own signature page” as

additional evidence of the parties' intent to keep the agreements separate. 813 S.E.2d at 302. Here, there is no evidence that signing the Arbitration Agreement was a precondition to admission.

In this instance the Admission Agreement (Exhibit 3) is a separate document from the Arbitration Agreement, and by all standards the two have not been merged. The Admission Agreement is paginated as pages 1-12, and explicitly states page 1 of 12 and at the end states page 12 of 12. The Arbitration Agreement is not contained within those 12 pages. Furthermore, page 12 of 12 states that those 12 pages constitute the entire agreement for admission between the parties. The Arbitration Agreement alleged to be the binding Arbitration Agreement between the parties, is a separate and distinct document and is paginated as page 1 of 1. There are further distinctions between the two documents, including different termination clauses. The Admission Agreement states that the resident and/or his/her legal representative may terminate the agreement at any time, upon written notice to the facility. The Arbitration Agreement states that the agreement shall remain in effect for all care at the facility and shall survive termination or breach of this Arbitration Agreement or the Admission Agreement. The Court therefore finds that the Admission Agreement and Arbitration Agreement do not merge and therefore Defendant's contention of Estoppel fails.

III. Plaintiff is not Equitably Estopped from Opposing Arbitration.

Ms. Rice did not sign the Arbitration Agreement or authorize anyone to sign for her. Yet, the Facility argues South Carolina Supreme Court precedent suggests Ms. Rice's estate is equitably estopped from opposing arbitration. (Wilson v. Willis, 426 S.C. 326, 827 S.E.2d 167 (2019)). However, the Facility does not even cite or attempt to apply the

elements of equitable estoppel imposed by South Carolina law.¹ Plus, Wilson actually refused to compel arbitration against a non-signatory, holding there is a presumption *against* forcing someone to arbitrate based on a contract she did not sign. 426 S.C. at 338, 827 S.E.2d at 173. Wilson even went on record to say equitable estoppel is rarely appropriate to force arbitration. Id. at 345, 827 S.E.2d at 177 (finding equitable estoppel “should be used sparingly”). Finally, the Facility cannot meet the “direct benefits” test considered in Wilson because Plaintiff is not attempting to enforce a contractual claim under the Admission Agreement and Plaintiff’s claims in no sense rely on the Arbitration Agreement’s terms, and the Facility’s argument to the contrary expressly links its estoppel claim to its fatally flawed merger argument.

The “direct benefits estoppel” discussed in Wilson could only apply if Plaintiff has “consistently maintained that other provisions of the same contract should be enforced to benefit” her. 426 S.C. at 340, 827 S.E.2d at 175 (quoting Pearson, 400 S.C. at 290, 733 S.E.2d at 601). In other words, the Facility’s burden is to show Plaintiff has “knowingly exploit[ed]” the Arbitration Agreement to her benefit. Wilson, 426 S.C. at 340, 827 S.E.2d at 175. The Facility makes no attempt to meet this burden and cannot do so. Plaintiff’s

¹ As Wilson recognized, whether a non-signatory may be bound to an arbitration contract is a state law issue. 426 S.C. at 348, 827 S.E.2d at 174 (citing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630-31 n. 5 (2009)). Under South Carolina law, 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. Wilson did not dismiss or eliminate this test for equitable estoppel but only found its application was an issue that had not been preserved for appellate review. The Facility argues Wilson concluded this test only applies to “non-arbitration cases.” Wilson, 426 S.C. at 340 n. 9, 827 S.E.2d at 175 n. 9. However, that could not have been Wilson’s meaning because applying different rules to arbitration and non-arbitration contracts would violate the U.S. Supreme Court’s equal-treatment principle. See Prima Paint Corp. v. Flood Conklin Mfg. Co., 388 U.S. 395, 404 n. 12 (1967) (finding intent of Federal Arbitration Act was “to make arbitration agreements as enforceable as other contracts, but not more so”).

claims do not cite or rely on the Arbitration Agreement. Instead, the Facility argues Plaintiff received direct benefit of the Admission Agreement and, therefore, should be estopped from denying the Arbitration Agreement.

But, this argument has two key flaws. First, Plaintiff has not obtained a “direct benefit” from the Admission Agreement as that term is used for estoppel purposes. Plaintiff does not allege a breach of contract claim based on the Admission Agreement or otherwise rely on that contract to seek liability against the Facility. The mere fact that Ms. Rice’s relationship with the Facility underlying Plaintiff’s claims was memorialized in the Admission Agreement is not sufficient for the Facility to invoke estoppel. Wilson, 426 S.C. at 343, 827 S.E.2d at 176 (“direct benefits estoppel is not implicated simply because a claim relates to or would not have arisen ‘but for’ a contract’s existence”). Second, this argument shows the Facility’s estoppel claim is wholly dependent on a merger argument it cannot prove. As discussed in the Argument above, there is no merger here because (1) the contracts were created for different purposes; and (2) there are many indications from the contracts’ language they were not intended to be construed as one.

Finally, this Court has previously rejected a nursing home’s attempt to use direct benefits estoppel to compel a non-signatory nursing home resident to arbitrate. Thompson, 416 S.C. at 58-59, 784 S.E.2d at 687-88; see also Hodge, 422 S.C. at 556-57, 813 S.E.2d at 299-300 (applying Thompson). After surveying Pearson and Fourth Circuit cases, Thompson refused to apply this form of estoppel because it generally requires proof of some benefit to the party opposing estoppel in “*the contract that includes the arbitration provision.*” 416 S.C. at 59, 784 S.E.2d at 688 (emphasis added). The Facility, therefore, cannot build an estoppel argument by citing supposed benefits Ms. Rice gained in the

Admission Agreement. Thompson also rejected any effort to argue Ms. Rice gained a “direct benefit” from the Arbitration Agreement. Id. at 60, 784 S.E.2d at 688 (“any possible benefit emanating from the [Arbitration Agreement alone is offset by the [Arbitration Agreement’s] requirement that Mother waive her right of access to the courts . . .”).

Therefore, Defendant’s contentions based on Equitable Estoppel fail in the case.

IV. Adult Health Care Consent Act

Any contention that the Adult Health Care Consent Act allows Ms. Lovett to consent is misplaced. The Act only applies if Ms. Rice was “unable to consent,” a term defined by the Act as limited to a person who cannot (1) appreciate the nature and implications of both her condition and proposed interventions; (2) form a reasoned decision concerning proposed treatment courses; or (3) communicate her decisions in an unambiguous manner. S.C. Code Ann. § 44-66-20(8). The Facility’s merger argument could only be relevant to this Motion if Ms. Lovett had authority under the Act. Unless Ms. Rice is proven to be “unable” to consent as defined above, the Act would not apply even to the Admission Agreement, and the merger argument would fail at its initial hurdle. Hodge, 422 S.C. at 574, 813 S.E.2d at 308. Defendant offered no evidence that Ms. Rice was unable consent. Therefore, any efforts to bootstrap itself into a claim of estoppel is not aided by any contention pursuant to this Act.

V. Failure to Establish Foundation and Authenticity

Furthermore, Defendants have the duty to authenticate and lay the foundation for the documents. Such a requirement applies to motions to compel arbitration as well. Berry v. Spang, 433 S.C. 1; 855 S.E.2d 309 (S.C. App. 2021). As the Berry Court noted, “A party offering evidence must meet ‘the requirement of authentication...as a condition precedent

to admissibility.” Id. citing Deep Keel, LLC v. Atl. Private Equity Grp., LLC, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015)(quoting Rule 901(a), SCRE). While the burden to authenticate is not high, it still, nonetheless, exists and requires that the proponent offer a satisfactory foundation from which it could be reasonably found that the evidence is authentic. Id.

Unlike the moving party in Berry, Defendants have failed to provide any testimony, affidavit, or other foundation for the Admission Agreement and Arbitration Agreement and failed to authenticate same. As a result, Defendants failed to comply with the authentication/foundation requirements to establish that an enforceable arbitration agreement and/or admission agreement was signed and executed. As a result, and as an additional sustaining ground, the Defendants’ Motion is denied.

V. The Arbitration Agreement is not enforceable as to Wrongful Death Beneficiaries

Like the spouse in Hodge, Wrongful Death Beneficiaries in the present case have claims as a result of Ms. Rice’s injuries. Hodge v. Unihealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018). However, the agreement by its very own terms required that the Defendants have Ms. Rice sign the Arbitration Agreement. Arbitration Agreement, p. 7. This section of the Arbitration Agreement required that if the resident was competent, then the resident was required to sign same. However, despite the fact that Ms. Rice was competent, the Defendants failed to have her sign the Arbitration Agreement. Despite knowing the requirement to have Ms. Rice sign the Arbitration Agreement and the knowledge that she was competent, the Defendants instead had Ms. Lovett who had no authority, sign the Arbitration Agreement on Ms. Rice’s behalf. Because Ms. Rice was required to sign the Arbitration Agreement in the first place for it to

be enforceable, no arbitration agreement could have existed as to Ms. Lovett as the terms of the Agreement required Ms. Rice, not Ms. Lovett, to sign.

Additionally, the explicit language in the Arbitration Agreement indicates that the Agreement is between Jo Eva Rice or “Durable Power of Attorney for Healthcare”/”Resident’s Legal Guardian”/”Resident’s Responsible Party” (hereinafter collectively “Representative”). The signature line does not reflect that Ms. Lovett was signing on behalf of herself individually for her own claims, or that of any Wrongful Death Beneficiaries. Furthermore, in the Arbitration Agreement the paragraph above the signature line, the Arbitration Agreements states, “Resident/Representative Signature”. As a result, the Arbitration Agreement is explicitly clear that Ms. Lovett was not attempting to sign on the behalf Herself. Any contention that the Wrongful Death beneficiaries would fail, even if the remainder of the Arbitration Agreement was found to be enforceable, which this Court finds that it is not.

**THI of South Carolina at Magnolia Place – Spartanburg a/k/a Physical Rehab and
Wellness of Spartanburg**

For the reasons stated above, the Defendant’s Motion to Dismiss and/or Compel Arbitration is denied.

Defendants Fundamental Clinical and Operational Services, LLC;

and

Fundamental Administrative Services, LLC

Because Defendant's Motion to Compel Arbitration have been denied, the Defendants Fundamental Clinical and Operational Services, LLC, and Fundamental Administrative Services, LLC's Motions to Stay Motions to Stay, are as a result denied as these issues are now moot.

IT IS SO ORDERED.

Date: _____

The Honorable J. Derham Cole
Circuit Court Judge



Spartanburg Common Pleas

Case Caption: Sonya Lovett , plaintiff, et al VS Fundamental Clinical And
Operational Services, Llc , defendant, et al
Case Number: 2021CP4203701
Type: Order/Other

IT IS SO ORDERED!

s/J. Derham Cole 2053

Electronically signed on 2022-11-21 15:06:48 page 16 of 16

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2021-CP-42-03701

Sonya LOVETT,

FUNDAMENTAL Clinical and Operational
Services, LLC, et al.

Plaintiff(s)

Defendant(s)

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☒ Other SCRPC 56.
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other .

IT IS ORDERED AND ADJUDGED: ☐ formal order to follow; ☒ **Statement of Judgment by the Court:**

This matter came before this court on **MOTION** of the defendant **TO ALTER, AMEND, and/or RECONSIDER** the Court's prior order denying the defendant's motions to compel arbitration and to stay these proceedings pursuant to *Rule 59(e), SCRPC*.

After consideration of the written and oral arguments of counsel in support of and against the motion, the applicable court rules, and statutory and case law, this court finds that the defendant's **MOTION** should be and **IS** therefore **DENIED**.

J. DERHAM COLE,

Presiding Judge

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

MATTHEW W. CHRISTIAN, Esq.

JAMES D. GANDY, III, Esq.

ATTORNEY(S) FOR PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

AMY W. COX CLERK OF COURT



Spartanburg Common Pleas

Case Caption: Sonya Lovett , plaintiff, et al VS Fundamental Clinical And
Operational Services, Llc , defendant, et al
Case Number: 2021CP4203701
Type: Order/Form 4

IT IS SO ORDERED!

s/J. Derham Cole 2053

Electronically signed on 2023-02-28 17:00:44 page 2 of 2

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C.A. No.:
	)	
The Estate of Jo Eva Rice, deceased, by her	)	
Personal Representative Sonya Lovett,	)	
	)	
Plaintiff,	)	SUMMONS
	)	(Jury Trial Demanded)
v.	)	
	)	
Fundamental Clinical and Operational	)	
Services, LLC; Fundamental Administrative	)	
Services, LLC; and THI of South Carolina at	)	
Magnolia Place – Spartanburg, a/k/a Physical	)	
Rehab and Wellness of Spartanburg,	)	
	)	
Defendant(s).	)	

TO THE DEFENDANT(S) ABOVE-NAMED:

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

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

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

Greenville, South Carolina
Date: October 28, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C.A. No.:
	)	
The Estate of Jo Eva Rice, deceased, by	)	
her Personal Representative Sonya Lovett,	)	
	)	
Plaintiff,	)	COMPLAINT
	)	WRONGFUL DEATH ACTION
v.	)	AND SURVIVAL ACTION
	)	
Fundamental Clinical and Operational	)	
Services, LLC; Fundamental	)	
Administrative Services, LLC; and THI of	)	
South Carolina at Magnolia Place –	)	
Spartanburg, a/k/a Physical Rehab and	)	
Wellness of Spartanburg,	)	
	)	
Defendant(s).	)	
	)	

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

1. That the Plaintiff, Sonya Lovett, is a citizen and resident of the County of Spartanburg, State of South Carolina. At all times relevant herein, Sonya Lovett is and was the daughter of Jo Eva Rice and is the duly appointed Personal Representative of the Estate of Jo Eva Rice, who at the time of her death was a resident of the County of Spartanburg, State of South Carolina.
2. The defendant, Magnolia Place – Spartanburg, a/k/a Physical Rehab and Wellness of Spartanburg (hereinafter collectively Magnolia Place), is a business organized and existing under the laws of one of The States of The United States. At all times relevant herein, this defendant is and was a business which employs and/or contracts for the employment of physicians, nurses, therapists, and related staff to provide health care needs to patients and residents and operates nursing home

- facilities in the State of South Carolina. This business holds itself as being highly capable and highly skilled at providing physician services, nursing services, long-term skilled care, and rehabilitative services to the public at large and to persons such as Jo Eva Rice, deceased. Further, this defendant owns and/or leases property, advertises, maintains agents, and transacts business deriving substantial revenue in Greenville and Spartanburg County, South Carolina, both through its individual actions and in connection with its affiliated and/or parent and/or subsidiary entities including, Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Place – Spartanburg. At all times relevant herein, agents, employees, servants, and apparent agents of Magnolia Place and/or Fundamental Clinical Operational Services LLC, Fundamental Administrative Services LLC, and THI of South Carolina at Magnolia Place (hereinafter collectively known as Fundamental and THI respectively) acted on behalf of themselves and on behalf of Magnolia Place – Spartanburg.
3. Furthermore, at all times relevant herein, Fundamental, THI and Magnolia Place were acting in a joint enterprise to operate and manage the facility doing business as Magnolia Place – Spartanburg, located in Spartanburg, South Carolina, in order to provide care and treatment to vulnerable adults including Jo Eva Rice. That such facility held itself as being qualified to provide appropriate care to persons such as Jo Eva Rice.
 4. Hereinafter, the defendants Fundamental, THI, and Magnolia Place, shall be collectively identified and referred to as “Nursing Home Defendants.”

5. As relates to the care and treatment provided to the deceased Plaintiff herein, the unfolding sequence of events flowed from multiple and different acts of negligence by the same party and by different parties creating a number of events.

FACTUAL BACKGROUND

6. A short and plain statement of the facts showing that the Plaintiff is entitled to relief is as follows:
 - a. That on December 30, 2017 Jo Eva Rice was admitted to Magnolia Place – Spartanburg a/k/a Physical Rehab and Wellness of Spartanburg following hospitalization for a stroke. That she remained a resident/patient at Magnolia Place – Spartanburg a/k/a Physical Rehab and Wellness of Spartanburg until June 18, 2018 when she was transported to a hospital;
 - b. That at the time of her admission she was not properly assessed by a registered nurse;
 - c. That on admission Ms. Rice had a history of seizure disorder and taking Depakote;
 - d. That during her stay she experienced a seizure and had to be transported to the hospital for emergency room care on March 7, 2018;
 - e. That during her stay at the facility the Depakote prescription was frequently changed and the records reflect volatility in valproic acid level;
 - f. That Ms. Rice experienced significant weight changes while at the facility, which were not timely and properly documented or responded to;
 - g. That Ms. Rice developed Stage III pressure ulcers while a resident at the facility, which were ultimately and eventually treated;

- h. That during her stay, the care plan was not timely and properly adjusted to respond to the changing needs of the resident;
 - i. That the facility manipulated the MDS so as to result in RUG scores to maximize compensation without meeting the needs of the resident;
 - j. That on June 17, 2018 Ms. Rice's roommate notified the staff that she was experiencing seizure-like tremors. That the staff failed to attempt to wake Ms. Rice to check her status, or otherwise attend to her. That further, the staff failed to summon a registered nurse, physician, or EMS;
 - k. That subsequently, Ms. Rice was found in an unresponsive state. EMS was called and she was transported to the hospital, where she subsequently passed away;
 - l. That the facility failed to timely and properly respond to weight changes, impending pressure ulcers, failed to turn and reposition and provide appropriate pressure relieving devices, failed to timely and properly respond to a seizure event, failed to timely and properly respond to weight loss and other changing circumstances related to her condition and her medications;
7. That on December 30, 2017 Jo Eva Rice, deceased, became a resident/patient at Magnolia Place – Spartanburg a/k/a Physical Rehab and Wellness of Spartanburg. That ultimately, Ms. Rice was transported to the hospital on June 18, 2018 and passed away on June 19, 2018. That during her stay at the facility, Ms. Rice developed serious and severe pressure ulcers and ultimately on the night of June 17, 2018, began to experience a seizure at approximately 10:45 p.m., which was reported to the facility staff. That no intervention was taken by this Defendant

facility. That at approximately 12:30 a.m. on July 18, 2018, Ms. Rice was again visibly seizing, which was again reported to the Defendant facility staff. At that time, she became unresponsive, went into cardiopulmonary arrest, and was transported to the hospital where was subsequently pronounced dead.

8. That the standard of care for reasonably prudent nursing homes, skilled nursing facilities, nurse practitioners, and other caregivers in the same or similar circumstances require at a minimum the following:
 - a. Timely evaluation and assessment of Jo Rice, outlining all risk factors with which she presented in order to design an appropriate plan of care;
 - b. Provision of complete and comprehensive monitoring of Jo Rice;
 - c. Implementing a care plan designed to prevent injuries;
 - d. Timely and appropriate intervention, care planning and care for a resident at risk for pressure ulcers, and in need of assistance in daily living activities, at risk for seizures, on anti-seizure medications, and having other specialty needs;
 - e. Timely and properly notifying physicians and other caregivers of changes in conditions, including vital signs, skin and wound appearance, and other declining and concerning conditions;
 - f. Addressing changes in weight loss;
 - g. Providing appropriate wound care, turning, repositioning, and other assistance with ADLs;
 - h. Keeping true and accurate records;
 - i. Timely and properly assessing Jo Rice's wounds or pressure ulcers;
 - j. Timely responding to Ms. Rice's change of condition on June 17, 2018;

- k. Timely contacting a registered nurse, nurse practitioner, physician or otherwise responding to Ms. Rice's seizure activity on June 17, 2018;
 - l. Timely and appropriately informing the treating physicians of labs, medication level, and response to Depakote;
 - m. Timely and properly communicating with all caregivers regarding, but not limited to, changes in her condition, her response to medication, laboratory levels, and communications with the nursing home pharmacy;
 - n. Recognizing and responding to the pressure ulcers by providing proper care and appropriate pressure-relieving devices;
 - o. Responding to changes in her condition related to physician orders and instruction;
 - p. Timely and properly assessing, reassessing, and responding to changes in the Plaintiff's deceased's condition with regard to her care planning and implementation;
 - q. Providing a toileting program;
 - r. Timely calling emergency medical services on June 17 or June 18, 2018;
 - s. Providing proper evaluation and assistance to manage seizures;
 - t. Having adequate and sufficient staffing and registered nursing care for the resident; and
 - u. Properly assessing the patient on June 17 and June 18, 2018.
9. That the acts of the above were willful, wanton, careless, negligent and grossly negligent and involving the care and treatment of the Nursing Home Defendants, and including the facilities identified herein, and were below the accepted standard

of care for reasonably prudent caregivers, facilities, nursing homes, and other agents and servants of these Defendants. These breaches of the standard care include, but are not limited to: neglect, corporate negligence, and mismanagement; failure to exercise independent judgement as patient advocates; failure to ensure proper preventative measures in place to keep residents safe; failure to assess the residents; failure to properly train staff; failure to properly supervise; and failure to abide by applicable federal and state laws governing long term care facilities and skilled nursing facilities. The above deficiencies, neglect, and failures occurred on numerous occasions, and in numerous ways, creating multiple events, and caused Jo Eva Rice's pain and suffering, and further caused her to develop pressure ulcers, seizures, weight loss, and suffer in other ways as set forth herein and as discovery may disclose. That such conditions required medical care and treatment, caused there to be medical costs and expenses, caused great pain, suffering, stress, anxiety, and led to and caused her death.

10. That as a direct and proximate result of the Nursing Home Defendants' acts and/or omissions, Ms. Rice suffered the following injuries and damages:
 - a. Seizures;
 - b. Pressure ulcers;
 - c. Infectious sepsis;
 - d. Death;
 - e. Trauma;
 - f. Decreased levels of cognition, health and consciousness;

- g. Pain, suffering, physical and mental stress, loss of enjoyment of life, and anxiety;
 - h. Injuries to her body;
 - i. Loss of dignity;
 - j. Hospitalization;
 - k. Underwent medical care and procedures which otherwise she would not have to undergo;
 - l. Medical expenses; and
 - m. In such other and further ways as discovered at trials and in discovery.
11. That the Defendants herein, during Ms. Rice's residency at Magnolia Place – Spartanburg a/k/a Physical Rehab and Wellness of Spartanburg fell below the accepted standard of care for reasonably prudent nurses, caregivers, nurse practitioners, and care providers and were willful, wanton, negligent, careless, and grossly negligent in the following ways:
- a. In failing to timely evaluate and assess Jo Rice, outlining all risk factors with which she presented in order to design an appropriate plan of care;
 - b. In failing to implement a provision of complete and comprehensive monitoring of Jo Rice;
 - c. In failing to implement a care plan designed to prevent injuries;
 - d. In failing to implement timely and appropriate intervention, care planning and care for a resident at risk for pressure ulcers, and in need of assistance in daily activities, at risk for seizures, on anti-seizure medications, and having other specialty needs;

- e. In failing to timely and properly notify physicians and other caregivers of changes in conditions, including vital signs, skin and wound appearance, and other declining and concerning conditions;
- f. In failing to address changes in weight loss;
- g. In failing to provide appropriate wound care, turning, repositioning, and other assistance with ADLs;
- h. In failing to keep true and accurate records;
- i. In failing to timely and properly assess Jo Rice's wounds or pressure ulcers;
- j. In failing to timely respond to Ms. Rice's change of condition on June 17, 2018;
- k. In failing to timely contact a registered nurse, nurse practitioner, or physician on June 17, 2018;
- l. In failing to timely and appropriately inform the treating physicians of labs, medication level, and response to Depakote;
- m. In failing to timely and properly communicate with all caregivers regarding, but not limited to, changes in her condition, her response to medication, laboratory levels, and communications with the nursing home pharmacy;
- n. In failing to recognize and respond to the pressure ulcers by providing proper care and appropriate pressure relieving devices;
- o. In failing to respond to changes in her condition related to physician orders and instruction;
- p. In failing to timely and properly assess, reassess, and respond to changes in the Plaintiff's deceased's condition with regard to her assessments and care planning;

- q. In failing to provide a toileting program;
 - r. In failing to timely call emergency medical services on June 17 or June 18, 2018;
 - s. In failing to provide proper evaluation and assistance to manage seizures;
 - t. In failing to have adequate and sufficient staffing and registered nursing attending the resident; and
 - u. In failing to properly assess the patient on June 17 and June 18, 2018.
12. That the willful, wanton, careless, and grossly negligent treatment by the above Defendant was below the accepted standard of care for reasonably prudent caregivers, facilities, nursing homes, nurses, and medical providers. These include but are not limited to neglect, corporate negligence, and mismanagement; failure to exercise independent judgment as patient advocates; failure to ensure proper preventative measures in place to keep residents safe; failure to assess the residents; failure to properly train staff; failure to supervise; and failure to abide by applicable federal and state laws governing long-term care facilities and skilled nursing facilities. The above deficiencies, neglect, and failures caused Ms. Rice to undergo much pain, suffering, anxiety, stress, and ultimately caused her to go into an untreated seizure which resulted in her death.

SURVIVAL ACTION

13. That each and every allegation and factual statement contained above is restated and incorporated by reference herein.

14. That the Survival Action is brought by the Plaintiff on behalf of the Estate of Jo Eva Rice for her pain and suffering, loss of enjoyment of life, mental shock and suffering, and medical expenses.

WRONGFUL DEATH ACTION

15. That each and every allegation and factual statement contained above is restated and incorporated by reference herein.
16. That the Wrongful Death Action is brought on behalf of the statutory beneficiaries of the deceased, who are the three children of the decedent, namely Sonya Lovett, Willy James Smith, and Tracie Wright, for their shock, and grief, and their loss of the aid, counsel, comfort, society, love, and affection of their mother.

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

17. Plaintiff restates and re-alleges each and every paragraph previously pleaded above as if repeated verbatim.
18. That the Nursing Home Defendants were willful, wanton, careless, negligent, grossly negligent, and provided care below the required standard of care in the following way:
- a. In failing to properly treat, evaluate, and take diagnostic measures at the appropriate times to care for Jo Eva Rice;
 - b. In failing to timely obtain appropriate and necessary consultations by specialists and all other qualified physicians for the care, evaluation, and treatment of Jo Eva Rice;

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

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

**SECOND CAUSE OF ACTION
(NEGLIGENCE PER SE AS TO NURSING HOME DEFENDANTS)**

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

**THIRD CAUSE OF ACTION
(NEGLIGENT REPRESENTATION BY NURSING HOME DEFENDANTS)**

23. Plaintiff restates and re-alleges each paragraph previously pled as if repeated verbatim.
24. Prior to, and around the time of Jo Eva Rice's admission to the Defendant's facility, and at the time of Jo Eva Rice's sustained injuries at the facility, agents of the facility made untrue statements to Jo Eva Rice and/or to her family and all

representatives about the quality of care that Ms. Rice would receive at the Defendant's facility. Such statements were intended by those making them to be relied upon by Jo Eva Rice, her family and all representatives and upon which they did rely.

25. The Defendants represented to Jo Eva Rice and to the family and all representatives that she would receive appropriate care within professional standards, that such care would be designed to properly provide the care and treatment under the conditions with which she presented, that the facility had adequate staffing and adequate funding, that Jo Eva Rice would be carefully monitored, that Jo Eva Rice would receive adequate nutrition, hydration, medications, therapies, evaluations, and preventive interventions, and that Jo Eva Rice would be safe and secure and that problems or insufficiencies that the Defendants' facility may have had in the past have been corrected.
26. That these statements were untrue, that the Defendants knew that such statements were untrue, and yet they intended they be relied upon by Jo Eva Rice and her family and all representatives and upon them, they did rely on choosing to admit Jo Eva Rice to the facility.
27. These representations were willful, wanton, careless, reckless, and negligent in that these Defendants knew or should have known that they would not be able to meet these representations and did in fact fail to meet these representations.
28. That it is a direct and proximate result of these Defendants' misrepresentations that Jo Eva Rice and her beneficiaries suffered injuries and damages as set forth above.

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

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

Place. That these monies were divested from this facility with the full knowledge of such money was necessary for the resident care, but would not be available.

33. That as a direct and proximate result of the Defendants' corporate acts and/or omissions, Plaintiff's decedent and her beneficiaries suffered the injuries and damages set forth above, including Ms. Rice's death.

WHEREFORE, the Plaintiff prays for judgement against each and every Defendant in the following particulars:

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

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

Greenville, South Carolina
Date: October 28, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
THE ESTATE OF JO EVA RICE,	)	CASE NO. 2021-CP-42-03701
DECEASED, BY HER PERSONAL	)	
REPRESENTATIVE SONYA LOVETT,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
FUNDAMENTAL CLINICAL AND	)	DEFENDANT THI OF SOUTH
OPERATIONAL SERVICESS, LLC;	)	CAROLINA AT MAGNOLIA PLACE AT
FUNDAMENTAL ADMINISTRATIVE	)	SPARTANBURG D/B/A PHYSICAL
SERVICES, LLC; AND THI OF SOUTH	)	REHABILITATION AND WELLNESS
CAROLINA AT MAGNOLIA PLACE	)	CENTER OF SPARTANBURG'S ANSWER
SPARTANBURG, A/K/A PHYSICAL	)	TO THE COMPLAINT
REHAB AND WELLNESS OF	)	
SPARTANBURG ,	)	
	)	
DEFENDANTS.	)	
	)	

TO: W. HAROLD CHRSTIAN, ATTORNEY FOR THE PLAINTIFF:

The Defendant, THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Physical Rehabilitation and Wellness Center of Spartanburg (misidentified in Plaintiff's Complaint as "THI of South Carolina at Magnolia Place – Spartanburg a/k/a Physical Rehab and Wellness of Spartanburg" and hereinafter "this Defendant" or "the Facility"), 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. To the extent this Defendant hereafter responds to allegations made against “Nursing Home Defendants”, any such responses are being made by this Defendant as to itself and not on behalf of any other defendants.

3. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 1 of Plaintiff’s Complaint and therefore denies the same and demands strict proof thereof. To the extent those allegations call for legal conclusions, no response is required.

4. Responding to the allegations set forth in Paragraph 2 of Plaintiff’s Complaint, this Defendant asserts that it is a limited liability company organized under the laws of the state of Delaware. Further responding, this Defendant admits that it operates a skilled nursing facility in Spartanburg County, South Carolina. This Defendant denies the remaining allegations set forth in Paragraph 2 of Plaintiff’s Complaint and demands strict proof thereof. To the extent those allegations call for legal conclusions or are directed at parties other than this Defendant, no response is required.

5. This Defendant denies the allegations set forth in Paragraph 3 of Plaintiff’s Complaint. Further responding, this Defendant affirmatively asserts that no other entity operates, manages or controls the skilled nursing facility it is licensed to operate. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant or call for legal conclusions, no response is required.

6. This Defendant denies the allegations set forth in Paragraph 4 of Plaintiff’s Complaint and asserts that no other entity operates, manages or controls the skilled nursing facility it is licensed to operate.

7. This Defendant denies the allegations set forth in Paragraph 5 of Plaintiff's Complaint. To the extent those allegations call for legal conclusions, no response is required.

8. Answering the allegations set forth in Paragraph 6(a) of Plaintiff's Complaint, this Defendant asserts that Ms. Rice was first admitted to the Facility on March 8, 2017, and then readmitted on January 5, 2018 following a hospitalization. This Defendant admits that on June 18, 2018, Ms. Rice was transferred to a hospital.

9. This Defendant denies the allegations set forth in Paragraph 6(b) of Plaintiff's Complaint and demands strict proof thereof.

10. Responding to the allegations set forth in Paragraphs 6(c), 6(d) and 6(e) of Plaintiff's Complaint, this Defendant craves reference to Ms. Rice'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.

11. This Defendant denies the allegations set forth in Paragraph 6(f) of Plaintiff's Complaint and demands strict proof thereof.

12. Responding to the allegations set forth in Paragraph 6(g) of Plaintiff's Complaint, this Defendant craves reference to Ms. Rice'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.

13. This Defendant denies the allegations set forth in Paragraphs 6(h) and 6(i) of Plaintiff's Complaint and demands strict proof thereof.

14. Responding to the allegations set forth in Paragraph 6(j) of Plaintiff's Complaint, this Defendant admits that on June 17, 2018, Ms. Rice's roommate notified the staff of Ms. Rice

experiencing jerking movements. This Defendant denied the remaining allegations in Paragraph 6(j) and demands strict proof thereof.

15. Responding to the allegations set forth in Paragraph 6(k) of Plaintiff's Complaint, this Defendant craves reference to Ms. Rice'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.

16. This Defendant denies the allegations set forth in Paragraph 6(l) of Plaintiff's Complaint and demands strict proof thereof.

17. Responding to the allegations set forth in Paragraph 7 of Plaintiff's Complaint, this Defendant admits that Ms. Rice was readmitted to the Facility on January 5, 2018 following a hospitalization. This Defendant also admits that Ms. Rice was transported to the hospital on June 18, 2018, but is without sufficient knowledge or belief as to the date of her death. Responding to the allegations regarding her stay at the Facility, this Defendant craves reference to Ms. Rice'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.

18. The allegations in Paragraph 8 of Plaintiff's Complaint, including all subparts, call for legal conclusions and require no response. Further responding, this Defendant asserts that its employees and staff at all times complied with the applicable standard of care in their treatment of Ms. Rice.

19. This Defendant denies the allegations set forth in Paragraphs 9, 10, 11 and 12 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof. Further responding, this Defendant affirmatively asserts that no other entity operates, manages or

controls the skilled nursing facility it is licensed to operate. To the extent the allegations in those Paragraphs are directed at other Defendants, no response is required.

20. Responding to the allegations set forth in Paragraph 13 of Plaintiff's Complaint, this Defendant restates its answers to the Paragraphs above as if set forth herein verbatim.

21. The allegations in Paragraph 14 of Plaintiff's Complaint call for legal conclusions and require no response. To the extent a response is required, any allegations intended to allege liability or damages against this Defendant are hereby denied and strict proof is demanded thereof.

22. Responding to the allegations set forth in Paragraph 15 of Plaintiff's Complaint, this Defendant restates its answers to the Paragraphs above as if set forth herein verbatim.

23. The allegations in Paragraph 16 of Plaintiff's Complaint call for legal conclusions and require no response. To the extent a response is required, any allegations intended to allege liability or damages against this Defendant are hereby denied and strict proof is demanded thereof.

24. Responding to the allegations set forth in Paragraph 17 of Plaintiff's Complaint, this Defendant restates its answers to the Paragraphs above as if set forth herein verbatim.

25. This Defendant denies the allegations set forth in Paragraph 18 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof. Further responding, this Defendant affirmatively asserts that no other entity operates, manages or controls the skilled nursing facility it is licensed to operate.

26. Responding to the allegations set forth in Paragraph 19 of Plaintiff's Complaint, this Defendant restates its answers to the Paragraphs above as if set forth herein verbatim.

27. The allegations in Paragraphs 20 and 21 of Plaintiff's Complaint call for legal conclusions and require no response. To the extent a response is required, any allegations intended to allege liability or damages against this Defendant are hereby denied and strict proof is demanded thereof.

28. This Defendant denies the allegations set forth in Paragraph 22 of Plaintiff's Complaint and demands strict proof thereof.

29. Responding to the allegations set forth in Paragraph 23 of Plaintiff's Complaint, this Defendant restates its answers to the Paragraphs above as if set forth herein verbatim.

30. This Defendant denies the allegations set forth in Paragraph 24 of Plaintiff's Complaint and demands strict proof thereof.

31. Responding to the allegations in Paragraph 25 of Plaintiff's Complaint, this Defendant craves reference to the Admission Agreement executed by the Plaintiff and the Facility for its contents therein. This Defendant denies any allegations inconsistent with that Agreement. Further responding, this Defendant asserts that at all times it complied with the applicable standard of care in its treatment of Ms. Rice.

32. This Defendant denies the allegations set forth in Paragraphs 26, 27 and 28 of Plaintiff's Complaint and demands strict proof thereof.

33. Responding to the allegations set forth in Paragraph 29 of Plaintiff's Complaint, this Defendant restates its answers to the Paragraphs above as if set forth herein verbatim.

34. This Defendant denies the allegations set forth in Paragraphs 30, 31, 32 and 33 of Plaintiff's Complaint and demands strict proof thereof. Further responding, this Defendant affirmatively asserts that no other entity operates, manages or controls the skilled nursing facility it is licensed to operate.

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

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

36. 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**

37. 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**

38. 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**

39. 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**

40. 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**

41. 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**

42. 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**

43. 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**

44. Some or all of the Plaintiff's claims are barred by the applicable Statute of Limitations.

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

45. 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**

46. 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**

47. 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**

48. 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**

49. 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**

50. 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.

[SIGNATURE BLOCK ON THE 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

T. Ashton Phillips, III

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Attorneys for the Defendant THI of South Carolina

at Magnolia Place at Spartanburg, LLC d/b/a

Physical Rehabilitation and Wellness Center of

Spartanburg

Charleston, South Carolina

Dated: December 3, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
THE ESTATE OF JO EVA RICE,	)	CASE NO. 2021-CP-42-03701
DECEASED, BY HER PERSONAL	)	
REPRESENTATIVE SONYA LOVETT,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
FUNDAMENTAL CLINICAL AND	)	DEFENDANT FUNDAMENTAL
OPERATIONAL SERVICESS, LLC;	)	ADMINISTRATIVE SERVICES, LLC'S
FUNDAMENTAL ADMINISTRATIVE	)	ANSWER TO THE COMPLAINT
SERVICES, LLC; AND THI OF SOUTH	)	
CAROLINA AT MAGNOLIA PLACE	)	
SPARTANBURG, A/K/A PHYSICAL	)	
REHAB AND WELLNESS OF	)	
SPARTANBURG ,	)	
	)	
DEFENDANTS.	)	
	)	

TO: W. HAROLD CHRSTIAN, ATTORNEY FOR THE PLAINTIFF:

The Defendant, Fundamental Administrative Services, LLC (hereinafter “this Defendant” or “FAS”), 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. To the extent this Defendant hereafter responds to allegations made against “Nursing Home Defendants”, any such responses are being made by this Defendant as to itself and not on behalf of any other defendants.

3. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 1 of Plaintiff’s Complaint and therefore denies the same and demands strict proof thereof. To the extent those allegations call for legal conclusions, no response is required.

4. To the extent the allegations in Paragraph 2 of Plaintiff’s Complaint are directed at this Defendant, they are denied and strict proof is demanded thereof. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. Rice. This Defendant further denies any interaction or relationship with the Plaintiff or her decedent of any kind. To the extent these allegations are directed at parties other than this Defendant, no response is required.

5. This Defendant denies the allegations set forth in Paragraph 3 of Plaintiff’s Complaint. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. Rice. This Defendant further denies any interaction or relationship with the Plaintiff or her decedent of any kind. To the extent these allegations are directed at parties other than this Defendant, no response is required.

6. This Defendant denies the allegations set forth in Paragraph 4 of Plaintiff’s Complaint and affirmatively asserts that this Defendant has never been a licensed operator of a skilled nursing facility.

7. This Defendant denies the allegations set forth in Paragraph 5 of Plaintiff’s Complaint. To the extent those allegations call for legal conclusions, no response is required.

8. This Defendant is without sufficient knowledge and information to form an opinion as to the truth of the allegations set forth in Paragraphs 6 and 7 of Plaintiff's Complaint, including all subparts, and therefore denies the same and demands strict proof thereof. To the extent these allegations assert or imply liability as to this Defendant, they are denied. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. Rice. This Defendant further denies any interaction or relationship with the Plaintiff or her decedent of any kind. To the extent these allegations are directed at parties other than this Defendant, no response is required.

9. The allegations in Paragraph 8 of Plaintiff's Complaint call for legal conclusions and require no response. Further responding, this Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. Rice. This Defendant further denies any interaction or relationship with the Plaintiff or her decedent of any kind. To the extent these allegations are directed at parties other than this Defendant, no response is required.

10. This Defendant denies the allegations set forth in Paragraphs 9, 10, 11 and 12 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof. Further responding, this Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. Rice. This Defendant further denies any interaction or relationship with the Plaintiff or her decedent of any kind. To the extent these allegations are directed at parties other than this Defendant, no response is required.

11. Responding to the allegations set forth in Paragraph 13 of Plaintiff's Complaint, this Defendant restates its answers to the Paragraphs above as if set forth herein verbatim.

12. The allegations in Paragraph 14 of Plaintiff's Complaint call for legal conclusions and require no response. To the extent a response is required, any allegations intended to allege liability or damages against this Defendant are hereby denied and strict proof is demanded thereof.

13. Responding to the allegations set forth in Paragraph 15 of Plaintiff's Complaint, this Defendant restates its answers to the Paragraphs above as if set forth herein verbatim.

14. The allegations in Paragraph 16 of Plaintiff's Complaint call for legal conclusions and require no response. To the extent a response is required, any allegations intended to allege liability or damages against this Defendant are hereby denied and strict proof is demanded thereof.

15. Responding to the allegations set forth in Paragraph 17 of Plaintiff's Complaint, this Defendant restates its answers to the Paragraphs above as if set forth herein verbatim.

16. This Defendant denies the allegations set forth in Paragraph 18 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof. Further responding, this Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. Rice. This Defendant further denies any interaction or relationship with the Plaintiff or her decedent of any kind. To the extent these allegations are directed at parties other than this Defendant, no response is required.

17. Responding to the allegations set forth in Paragraph 19 of Plaintiff's Complaint, this Defendant restates its answers to the Paragraphs above as if set forth herein verbatim.

18. The allegations in Paragraphs 20 and 21 of Plaintiff's Complaint call for legal conclusions and require no response. Further responding, this Defendant asserts that it has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms.

Rice. This Defendant further denies any interaction or relationship with the Plaintiff or her decedent of any kind. To the extent these allegations are directed at parties other than this Defendant, no response is required.

19. This Defendant denies the allegations set forth in Paragraph 22 of Plaintiff's Complaint and demands strict proof thereof.

20. Responding to the allegations set forth in Paragraph 23 of Plaintiff's Complaint, this Defendant restates its answers to the Paragraphs above as if set forth herein verbatim.

21. This Defendant is without sufficient knowledge and information to form an opinion as to the truth of the allegations set forth in Paragraphs 24 and 25 of Plaintiff's Complaint, including all subparts, and therefore denies the same and demands strict proof thereof. To the extent these allegations assert or imply liability as to this Defendant, they are denied. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. Rice. This Defendant further denies any interaction or relationship with the Plaintiff or her decedent of any kind. To the extent these allegations are directed at parties other than this Defendant, no response is required.

22. This Defendant denies the allegations set forth in Paragraphs 26, 27 and 28 of Plaintiff's Complaint and demands strict proof thereof. Further responding, this Defendant further denies any interaction or relationship with the Plaintiff or her decedent of any kind. To the extent these allegations are directed at parties other than this Defendant, no response is required.

23. Responding to the allegations set forth in Paragraph 29 of Plaintiff's Complaint, this Defendant restates its answers to the Paragraphs above as if set forth herein verbatim.

24. This Defendant denies the allegations set forth in Paragraphs 30, 31, 32 and 33 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof. Further responding, this Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. Rice. This Defendant further denies any interaction or relationship with the Plaintiff or her decedent of any kind. To the extent these allegations are directed at parties other than this Defendant, no response is required.

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

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

26. 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**

27. 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**

28. 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**

29. 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**

30. 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**

31. 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**

32. 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**

33. 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**

34. Some or all of the Plaintiff's claims are barred by the applicable Statute of Limitations.

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

35. 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**

36. 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**

37. 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**

38. 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**

39. 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**

40. 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 ID No.: 11925

T. Ashton Phillips, III

SC State Bar ID No.: 104227

P.O. Box 993, Charleston, SC 29402

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tgandy@ycrlaw.com; aphillips@ycrlaw.com

Attorneys for the Defendant Fundamental

Administrative Services, LLC

Charleston, South Carolina

Dated: December 3, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
THE ESTATE OF JO EVA RICE,	)	CASE NO. 2021-CP-42-03701
DECEASED, BY HER PERSONAL	)	
REPRESENTATIVE SONYA LOVETT,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
FUNDAMENTAL CLINICAL AND	)	DEFENDANT FUNDAMENTAL
OPERATIONAL SERVICESS, LLC;	)	CLINICAL AND OPERATIONAL
FUNDAMENTAL ADMINISTRATIVE	)	SERVICES, LLC'S ANSWER TO THE
SERVICES, LLC; AND THI OF SOUTH	)	COMPLAINT
CAROLINA AT MAGNOLIA PLACE	)	
SPARTANBURG, A/K/A PHYSICAL	)	
REHAB AND WELLNESS OF	)	
SPARTANBURG ,	)	
	)	
DEFENDANTS.	)	
	)	

TO: W. HAROLD CHRSTIAN, ATTORNEY FOR THE PLAINTIFF:

The Defendant, Fundamental Clinical and Operational Services, LLC (hereinafter “this Defendant” or “FCOS”), 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. To the extent this Defendant hereafter responds to allegations made against “Nursing Home Defendants”, any such responses are being made by this Defendant as to itself and not on behalf of any other defendants.

3. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 1 of Plaintiff’s Complaint and therefore denies the same and demands strict proof thereof. To the extent those allegations call for legal conclusions, no response is required.

4. To the extent the allegations in Paragraph 2 of Plaintiff’s Complaint are directed at this Defendant, they are denied and strict proof is demanded thereof. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. Rice. This Defendant further denies any interaction or relationship with the Plaintiff or her decedent of any kind. To the extent these allegations are directed at parties other than this Defendant, no response is required.

5. This Defendant denies the allegations set forth in Paragraph 3 of Plaintiff’s Complaint. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. Rice. This Defendant further denies any interaction or relationship with the Plaintiff or her decedent of any kind. To the extent these allegations are directed at parties other than this Defendant, no response is required.

6. This Defendant denies the allegations set forth in Paragraph 4 of Plaintiff’s Complaint and affirmatively asserts that this Defendant has never been a licensed operator of a skilled nursing facility.

7. This Defendant denies the allegations set forth in Paragraph 5 of Plaintiff’s Complaint. To the extent those allegations call for legal conclusions, no response is required.

8. This Defendant is without sufficient knowledge and information to form an opinion as to the truth of the allegations set forth in Paragraphs 6 and 7 of Plaintiff's Complaint, including all subparts, and therefore denies the same and demands strict proof thereof. To the extent these allegations assert or imply liability as to this Defendant, they are denied. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. Rice. This Defendant further denies any interaction or relationship with the Plaintiff or her decedent of any kind. To the extent these allegations are directed at parties other than this Defendant, no response is required.

9. The allegations in Paragraph 8 of Plaintiff's Complaint call for legal conclusions and require no response. Further responding, this Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. Rice. This Defendant further denies any interaction or relationship with the Plaintiff or her decedent of any kind. To the extent these allegations are directed at parties other than this Defendant, no response is required.

10. This Defendant denies the allegations set forth in Paragraphs 9, 10, 11 and 12 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof. Further responding, this Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. Rice. This Defendant further denies any interaction or relationship with the Plaintiff or her decedent of any kind. To the extent these allegations are directed at parties other than this Defendant, no response is required.

11. Responding to the allegations set forth in Paragraph 13 of Plaintiff's Complaint, this Defendant restates its answers to the Paragraphs above as if set forth herein verbatim.

12. The allegations in Paragraph 14 of Plaintiff's Complaint call for legal conclusions and require no response. To the extent a response is required, any allegations intended to allege liability or damages against this Defendant are hereby denied and strict proof is demanded thereof.

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

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

26. 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**

27. 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**

28. 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**

29. 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**

30. 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**

31. 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**

32. 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**

33. 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**

34. Some or all of the Plaintiff's claims are barred by the applicable Statute of Limitations.

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

35. 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**

36. 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**

37. 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**

38. 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**

39. 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**

40. 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.

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Attorneys for the Defendant Fundamental Clinical
and Operational Services, LLC

Charleston, South Carolina

Dated: December 3, 2021

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG) 2021-CP-42-03701

The Estate of Jo Eva Rice,
Deceased, by her Personal
Representative Sonya Lovett,

Plaintiff,

vs.

Fundamental Clinical and
Operational Services, LLC;
Fundamental Administrative Services)
LLC; and THI of South Carolina at)
Magnolia Place - Spartanburg, a/k/a)
Physical Rehab and Wellness of)
Spartanburg,)

Defendant.

Transcript of Record

April 1, 2022

B E F O R E:

Honorable J. Derham Cole
Spartanburg County Courthouse
Spartanburg, South Carolina
VIA WEBEX REMOTE HEARING

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

W. Harold Christian, Esquire
Attorney for Plaintiff

Russell G. Hines, Esquire
Attorney for Defendants

Sallie Beth Todd
Official Court Reporter

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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(There were no witnesses called during this hearing.)

Certificate of Court Reporter..... 41

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE</u>
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(There were no exhibits marked during this hearing.)

1 **THE COURT:** All right. What y'all got?

2 **MR. HINES:** Your Honor, this is Russ Hines. And first,
3 thank you, and thank Harold very much for working with me. I
4 realize we're here this morning at 9:30 on account of my -- as
5 an accommodation to me, which I very much appreciate.

6 **THE COURT:** You shouldn't have told me that. I didn't
7 know we were trying to accommodate you. I just thought it was
8 scheduled.

9 **MR. HINES:** Well, I probably shouldn't ---

10 **THE COURT:** You just used up your only favor.

11 **MR. HINES:** At 9:30 on a Friday morning, I've cashed in a
12 lot of chips I realize, but I sincerely thank you very much
13 for that whether it was known or unknown to you it's a big
14 help to me.

15 Your Honor, I'm representing all of the defendants in
16 this case, all of the moving parties. And some of them have
17 long names, so if I can just give them a little shorthand
18 because there actually on your roster you might see six
19 motions. I'm not sure why all of those motions -- it's
20 actually three motions that were actually filed twice each. I
21 don't understand why, so at least we can cut half of them away
22 right there. There were motions filed January, I think, 28th
23 and then maybe somebody in our office didn't realize they'd
24 already been filed and refiled them, the same things, on the
25 1st. But in any event, it's just three motions, one by each of

1 the defendants.

2 And what this is is a nursing home malpractice case,
3 wrongful death and survival. And the motion, the primary
4 motion, Your Honor, that's before you is the motion of the
5 skilled nursing facility. That's an entity called THI of
6 South Carolina at Magnolia Place at Spartanburg d/b/a Physical
7 Rehab and Wellness Center of Spartanburg; I'm just going to
8 call that the facility for shorthand. There are two other
9 defendants, one called Fundamental Clinical and Operational
10 Services, the other one called Fundamental Administrative
11 Services.

12 What we have here, Your Honor, is a motion by the
13 facility to compel arbitration, and motions -- the same
14 identical motion, but made by each of these two parties,
15 Fundamental Clinical and Fundamental Administrative. They are
16 asking for a stay pending the resolution of the arbitration
17 question that we're raising via the facility's motion to
18 compel arbitration. What that means is a stay, you know,
19 pending ultimately the outcome of the arbitration or at least
20 the outcome of the question of arbitrability that we're
21 raising here in the motion.

22 **THE COURT:** Well can I assume that the plaintiff has no
23 objection to that?

24 **MR. CHRISTIAN:** That's correct, Your Honor, as far as a
25 stay pending the outcome.

1 **THE COURT:** All right. Okay.

2 **MR. HINES:** Okay. Great. That allows really those two
3 motions then to be put aside and the whole shooting match is
4 really about the facility's motion to compel arbitration.
5 And, Your Honor, I'll apologize in advance. The nature of
6 this argument is one that's a bit cumbersome and I don't mean
7 to give too much of a monolog here, but I will try to cover
8 this ground as quickly as I can because what we have here is
9 the resident who is now deceased, her name is Jo Eva Rice.
10 Ms. Rice, she was admitted to the facility on January 5th of
11 2018. When she was admitted to the facility, her daughter
12 Sonya Lovett, who is now the plaintiff in this case and the
13 personal representative of Ms. Rice's estate, she signed on
14 her mother's behalf and admission agreement and another
15 document called an arbitration agreement.

16 And, Your Honor, to give you a short little road map for
17 what I intend to argue to you is that we recognize that Ms.
18 Ricer herself did not sign the arbitration agreement. So what
19 we're trying to do here is we're trying to enforce the
20 arbitration agreement against a non-signator, and South
21 Carolina law does allow for this. You typically, I guess, in
22 a more straightforward case you'd have the resident herself,
23 in this case Ms. Rice, sign the arbitration agreement or you
24 would have Ms. Rice having given a power of attorney including
25 within it the power to enter into an arbitration agreement and

1 her attorney in fact would have signed it for her. We don't
2 deny that we don't have either of those situations here. What
3 we have here though, is available to us, one of the means that
4 South Carolina recognizes to enforce agreements like this to
5 non-signatories which is through the process of merger and
6 then equitable estoppel, so I'm going to be arguing two
7 things to you to that point.

8 Number one is merger, which means the merger of the
9 admission agreement and the arbitration agreement and to be
10 one contract. And then if you'll go with me that far, and
11 I'll admit to you my equitable estoppel argument hinges on the
12 success of my merger argument because the equitable estoppel
13 argument then says that you cannot receive direct benefits by
14 virtue of a contract that includes an arbitration provision
15 and then deny the enforceability of that arbitration provision
16 within that contract under which you received those benefits.
17 You can't have your cake and eat it too you might say in more
18 colloquial terms. So anyway, Your Honor, first thing's first,
19 merger, and that is the foundation for my equitable estoppel
20 argument.

21 Now, as to merger there is a case that I think is the
22 springboard for all of this, which is case called Coleman vs
23 Mariner Health Care. In that case there was a somewhat
24 similar situation, actually very similar in some important
25 respects. You had the resident of the facility who was

1 admitted with the help of her sister. In that case her sister
2 signed an admission agreement and an arbitration agreement on
3 behalf of the resident. Now, the big issue in that case, Your
4 Honor, was whether or not the arbitration agreement was
5 enforceable on the basis of the Adult Healthcare Consent Act,
6 sometimes that's called the Surrogacy Statute. And the idea
7 there was that by virtue of the authority under the Adult
8 Healthcare Consent Act that the sister of the resident had the
9 authority not only to admit her sister to the facility, but
10 also to sign an arbitration agreement. Now in that case, Your
11 Honor, the Supreme Court said without question the Adult
12 Healthcare Consent Act doesn't give the sister the authority
13 to sign an arbitration agreement. Again, I'm only making that
14 point to say we're not arguing to Your Honor that we have a
15 statutory authority under the Adult Healthcare Consent Act.

16 But importantly, another argument that was in favor of
17 that arbitration agreement was the merger and equitable
18 estoppel argument. In the Court, although in that case the
19 Court rejected the equitable estoppel, excuse me, the merger
20 argument, the idea of the merger of the admission agreement
21 and the arbitration agreement, the Court said no, there's no
22 merger. The Court did recognize that South Carolina
23 recognizes the proposition of law where you have multiple
24 instruments that are signed at the same time, by the same
25 parties, for the same purpose, and of course the same

1 transaction our law presumes that they have merged unless
2 there is evidence of a contrary intent. Now in that case,
3 Your Honor, the Court found there was evidence of a contrary
4 intent, and it found it -- and again, I'm speaking of Coleman,
5 it found there was evidence of a contrary intent because, for
6 instance, the arbitration agreement in that case had a
7 provision in it that said it was revocable freely within 30
8 days meaning that if upon having executed it there were second
9 thoughts within 30 days it could simply be revoked. It also
10 found that there was evidence -- the Court spoke in terms of
11 what they called separatedness, meaning in intent to view
12 these instruments as separate stand-alone agreements as
13 opposed to a merged agreement. And it found that evidence of
14 separatedness both from the revocability the arbitration
15 agreement had and from the fact that the arbitration agreement
16 included an entire agreement clause that referenced, in the
17 Court's view, the admission agreement has a separate
18 instrument or separate contract.

19 My point in mentioning Coleman to you is to lay this
20 foundation, which is to say most importantly for me, the
21 difference between this case and Coleman is a factual
22 difference. Legally though, Coleman gave me the premises for
23 which I make this argument, which is yes, South Carolina does
24 recognize merger of instruments where again the same time,
25 same purpose, same parties, of course the same transaction.

1 Another thing that Coleman stands for, Your Honor, is that
2 Coleman recognized that in the case just like this one, in
3 terms of having an admission agreement and an arbitration
4 agreement, that every one of those boxes is checked: same
5 time, same parties, purpose, and transaction. Because what
6 Coleman said was we recognize that all of those are there
7 boom, boom, boom, boom, however, even though that presumption
8 of merger has arisen because of those, the contrary intent is
9 evident and so therefore there's no merger. So again, Coleman
10 recognized not only that the merger doctrine applies, it also
11 recognized that in the case of admission agreements and
12 arbitration agreements that we have those four, which were
13 signed like these were here on the same day, by the same
14 parties, so every one of those. Coleman, Your Honor, confirms
15 that what we have here is two instruments signed by the same
16 parties, same purpose, same time, of course the same
17 transaction.

18 Where I am trying to distinguish this case from Coleman
19 is to say unlike Coleman there is no revocation clause in the
20 arbitration agreement. It's not revocable. Also, you don't
21 have a situation where there's an entire agreement clause that
22 make reference or enforces the idea that there are intended to
23 be two separate documents.

24 In fact, Your Honor -- I'm trying to pull something up
25 here on the side by side, Your Honor, so I can see it very

1 easily and I hope it's not disrupting your view of me or your
2 hearing me, but I don't think it is.

3 There is an entire agreement clause in our admission
4 agreement, but importantly it contains the following language,
5 Your Honor: The undersigned further acknowledges that he/she
6 has received and read the admission handbook and other
7 admissions materials and understand that these documents are
8 made a part of this agreement by reference herein. Your
9 Honor, the admission agreement and the arbitration agreement
10 signed as it was in conjunction with the admission is indeed
11 another admission material. So unlike the case of Coleman
12 where there was evidence of seperatedness by virtue of an
13 entire agreement clause, here the entire agreement clause in
14 the admission agreement specifically contemplates this body of
15 documents, of these other admission materials outside of its
16 four corners that are a part of it, and we submit to Your
17 Honor that that includes the arbitration agreement. In fact -
18 - forgive me, Your Honor, I lost my train of thought just a
19 little bit. But the point I've made there is that's our
20 merger argument. We have those two documents, same time, same
21 parties, same place, same transaction. We don't have evidence
22 of an intent to be of speratedness.

23 And I would make this point, Your Honor, the rule of
24 merger is a rule that is a rule that has its own sort of
25 guardrails against excessive application. It doesn't apply at

1 all until you have those four prerequisites: time, the
2 parties, purpose, and transaction. If you don't have any one
3 of those, there's no question of merger anyways. So once you
4 have all of those, one, it provides a safeguard against its
5 overzealous application. But it also has to, if it is to mean
6 anything, mean that to upset the presumption in favor of
7 merger there has to at least be a nonspeculative basis upon
8 which to find that the parties intended there not to be a
9 merger, because again, the question here comes down to the
10 party's intent which is a fact specific question. So I would
11 -- in the plaintiff's brief in opposition they use a phrase I
12 think if there is -- essentially sort of saying if there's any
13 suggestion of an intent for these documents not to be merged
14 then there's no merger. Your Honor, respectfully I believe it
15 has to be something more than just a mere notion that is
16 speculative, otherwise the whole foundational premise of these
17 four prerequisites and a presumption in favor of merger, it
18 just doesn't make any sense. It allows an exception to devour
19 the rule. So while we recognize that there can be evidence
20 that overrides those four prerequisites, it must be at least
21 evidence upon which there can be a nonspeculative inference.
22 You know, just like jury verdicts in South Carolina can't be
23 based on surmise and speculation, I submit to Your Honor that
24 a factual finding against merger can't be either.

25 And, Your Honor, with that about merger what I'm thinking

1 I might do, as opposed to just going through, I'll make this
2 merger argument and then I'll also make the equitable
3 estoppel. Then if Your Honor is okay with it, allow Mr.
4 Christian to, you know, make his arguments and then I'll reply
5 to those because he has some specific attacks that I'll --
6 well specific challenges that I can rebut. But that's the
7 merger argument there, Your Honor.

8 So with that I'm now going to transition to the equitable
9 estoppel argument. Equitable estoppel was recognized in a
10 case called, well there's more than one case really, but the
11 case that's probably most important is a case called Wilson vs
12 Willis, our Supreme Court decided it maybe a year or two ago.
13 And it recognized a concept called direct benefits estoppel,
14 and it recognized this idea that you can't -- it's kind of a
15 you can't talk out of both sides of your mouth theory. You
16 can't say on the one hand, we have a contract and I've
17 benefited directly by virtue of that contract, and you can't
18 approve of the contract for that purpose and then have in that
19 contract and arbitration provision that you then deny the
20 enforceability of. So again, the point I would make here is,
21 at least to start, is that equitable estoppel is not an
22 argument strictly speaking for the enforceability of a
23 contract. It's an argument based upon equitable principles
24 that there should be no ability by their adversary to deny its
25 enforceability. So arguments, for instance, that Ms. Lovett

1 signed this without authorization they fall by the wayside
2 because they don't go to defeat any of the elements of
3 equitable estoppel because the estoppel claim again is not me
4 -- it's not a claim that's based upon us coming to you and
5 saying here's an enforceable contract. It's a claim about
6 coming to you and saying, Your Honor, they can't deny its
7 enforceability having allowed it to be enforced for their
8 benefit. So the direct benefits here, and the key is it has
9 to be a direct benefit, and it also is -- the case law uses
10 the term "consistently maintain" that the contract should be
11 enforced for their benefit.

12 Well here the admission was on January 5th, 2018. Ms.
13 Rice was a resident of the facility until June 18th of 2018, so
14 you have a period of about six months, five months where
15 during that time she had received the benefit of her
16 admission. She had received room and board and care and
17 treatment, and all of the bundle of things that would be
18 provided to her by virtue of that admission agreement. And,
19 Your Honor, if again you will bear with me on the merger
20 agreement. The admission agreement includes the arbitration
21 agreement. So therefore you have benefits that were directly
22 received consistently over a period of months, and you have
23 within that same document now, by virtue of -- the same
24 contract by virtue of merger, you have an arbitration
25 provision that the plaintiff in this case should be estopped

1 to deny the enforceability of under that scenario. And I
2 guess, Your Honor, with that if it pleases the Court I would -
3 - I think I've at least laid out the framework of my argument
4 on both of those fronts, merger and equitable estoppel. And
5 then if I could have an opportunity upon hearing Mr. Christian
6 to respond to that, then that would be appreciated. But I
7 think after that I will stop my monologue unless the Court has
8 questions.

9 **THE COURT:** All right. Mr. Christian.

10 **MR. CHRISTIAN:** Yes, sir. May it please the Court?

11 First, counsel referred to some documents that I'm not
12 sure were even presented to the Court or in evidence, so to
13 take care of that I filed a brief with the Court and emailed
14 one to His Honor containing four exhibits and I would like to
15 make sure those are part of the record. That would be -- they
16 contained the affidavit of the daughter that he referred to,
17 Ms. Lovett. The arbitration agreement itself, which is
18 exhibit 2; the admission agreement, which is exhibit 3, which
19 defense counsel referred to; and exhibit 4, which are two
20 pages of the nursing home records which basically document
21 that Ms. Rice was competent at the time all of this took
22 place, and there's several things that are important about
23 that.

24 The one thing that really stands out here is that the
25 defendants initially filed this motion contending that there

1 was an enforceable arbitration agreement because the daughter
2 had the power of attorney, that's what their motion says. And
3 so what we're hearing today is a totally different premise.
4 The one thing they skip over right from the beginning is the
5 daughter had no authority to sign any documents. She didn't
6 have the authority to sign the admission agreement, and she
7 didn't have the authority to sign the arbitration agreement.
8 And if she didn't have the legal authority to sign the
9 admission agreement, this argument about merger which we
10 totally disagree with, factually and legally, doesn't apply to
11 anything. The only way the daughter could have the authority
12 to sign any documents would be, number one, if she held a
13 power of attorney, which she did not as set forth in our
14 affidavit.

15 The burden is not on us to disprove a contract; the
16 burden is on the defendants to prove there's an enforceable
17 contract and that needs to be said. The second thing is the
18 only other way that daughter could sign any of these documents
19 legally would be, as counsel mentioned, if she had the
20 authority under the Adult Healthcare Consent Act. And the
21 Adult Healthcare Consent Act requires essentially in the
22 statute that the principal be incapable of understanding what
23 she would be doing to sign documents, and then it allows
24 someone, a responsible party, to sign on her behalf. So
25 number one, defendants have shown no evidence that that was

1 triggered here.

2 Number two, the defendants' own documents in exhibit 4
3 show that that did not exist, and so really the argument could
4 end right here. The daughter had no authority to sign
5 document one, the admission agreement, and therefore this
6 argument of merger, which we'll show the Court is absolute
7 nonsense in this case. This case is on all fours with
8 Coleman, with Hodge, and with the Thompson case. All three
9 cases dealing with this issue. There's never been a case in
10 South Carolina dealing with a nursing home admission where the
11 Court's have found that there was a merger and an equitable
12 estoppel.

13 If you read the Hodge case, which I've outlined in my
14 brief and will talk about in a little bit here, which is
15 subsequent to Coleman. It actually just adds more meat to the
16 Coleman case. This case is almost on all fours and parallels
17 that case, where the Court denied arbitration. So having
18 said, number, one that there is no enforceable admission
19 agreement and therefore merger is not even a conversation, I
20 will talk about the merger issue.

21 Sonya Lovett, the daughter, signed a 12-page admission
22 agreement. In that admission agreement there's no reference
23 to the arbitration agreement. There are different terms, as
24 counsel talked about. He said in the Coleman case one of the
25 differences was the arbitration agreement said that it could

1 be terminated in 30 days and there was nothing in the
2 admission agreement saying it could be terminated. Well this
3 case is identical to that except it's reversed. The admission
4 agreement says it can be terminated at any time by the
5 patient, where the arbitration agreement has a nontermination
6 agreement. It's identical to Coleman in that respect, except
7 the terms are in different documents which indicates a lack of
8 intent for merger. Furthermore, there are two entirely
9 different purposes and Hodge, Coleman, and Thompson talk about
10 that factor when it comes to merger. The arbitration
11 agreement is solely related to legal issues, a waiver or a
12 jury trial where the admission agreement is related totally
13 and solely to provision of services.

14 Now, counsel says that the admission agreement, and this
15 is one of the other things that all of these cases talk about,
16 is the admission agreement says that that 12-page document is
17 the entire agreement. And I heard counsel say something other
18 than what I'm reading her, so let me just read the paragraph
19 under that which is entitled entire agreement. I/we hereby
20 acknowledge that I/we have read this page and all preceding
21 pages of the 12-page document and they're numbered 1 of 1, 2
22 of -- I'm sorry, 1 of 12, 2 of 12, etcetera, and acknowledge
23 that this agreement, this 12-page agreement, represents the
24 entire agreement and understanding between the parties and
25 supersedes all previous representations, understandings, or

1 agreements, oral or written, between the parties and may not
2 be amended except by written agreement of the parties. That
3 is the paragraph that's written under the heading that says
4 entire agreement at the conclusion of this document. It does
5 not say anything about an arbitration agreement. In fact, the
6 arbitration agreement, again, has different terms about
7 termination. Some of the other factors that these cases talk
8 about is the fact that they were page numbered just like these
9 are. The admission agreement says page 1 of 12, 2 of 12, 12
10 of 12. The arbitration agreement says 1 of 1 indicating they
11 were intended to be separate documents because what merger is
12 about was the intention that they be essentially one document.
13 The Courts in Hodge and Coleman and Thompson talk about the
14 concept of requiring a signature on each indicates they did
15 not intend them to merge.

16 So there's so many things that indicate that merger ---
17 that this case is parallel to the Hodge, Thompson, and Coleman
18 cases. And so here the defendants are simply trying to
19 enforce a contract that doesn't exist, that the principal
20 never consented to, and there's no evidence that she gave
21 permission to anyone to sign any of these documents for her so
22 the argument has sort of changed since the motion was filed.
23 The focus is on, number one, what did Ms. Rice do, and that's
24 what all of these cases say. You don't look at what the
25 alleged agent does. Under defendant's argument, I could ask

1 counsel where he banks, I could go into that bank and tell
2 them I have the authority to withdraw his money and that would
3 be okay because there's no evidence being presented that Ms.
4 Rice gave anyone consent to sign her name to any documents.

5 So it is untrue that she represented that she had a power
6 of attorney as they have alleged in their motion. But even if
7 she did, it doesn't matter because she didn't sign or enter
8 into anything and there's no evidence that she did. Ms.
9 Lovett had no authority to sign anything.

10 Just four years ago the Hodge case, which is cited in my
11 brief, rejected the same arguments the defendant is making in
12 this case. Not only -- so when it comes to merger, there is
13 no merger. The documents are exclusive of each other, they're
14 paginated different, they have different termination, and
15 there's no showing of evidence. The Hodge cases specifically
16 talks about this issue. If I might? The Hodge case, as
17 counsel said, quotes the Thompson case and estoppel does not
18 even come into consideration unless the two documents merge,
19 and they cite all of these things that I just spoke to. The
20 Coleman case, again, which the Hodge case refers to, says that
21 there was no merger. Why? Number one, separate documents.
22 We clearly have separate documents. Number two, the contracts
23 like here show they are separate documents the way they are
24 page numbered, and they refer to that in the Coleman case.
25 The two documents state they are sperate. One says, the one

1 here says the 12-pages are the entire agreement, and counsel
2 says well the two documents state they're separate. The one
3 here says these 12 pages are the entire agreement, and counsel
4 says well somewhere in this contract it says other admission
5 documents but he has no evidence that this included the
6 arbitration agreement as being referenced and is not included
7 in the policies they were presented. And counsel's making
8 arguments about things that we're supposed to assume exist.

9 They had different termination provisions and each had
10 its own signature. All of those items the Coleman case talks
11 about that counsel does not mention in this case.

12 It's also very specific that both Hodge and Coleman talk
13 about the fact that signing the admission agreement is a
14 healthcare decision, not a legal decision, and so there's a
15 very high bar to showing merger in such cases.

16 It is in fact true, if you can give me just a minute to
17 backtrack. I'm sort of, rather than doing my argument, trying
18 to meet the issues of defense counsel. The case of Klutts, K-
19 L-U-T-T-S v Down'Round, which is cited in my brief,
20 specifically says that anything, it used the word anything,
21 indicating a contrary intention prevents merger, prevents
22 merger, anything. And here we've shown numerous things as
23 they existed in the Coleman case, so that's not caselaw we're
24 making up, that's Klutts v Down'Round. It says if anything
25 indicates a contrary intention, those anythings would include

1 separate documents, separate signatures, and entire agreement
2 clause, different determination clauses, page numbers stating
3 specifically 1 through 12 and the other one saying 1 of 1, one
4 being a healthcare document, one being a legal document. And
5 again, I would go back to my original statement, the daughter
6 Ms. Lovett had no authority to sign either of these documents
7 because the adult consent -- Healthcare Consent Act doesn't
8 apply, and so I don't know how we're supposed to say she had
9 the authority to sign any of these documents. Again, the
10 Coleman, Thompson, and Hodge cases all talk about how all of
11 these serve different purposes.

12 And then finally, counsel talks about this equitable
13 estoppel argument, so if they accomplish merger, if they prove
14 that Ms. Rice signed the document, which she did not, or that
15 someone had authority to sign, which they did not, and then
16 you reach the merger argument and they prove that, which they
17 did not, then you look to see if there's equitable estoppel.
18 In the Wilson v Willis case does address this, and it states,
19 number one, that Court says there's a presumption against
20 forcing someone to arbitrate based on an agreement she didn't
21 sign, it says that. Number two, the Wilson case which counsel
22 cites, states equitable estoppel should be used sparingly.
23 Number three, you look at the Direct Benefits case to see if
24 that person used the other document to benefit themselves, if
25 they had signed it, first of all they had to sign it, and to

1 knowingly exploit the agreement to her benefit. And it goes
2 on to say the mere fact that she was admitted to the nursing
3 home under the admission agreement is not sufficient to show
4 an exploitation of the other agreement to force equitable
5 estoppel for the arbitration agreement. And it actually goes
6 on to state that the mere fact that a claim would not exist
7 but for the admission contract is not sufficient evidence of
8 exploiting and taking advantage of the other signature. So
9 there is no trigger here to show that anyone had the right to
10 sign, and an examination of the cases as they actually speak
11 would show that this motion should be summarily dismissed.

12 **THE COURT:** Mr. Hines.

13 **MR. HINES:** Your Honor, I think that there's a danger and
14 difficulty to this in conflating certain concepts. For
15 instance, Mr. Christian, I just understood in his argument he
16 referenced the Adult Healthcare Consent Act a number of times.
17 To be clear, we are not at all invoking the Adult Healthcare
18 Consent Act. We recognize that the Coleman case says that
19 does not provide a statutory authority to enter into an
20 arbitration agreement, no question. The other thing is, for
21 instance, he mentioned the idea of finding out, you know, my
22 bank and going there and saying he was my agent. There's a
23 joke to be made there about how little of a recovery you would
24 probably get out of that, but more importantly, Your Honor,
25 that's an agency theory, that's not an equitable estoppel

1 theory. And so he's absolutely correct when he says that when
2 we are talking about -- if we are basing this on an agency
3 based authority no question that the supposed principal is the
4 manifestations of the supposed principal either implicitly or
5 expressly that we would use to come up with an equitable, or
6 excuse me, an apparent authority or an actual authority
7 argument. We're not arguing that. So these concepts we have
8 to stay within the lines to properly analyze this.

9 And I would mention this, Your Honor, there was mention
10 of our motion being -- that we have premised this on Ms.
11 Lovett being the power of attorney, and I can see how -- well,
12 Your Honor, I think that's respectfully a bit of a misreading
13 of the motion. The motion, what it actually says, Your Honor,
14 in pertinent part is Ms. Lovett identified herself as Jo Eva
15 Rice's "durable power of attorney for healthcare/legal
16 guardian/responsible party" in the arbitration agreement.
17 Where that's coming from, Your Honor, and plaintiff is correct
18 it's one of the places it's in the record is exhibit 2, the
19 admission agreement, exhibit 2 to plaintiff's memo. Exhibit 3
20 to plaintiff's memo is the admission agreement. This is the
21 final sentence of the arbitration agreement, by her signature
22 below the executing party represents that she -- that he/she
23 has the authority to sign on respondent's behalf so as to bind
24 the resident as well as the representative. That's the plain
25 language of the final sentence of the arbitration agreement.

1 Above it also does identify her as -- it makes reference to
2 the resident's durable power of attorney for healthcare/legal
3 guardian/responsible party. But the language I want to focus
4 on is by his or her care -- by signature below the executing
5 party represents that he/she has the authority. Now that
6 authority doesn't have to come from a power of attorney. It
7 can come from an agency, you know, it doesn't say what source
8 of authority, it says she has the authority to sign on a
9 respondent's behalf so as to bind the resident as well as the
10 representative and there it is duly signed by Ms. Lovett.
11 Now, Your Honor, there is a presumption under our law that one
12 who has signed a contract is presumed to have read,
13 understood, and assented to its terms. That's a case called
14 Gibson vs (inaudible). There's no question here that she has
15 indeed made that representation. There's no suggestion here
16 that Ms. Lovett -- and she couldn't be a personal
17 representative if there was any question as to her competency,
18 but there's no suggestion that she did not sign it, she did.
19 She did, in signing, make that representation. It's a 1-page
20 document, it's not some sort of phone book. And I'm not
21 suggesting to Your Honor that that carries the day and
22 improves her authority, because again, my argument is based
23 upon not proving that she signed this as an authorized agent,
24 but that they should be estopped to argue that it's not
25 enforceable. That's a different way of going about this, and

1 you know there's more than one way to skin a cat. We're not
2 arguing agency, we're not arguing power of attorney, we're not
3 arguing the Adult Healthcare Consent Act, so when those things
4 come up those things are really sort of missing the point that
5 we're making.

6 Similarly, Mr. Christian has said, and I think this might
7 actually be helpful to me in illustrating my point, the denial
8 that Ms. Lovett even had authority to sign the admission
9 agreement. Well equitable estoppel applies to that
10 proposition too. In fact, think about it, let's just take the
11 case if we were here to argue whether or not she had authority
12 to sign the admission agreement. We would say well hold on
13 now, whether or not she had the authority to it, the resident
14 was admitted by virtue of that in which she did represent that
15 authority. She, not the resident, but she, Ms. Rice -- Ms.
16 Lovett rather. And she resident was admitted, and not only
17 admitted, received room, received board, received care,
18 received treatment. And I would note this case, there's an
19 allegation, the primary allegation is really that Ms. Rice had
20 a history of seizures and that there was not a proper on June
21 17th and 18th to a seizure that she was suffering. There's
22 other allegations too about not monitoring her changes in
23 conditions and certain things like that, but even the
24 plaintiff's complaint is not so broad as to say that she
25 received nothing at the facility that wasn't efficient. I

1 mean she was there for six months, she received meals, she
2 received treatment, these are benefits. And by the way the
3 question of whether or not the care met the standard in the
4 ways that the plaintiff challenges, that's not for us to
5 discuss today, that's the merits. So as far as the idea that
6 Ms. Lovett didn't have the authority to even sign the
7 admission agreement, equitable estoppel takes care of that
8 just as strong as it takes care of the merger agreement. The
9 idea is that's an agreement that was signed and consistently
10 enforced to the benefit of the resident, Ms. Rice.

11 And I don't mean to beat a dead horse on it, Your Honor.
12 I suppose I don't have anything more to say to that. She got
13 those benefits for approximately five months. Again, room,
14 board, care, treatment, by the way things that the plaintiff
15 isn't even complaining about. The scope of plaintiff's
16 complaint doesn't include every single aspect of her residency
17 there, it includes certain aspects. So even conceding to
18 plaintiff's complaint for the purposes of this argument
19 identifies deficiencies, it's not all deficiencies is what I'm
20 saying, and what's not deficiencies are indeed benefits.

21 Now, I would make the point Mr. Christian I thought I
22 understood him to say -- this is a good way to make this
23 point, he suggested maybe that I am misremembering certain
24 nuances of the case law in this. Your Honor, I don't believe
25 that's the case, but for instance, if we're going to talk

1 about some of the nuances of the case law, I understood Mr.
2 Christian to argue these two agreements aren't even for the
3 same purpose. Well, Your Honor, the Coleman Court gives me
4 that much. If you'll indulge me a little bit of reading.
5 This is from the Coleman decision, Appellants contend that
6 even if sister lacked the capacity to execute the arbitration
7 agreement under the Adult Healthcare Consent Act, and again,
8 Coleman absolutely said she did lack it under the Adult
9 Healthcare Consent Act, that's not our argument. It says even
10 if, it's going to another argument, that's where we pick up,
11 she's nevertheless equitably estopped to deny the arbitration
12 agreement's enforceability. Circuit Court held there was no
13 estoppel here and we agree. And now we're going to explain
14 why, Appellant's equitable estoppel argument is premised on
15 their contention, just like mine is here, that under state law
16 the admission agreements and arbitration agreements merge in
17 South Carolina. The general rule is that the absence of
18 anything indicating a contrary intention where instruments are
19 executed at the same time, by the same parties, for the same
20 purpose, and of course for the same transaction the Courts
21 will consider and construe the documents together. The theory
22 is that the instruments are effectively one instrument of
23 contract. Here the documents were executed at the same time,
24 by the same parties, for the same purposes, and in the course
25 of the same transaction unless there is a contrary intention.

1 The Appellant's are correct that there was a merger. I don't
2 see how there's any room to argue that we don't have the same
3 purpose, or the same -- it is the exact same situation in
4 Coleman in terms of a family member signs the arbitration
5 agreement and admission agreement, two separate documents, for
6 the resident. That's exactly what happened here.

7 The reason our outcome, we contend, should be different
8 from Coleman is because we have different facts on this
9 question of what the intention was. So you know, Mr.
10 Christian here for instance, he recognizes and we do too, this
11 issue of an entire agreement clause, that was important to the
12 Coleman Court. And I suspect in this case Mr. Christian -- I
13 want to make this clear, Your Honor. He was reading from the
14 entire agreement clause and he read one paragraph. If he --
15 two paragraphs below that right above the signature page is
16 the language that I read to you the undersigned further
17 acknowledges that he/she has received and read the admission
18 handbook and other admissions material and understand that
19 those documents are made a part of this agreement by reference
20 herein. I mean what I am reading is within that section
21 called entire agreement. It must have escaped his memory in
22 that moment, so I want to be clear, I'm not picking something
23 from way outside the entire agreement clause. That's the
24 third paragraph and it's one sentence, so it's right there
25 underneath it.

1 And to that point, Your Honor, about what other admission
2 agreement, admission materials are, this is the language from
3 our Court of Appeals in a case called Stott vs White Oak
4 Manor, and it's just a quote of a sentence in the case. The
5 same day as decedent's admission into White Oak, Stott acting
6 as decedent's representative, signed White Oak's admission
7 documentation including the arbitration agreement. Just in
8 the common language that the Court of Appeals used, there was
9 a recognition that the contemporaneously signed admission
10 agreement, arbitration signed contemporaneously with admission
11 is admission documentation. That's not anything that was --
12 and it wasn't necessary for admission. Certainly the
13 admission could have just been -- could have just said it's an
14 optional arbitration agreement, but it was signed. It was
15 signed by a competent adult, who again is deemed to have read,
16 understood, and agreed to it by virtue of our law. And so
17 certainly it was in conjunction with the admissions process,
18 done at the same time. Again, I don't know how it can be
19 argued that it's not admissions material given that Coleman
20 recognizes that we're talking same time, purpose, transaction,
21 and parties.

22 Now, one thing I missed, Your Honor, there's this motion,
23 and I don't think the case is quite as strong as I was
24 understanding Mr. Christian to argue about this business of
25 multiple signatures on both, page 1 of 1, page 1 of 12 and so

1 forth. This is an obvious point but it's important to keep in
2 mind, the whole idea of merger only exists because we're
3 talking about situations where there are multiple instruments
4 involved. There will never be a question of merger without
5 multiple instruments, I mean, there's nothing to merge.
6 You've got to have something to merge. So the fact that one
7 says 1 of 12 and the other one says 1 of 1, that doesn't tell
8 us anything about the consent of the parties; because again,
9 if the intent of the parties could be determined by the
10 existence of multiple instruments there would never be a
11 merger, it would be self-defeating. What he also needs to
12 understand as it operates in this environment, it operates in
13 the environment where again we have the guardrails as I
14 mentioned, same time, same purpose, same transaction, same
15 parties. If you don't have any one of those, you don't have
16 anything to talk about anyway. So the idea that that would be
17 overridden by the fact that one says 1 of 1 and the other one
18 says 1 of 12, yes, those instruments, one is a one page
19 instrument and one is a 12 page instrument. But we're not
20 talking about whether they should be continuously paginated,
21 we're talking about whether they should be merged.

22 So I submit to Your Honor that those cases do not go so
23 far as to say that's the death nail of my argument. In fact,
24 logically I don't know how they possibly could without
25 completely eviscerating the whole merger presumption. Again,

1 I recognize there's language that talks about the existence of
2 a contrary intention, but what that logically has to mean is
3 something that the Court, as Court's must do, can hang its hat
4 on to come up with a nonspeculative conclusion because
5 decisions of factual determination can't be made on
6 speculation.

7 A couple more points, Your Honor, then I promise I'll
8 hang up. Oh, there was a notion about a presumption against
9 enforcing against a non-signatory. Your Honor, that language
10 is something that should carry no sway with the Court today.
11 The language is, one, I don't -- it's dicta in any event, but
12 it is also -- it's also completely at odds with the Federal
13 Arbitration Act. One thing we did not discuss, but there's no
14 question here, the Federal Arbitration Act governs this. The
15 Federal Arbitration Act governs any contract, arbitration
16 agreement involving a contract evidencing a transaction in
17 interstate commerce. The arbitration agreement here says that
18 the FAA applies. We have a case called Dean vs Heritage
19 Healthcare where our Supreme Court recognized that arbitration
20 agreements in the contexts of these nursing home admissions,
21 they are governed by the FAA because they involve interstate
22 commerce. The point is the FAA says that state law -- states
23 have to place arbitration agreements on equal footing with any
24 other contract. And that means, you know, that you can't have
25 a state law that disfavors an arbitration agreement if there's

1 not such a law that applies to any other contract. Well the
2 whole idea of not enforcing an arbitration agreement against a
3 non-signatory can only jive with the FAA if that premise
4 applies for any other contract, and I'm not aware that it
5 does. A special rule that disfavors arbitration agreements,
6 and what Mr. Christian mentioned was I understood a rule that
7 disfavors arbitration -- the enforcement of arbitration
8 agreements against non-signatories. That can't apply, can't
9 single out arbitration agreements unless there's some other
10 rule that would say the same thing as to any other contract,
11 and I'm not aware that there is. In fact, in that place where
12 that dicta is mentioned in that case, I don't think the Court
13 even cites any South Carolina law ---

14 **MR. CHRISTIAN:** It is.

15 **MR. HINES:** (Inaudible) Sure, Your Honor probably doesn't
16 hear very many of these motions. I mean, you know ---

17 **THE COURT:** These motions, are you serious, I hear them
18 all the time.

19 **MR. HINES:** Well you probably hear -- well, Your Honor, I
20 shouldn't get carried away. I should say that I would imagine
21 that the percentage of motions where this is invoked are
22 relatively quite a small amount of the motions that you're
23 hearing. I'm not suggesting, Your Honor, that -- I guess what
24 I mean, Your Honor, is the word sparingly is a troublesome
25 word because it might suggest I think unduly some sort of

1 hostility towards what we're arguing. I think that the
2 question is sparingly though it may be, it should be applied
3 wherever it does apply, and it applies here. So the word
4 sparingly shouldn't mean, yeah, the dots are connected but I'm
5 just going to toss them out the window anyways because it's
6 sparingly. I don't think that that sparingly should be taken
7 to -- in some notion that just means it allows for just
8 essentially ignoring a proper case on the idea that well we
9 shouldn't do it that often. I mean it's either a proper case
10 or it's not is what I'm saying. That sparingly language I
11 don't think is, you know, is really significant ---

12 **THE COURT:** It means clearly applicable.

13 **MR. HINES:** Correct. Yeah, I think -- I would agree with
14 that. If we make a case where we fit within the framework
15 then that sparingly language shouldn't knock it out of the
16 framework if we've made that case persuasively.

17 And then one other thing, Your Honor, and this is the
18 last point. You've been very, very kind and indulging and I
19 appreciate it.

20 **THE COURT:** I'm getting paid for all day.

21 **MR. HINES:** Thank you, Your Honor. Nonetheless, I still
22 appreciate your patience with me.

23 Oh, there was something about this idea of terminations
24 and I wanted to clarify this. Mr. Christian made the point
25 that unlike in the Coleman case where they had this

1 revocability of the arbitration agreement, in the admission
2 agreement, wasn't -- he mentioned that it's flip flopped here.
3 The thing about that is, Your Honor, it's important that it's
4 flip flopped here because, you know, this is a case -- I wish
5 I could find one with different parties, but this is a case
6 called Hooters of America, Inc. vs Phillips. It's a US
7 District Court case. "Under South Carolina arbitration laws
8 the duty to arbitrate under arbitration clause in a contract
9 survives termination of the contract." So what he's
10 suggesting is flip flopping is nothing but the standard way
11 arbitration agreements operate. The whole idea is when you've
12 agreed to arbitrate, you're arbitrating your claims that arise
13 out of, you know, these related claims. So of course the
14 admission agreement can be terminated, a person can move out
15 of -- no longer be a resident, but that doesn't mean you've
16 terminated the arbitration agreement so therefore the claims,
17 if you make one, that would have been covered, you know --
18 meaning the arbitration clause has to survive or else unless
19 you're talking, unless you'd have to sue I suppose, or having
20 to dispute arising and sent to arbitration while the person
21 was still a resident. So I'm suggesting to Your Honor that
22 that idea of flipping the Coleman facts around, it doesn't
23 make the point that Coleman made. Coleman was making the
24 point about these two documents being -- showing a
25 separateness. In fact, I would argue that the way that the

1 arbitration agreement remains in force it actually shows its
2 continuing connection to the arbitration clause, even after
3 the admission agreement is no longer enforced. The only
4 reason there's an arbitration agreement is to deal with claims
5 that arise out of the admission agreement, that's it. I mean,
6 you know, it really doesn't make sense to me to think that
7 these things would stand on islands, never the two shall meet.
8 You know, again, Coleman tells us same purpose, time,
9 transaction, and parties.

10 Your Honor, my handwriting is not great, but I think I
11 have covered all of the little notes I jotted down and I thank
12 you, again, very much for your indulgence. And if you have
13 any questions I'll be happy to do my best with them, but
14 otherwise I think I've given you our arguments in favor of why
15 we ask that Your Honor compel arbitration between the facility
16 and the plaintiffs. And I don't think that we have any
17 disagreement here that if Your Honor should be inclined to do
18 that, that a stay would be appropriate for these other
19 parties.

20 **MR. CHRISTIAN:** Your Honor, may I speak briefly?

21 **THE COURT:** Sure.

22 **MR. CHRISTIAN:** The thing that I first heard counsel say
23 in reply is that they weren't even arguing the agency. If the
24 daughter had no authority, if she was not an agent, there are
25 no contracts and that's point number one. And that's what the

1 Hodge case -- the Hodge case talks about every issue he's
2 talking about, and had the same arguments that counsel is
3 making, and rejected every one of them for the same reasons
4 we've discussed. But the daughter had no authority, and the
5 Hodge case makes that point repeatedly. In the Hodge case her
6 husband signs for her. And they even said, you know, in that
7 case they wanted -- the defendants wanted to take the
8 deposition of the husband about agency, to prove he had the
9 authority. The Court said it doesn't matter what the husband
10 says, it only matters what the principle says who was the
11 resident in the nursing home. If she said -- if she can't say
12 that she had given him agency and authority then there are no
13 contracts, and the threshold issue is whether there's a
14 contract.

15 This issue about the Federal Arbitration Act is a red
16 herring indeed because the threshold issue is is there a
17 contract and state law governs that issue. And in this case
18 there are no contracts, number one. There's simply no
19 enforceable contract, period. Ms. Rice is the person who's
20 the principle, who's at issue, who owns this case. The Hodge
21 case is just abundantly clear about that, and there's no --
22 the defendants haven't offered any and said they're not even
23 arguing that the daughter had authority. Estoppel doesn't
24 apply because it's not the daughter's case; it's Ms. Rice's
25 case. And so that is a complete red herring, it's contrary in

1 its entirety to Hodge, to Coleman, to Thompson, to Wilson, all
2 of those cases you have to have agency authority to begin with
3 to even start these other arguments. The other arguments
4 fail.

5 And one thing, the issue with what counsel called the
6 flip flop was where the termination clause existed in one and
7 not the other one. It doesn't matter which one. The Court's
8 point was they were separate and different documents with
9 different terms in them, conflicting terms between them, so
10 they can't really merge. And as the other Courts point out if
11 there's anything such as that, and they point out the page
12 numbers and separate signatures and said if there's anything
13 that would prevent merger -- and again, my point is there's no
14 contract here because, as counsel said, there's no agency.
15 Thank you.

16 **THE COURT:** All right. Mr. Hines, last word.

17 **MR. HINES:** Thank you, Your Honor. Very briefly.

18 If Your Honor would like to hear more about this Hodge
19 case and how it doesn't tick off all of my arguments one by
20 one, I'd be happy to do that, that's something better done in
21 written form. If Your Honor would like something like that I
22 could do it. But I can assure Your Honor that my argument
23 navigates around the Coleman, Thompson, Hodge authority. And
24 by accepting the law as it's given and by distinguishing the
25 facts.

1 For instance, let me make two points that need to be
2 made. The first one, I hope I've made it before but I'll have
3 to try and reiterate it. If what Mr. Christian is saying is
4 true about how you have to have an enforceable contract, well
5 you wouldn't ever have a need for an equitable estoppel.
6 Equitable estoppel is a device to get around a lack of
7 enforceability by virtue of an equitable device. You don't
8 need that, you would never be able to get into that equitable
9 device if we were just talking enforceability. As I
10 understand it, for instance in the Coleman case that I read at
11 length a moment ago. That whole case proceeds from the idea,
12 you know, that equitable estoppel is a workable method of
13 enforcement. In fact, that's also said in the -- in this
14 Wilson vs Willis case. If Your Honor will indulge me just a
15 moment I can pull up the exact quote which is that South
16 Carolina has recognized several theories that can bind non-
17 signatories to arbitration agreements under general principles
18 of contract and agency law including, one, a corporation by
19 reference, assumption, agency, veil piercing, alter ego, and
20 estoppel. Estoppel is a separate basis. So we're not arguing
21 agency. Again, estoppel, the whole point is to say you can't
22 come in -- you can't argue against the enforceability of the
23 contract because equity precludes you from doing so.

24 Now, Your Honor, you may or may not be persuaded by that,
25 but a necessary element of that is not proving an enforceable

1 contract. If it were, once I proved it an enforceable
2 contract there'd be no reason to talk about equity. So you
3 know I think that's as clear as I can make it.

4 And the last point I would make, Your Honor, is that the
5 idea about the termination of the provision showing an idea of
6 a separateness, consider this, Your Honor. In the case of a
7 single contract without question includes an arbitration
8 clause. The arbitration clause is going to outlast the
9 contract in which it is included because that's the way
10 arbitration works. I mean there's nothing about that that
11 suggests any sort of intent of separateness. Let's just image
12 this was one document, there's never a question of merger and
13 it had an arbitration clause that said the exact same thing,
14 which of course is what it would say. Because just because
15 you've left the facility, in this case we weren't sued while
16 she was in the facility, the agreement was certainly
17 terminated. Ms. Rice was no longer living. This case was
18 brought last year. So if the arbitration agreement terminated
19 at the same time as the admission agreement did there would be
20 no question of arbitration now because the arbitration
21 agreement would no longer be enforced, but it has to be
22 enforced to over the tail of these disputes. The same way it
23 would if it was embedded in a single contract or a single
24 instrument because, again, our argument is it operates as a
25 single contract by virtue of merger.

Circuit Court
2021-CP-42-03701

Transcript of Record

Harold Ferguson
Proofreader



1 THE COURT: Let's move on to Lovett v. Fundamental.

2 MR. CHRISTIAN: Good morning, Your Honor.

3 THE COURT: Good morning. And this is defendant's
4 motion?

5 MR. HINES: Yes, sir.

6 MR. CHRISTIAN: Yes, sir.

7 MR. HINES: Yes, Your Honor.

8 THE COURT: All right, Mr. Hines.

9 MR. HINES: Thank you, Your Honor. May it please the
10 Court? I hope you're able to hear me all right? This is our
11 motion --

12 THE COURT: I am.

13 MR. HINES: This is the defendant's motion for
14 reconsideration of your prior order denying our motion to
15 compel arbitration and some motions to stay. And just by way
16 of very brief background, and that's -- well, before I even
17 get into that, let me -- let me say, I realize that this is a
18 motion for reconsideration, and as such, you know, I
19 understand that the Court's already given quite a bit of
20 thought to the order --

21 THE COURT: Careful consideration.

22 MR. HINES: Yes, Your Honor. And I will say candidly
23 that the biggest reason -- and I appreciate you hearing this
24 on reconsideration, but the biggest thing I'm endeavoring to
25 do is to dot my Is and cross my Ts from a record-preservation

1 standpoint. And so that's why the motion that I've filed is
2 pretty detailed, and for the most part, I think almost --
3 well, I'm happy just to rely on it as opposed to going point
4 by point through what is quite a lot.

5 THE COURT: Okay.

6 MR. HINES: But -- but with just a little bit of
7 background here, the -- this -- a motion to compel arbitration
8 was made by THI of South Carolina at Magnolia Place,
9 Spartanburg. That's a skilled nursing facility. And there
10 were -- along with that motion are two other motions that were
11 made by codefendants, Fundamental Clinical and Operational
12 Services, and Fundamental Administrative Services. And those
13 two motions, essentially, are tag-along motions. The idea
14 there is that they asked for the case to be stayed, as to
15 them, pending the results of the arbitration that the facility
16 was seeking to compel.

17 And Your Honor, the context of this is a nursing home
18 malpractice case. Allegations are wrongful death -- wrongful
19 death and survival based upon alleged deficient treatment
20 of -- or care provided to Jo Eva Rice, the decedent. The case
21 is being brought by Sonya Lovett, who is Mrs. Rice's daughter.

22 And the -- the main point, I guess, I want to make to
23 Your Honor in -- as far as in our argument time that we have
24 is, one, I think I have a duty of candor to the Court to
25 acknowledge that since we filed this motion to reconsider, the

1 court of appeals, in another case, where we're making a very
2 similar argument for arbitration.

3 The case is called The Estate of Mary Solesbee v.
4 Fundamental Clinical and Operational Services, et al. The
5 case was filed by the court of appeals on January 25th of this
6 year, and it's appellate case number 2019001731. The court
7 has ruled against us and this is a published decision on the
8 question of what's called merger. And just to refresh the
9 Court's memory, what -- our main argument here for enforcement
10 of the arbitration agreement is that we had an arbitration
11 agreement and an admission agreement that were signed at the
12 same time by Ms. Lovett, Sonya Lovett, when her mother was
13 being admitted to our facility.

14 And the argument is -- is that we have two documents,
15 signed at the same time, by the same parties, for the same
16 purpose, and in the course of the same transaction. Those
17 documents are presumed to merge unless there is an
18 intention -- there's evidence of a contrary intent. And the
19 contrary -- if there's evidence of a contrary intent, then the
20 documents would maintain their separate character. But if
21 there is a merger -- and again, the doctrine of merger flows
22 from the coincidence of these four things: multiple
23 instruments signed by the same parties, for the same purpose,
24 at the same time, and the course of the same transaction. If
25 they're merged, they would be considered and treated as one

1 single contract.

2 And if you'll go with me that far, then we've asked the
3 Court to apply -- to enforce the arbitration agreement on the
4 basis of direct benefits of estoppel. And that concept holds
5 that you cannot receive direct benefits from a contract and
6 then deny -- under certain provisions of the contract. And in
7 this case, if they are merged, the direct benefits to Ms. Rice
8 would be her admission to the facility, her receipt of room
9 and board, and various services, and treatments that she
10 received. Even though I understand that the allegations of
11 this case are there were deficiencies in that treatment, I
12 want to make clear two things. That those deficiencies did
13 not extend through the entirety -- throughout the entirety of
14 her experience. For instance, they don't suggest that she
15 wasn't fed, she wasn't -- she didn't receive room and board.
16 There's -- there -- they're more targeted, obviously. So
17 there are benefits that she received that are outside the
18 scope of what is complained about. And furthermore, what's
19 complained about is, of course, in dispute. And this isn't
20 the procedural juncture where the Court would decide questions
21 of the merits of the claim deficiencies or our defenses.

22 So if -- but if the Court would agree that the documents
23 are merged, then you look to this direct benefits. The idea
24 that, with the merger, the admission (sic) agreement is now
25 part and parcel of or merged with the admission agreement into

1 one contract. She received the benefits; therefore, she
2 cannot disclaim or deny the enforceability of the provision of
3 by virtue of merger the same contract that requires
4 arbitration of disputes.

5 Then, I realize that's a lot to say and it's a bit
6 longwinded, but on this case of Solesbee that we've -- that we
7 have, we've made the argument of merger, and the contracts
8 involved -- or the documents, rather, involved -- the
9 admission agreement and arbitration agreement -- are
10 identical. And in that case, the court of appeals ruled
11 against us on the basis that there was no merger of the -- of
12 these.

13 Now, I feel obliged, as I said, to bring that case to
14 Your Honor's attention because it's a published decision of
15 the court of appeals and it's -- it's relevant to be
16 considered here. I would argue that it is not binding on this
17 Court for two reasons: number one, the time for petitioning
18 for rehearing has not run. We've gotten that extended and we
19 do intend to petition for rehearing, so that decision is
20 not -- as a technical matter -- final. Number two -- and this
21 is something that will be a part of the petition for
22 rehearing, no doubt -- the court of appeals has a number of
23 points that we believe the court of appeals has misapprehended
24 or overlooked in finding against merger.

25 And I think all of these are addressed in what I've

1 submitted to you. Although -- the substance of them is. I
2 didn't address the case, the specific case of Solesbee,
3 because it hadn't been decided when the motion was filed. But
4 in short, the court of appeals found that there was no merger
5 of the arbitration and admission agreement in the Solesbee
6 case because it found that the admission agreement -- it noted
7 the admission agreement was governed by South Carolina law and
8 the arbitration agreement was governed by federal law. I
9 could argue to Your Honor that that is -- that is not a basis
10 on which to find there was an intent to maintain the separate
11 nature of these -- these two documents. I mean, when you're
12 talking about the -- an arbitration agreement that relates to
13 a transaction involving interstate commerce, which is
14 admission to a skilled nursing facility, you're always going
15 to be implicating the FAA. Whether the -- whether that
16 provision for arbitration is embedded without question in the
17 admission agreement itself or you have multiple instruments.
18 And so that's something I don't think that the court of
19 appeals has fully appreciated in that -- in pointing that out.

20 The next thing that the court of appeals noted is that
21 there's language -- a textual basis in the arbitration
22 agreement where the language reads that it "shall survive any
23 termination or breach of this agreement or the admission
24 agreement." And that's a quote. And what they're trying to
25 point out there to the court -- is that by referring to the

1 admission agreement and this agreement, there's a textual
2 recognition of there being separate things. An agreement --
3 this agreement -- in this case being the arbitration
4 agreement -- and the admission agreement being another
5 agreement.

6 I submit to Your Honor and I've submit -- will submit to
7 the court of appeals -- that's also not a valid basis to find
8 there is a lack -- or there's an intention contrary to merger
9 because what the court of appeals is coming from there is a
10 prior decision of the court of -- the supreme court -- in a
11 case called Coleman, where the court -- Coleman said something
12 similar but materially different than what the court of
13 appeals has said here.

14 In Coleman, there was an entire agreement provision in
15 the admission agreement, and in that entire agreement
16 provision, it had language that was sort of the converse of
17 what the language is in this case, which is it seemed -- it
18 said it recognized the arbitration agreement. It referred to
19 the arbitration agreement and referred to this agreement. And
20 in that case, it was talking -- this agreement was the
21 admission agreement. And importantly, that was in the entire
22 agreement provision of that document.

23 Here, not only is this sort of the opposite situation
24 where it's -- where the language that the court of appeals is
25 seizing on is in the arbitration agreement, and unlike the

1 Coleman case, the pertinent language was in the admission
2 agreement. The admission agreement itself, in the entire
3 agreement clause, and it has an entire agreement provision, it
4 reads as follows: "The undersigned further acknowledges that
5 he/she has received and read the admission handbook and other
6 admissions materials" -- and understood -- "and understands
7 that these documents are made a part of this agreement by
8 reference herein." That's something that the court of appeals
9 in the Solesbee case did not address. The fact that, by its
10 plain terms, the entire agreement provision of the admission
11 agreement, not only does it not refer to the arbitration
12 agreement as a separate document, it expressly reflects that
13 there are -- the other admissions materials, which we submit
14 and we briefed this, that the arbitration agreement certainly
15 are -- because it was signed in conjunction with the
16 admission -- are incorporated therein by reference.

17 One more point there is which to do -- few more that the
18 court of appeals made and I just want to tick them off, and
19 then I'll stand down. The arbitration agreement is silent in
20 our case as to whether it could be revoked, for the admission
21 agreement provides, "The resident and/or his legal
22 representative may terminate this agreement at any time upon
23 written notice."

24 Where the court of appeals is coming forth -- from there
25 is it's noting, again, the Coleman case, where the court of --

1 supreme court, rather -- found against merger on the facts, I
2 should point out, on the law, the court -- the supreme
3 court -- recognized the merger doctrine, that's same time,
4 parties, place, and purpose. But on the facts, it found an
5 intention contrary to merger. And what the court of appeals
6 is doing in Solesbee is trying to analogize this case to
7 Coleman and, respectfully, I believe that it -- its effort to
8 you that (sic), is erroneous.

9 The language here is talking about -- well, in Coleman
10 what you had was a situation where the arbitration agreement
11 specifically said that it could be revoked within 30 days.
12 And if the -- upon signing. So it's signed and a couple weeks
13 go by and it's decided by the person who signed it, they don't
14 want to have that agreement anymore, it can be revoked.
15 And -- but that's -- we don't have that here in this case.
16 There is no revocation of the arbitration agreement that's
17 possible. What the court of appeals has done in Solesbee is
18 it's conflated -- or wrongfully equated -- the term revoked
19 and terminate. To revoke something is to annul it. It is to
20 vacate it.

21 That's not anything we have here. The courts -- the fact
22 that the arbitration agreement is silent to the -- the
23 admission agreement provides that it may be terminated is --
24 it's beside the point. Where it's not talking about a
25 revocation of the agreement. It's just coming to an end. For

1 instance, it'd be terminated if the resident decided to leave
2 the facility. And the fact that the arbitration agreement
3 would continue to be operative, that's just the way
4 arbitration agreements work. Obviously, if the arbitration
5 agreement were to not be operative upon the resident leaving
6 the facility, then you could -- you'd only have an agreement
7 to arbitrate if the dispute arose and was pursued while the
8 resident was at the facility. And this is something we --
9 these points we've made -- although not specifically in
10 reference to the Solesbee case -- we've made in our motion.

11 And the last two, Your Honor, the court of appeals in
12 Solesbee made of the admission agreement and the arbitration
13 agreement were separately paginated and had their own
14 signatures, and that the -- it was not required -- the
15 arbitration agreement was not required for admission. Those
16 two things, again, Your Honor, we submit and this is also
17 briefed, are not a valid basis to find, in a nonspeculative
18 way, that there was an intention contrary to merger.

19 You know, whenever you're dealing with the question of
20 merger, you are always, by definition, going to be dealing
21 with multiple instruments. A merger will never be a question
22 at all unless you have multiple instruments. And so the idea
23 that they were separately paginated or had their own signature
24 pages, really says nothing of the party's intention to merge.
25 Because if -- it is essentially creating a situation where

1 you have a doctrine of merger that could never actually apply
2 because again, you always have some separatedness of two
3 documents to examine when you're talking about merger because
4 otherwise, there would be no question of merger. There would
5 be just a single -- there wouldn't be multiple instruments.
6 And so that's really -- I submit to Your Honor -- and
7 certainly will do again to the court of appeals because the
8 court of appeals hasn't addressed it in its opinion but that's
9 specious reasoning and really does not do anything other than
10 speculate as to the party's intent.

11 And finally, as to issue with the -- the voluntary nature
12 of the arbitration agreement. Of course, it was certainly a
13 voluntary agreement that was signed. But that doesn't have
14 anything to do with whether or not it was -- once it was
15 signed, once it was intended to be merged with the admission
16 agreement. So that's, again, another -- I think just the word
17 that comes to mind is specious or speculative in terms of the
18 way the court of appeals has found against merger.

19 And I appreciate Your Honor's indulgence in letting me
20 tick those off. I felt like I needed to bring to Your Honor's
21 attention the case that certainly addressed because it was --
22 it is identical admission and arbitration agreements in the
23 Solesbee case. And that's a recent case that rules against
24 us. And so I needed to bring it to your attention and I will
25 respectfully argue that, two things: one, it's technically

1 not final because of the petition for rehearing is still out
2 there; and two, it's -- as I've tried to distinguish -- there
3 are points -- material points -- that I do believe that,
4 respectfully, the court of appeals has misapprehended or
5 overlooked in deciding that case. And I think they provide
6 Your Honor with the bases to view the situation differently
7 because we're not -- we wouldn't be asking the Court, Your
8 Honor, -- to swim sort of directly upstream against this
9 precedent from the court of appeals. We would be -- we are
10 asking Your Honor to recognize that there are bases that you
11 could find in favor of us on merger that are not addressed in
12 the Solesbee case.

13 Your Honor, should you have any questions, I will be
14 happy to do my best to answer them, but other than that, I
15 will just rely on our -- on our written motion, which I think
16 is -- well, it's very detailed. And so with that, thank you
17 very much, Your Honor. I appreciate your attention.

18 THE COURT: All right. Thank you.

19 Mr. Christian?

20 MR. CHRISTIAN: Thank you, Your Honor.

21 You know, Judge, this is the exact same case essentially
22 that the court of appeals just decided in January a few weeks
23 ago. As Mr. Hines has already pointed out, it's the exact
24 same arbitration agreement, exact same admissions agreement,
25 exact same issues that the court of appeals has ruled against

1 this facility on.

2 And I appreciate the fact that they're suggesting that
3 they're not asking you to essentially overturn the court of
4 appeals decision, but that's essentially what they're doing,
5 right? It was the exact same issues that were involved in the
6 appeal.

7 The court of appeals and the supreme court have addressed
8 merger and estoppel -- I don't know -- I think seven or eight
9 or more times in the last 10 years in the arbitration context
10 for nursing home cases, and not once have they found that
11 estoppel and merger existed in these cases.

12 Magnolia's asking the Court to go against nearly every
13 single case in all of the precedent and to reverse the Court's
14 decision in this particular case when there's multiple
15 instances of examples showing that these documents did not
16 merge. And as I'm sure the Court is aware, there -- the law
17 states that if there is any evidence that the documents didn't
18 merge, any evidence to the contrary -- and that's the language
19 from the Coleman case, I believe -- that the documents didn't
20 merge, that they were not the same, then it is to be construed
21 against the defendants regardless of whether or not there's a
22 clause in the admissions agreement that purports to say
23 otherwise.

24 Their contention that it really doesn't matter that one
25 agreement was voluntary and one was not voluntarily -- or that

1 one was required for admission to the facility and one was
2 not, is in contrary to the courts and the case law of our
3 state. Our courts have held repeatedly that that is another
4 example of the separateness of the agreements. That the
5 admission agreement was required for admission to the
6 facility; the arbitration agreement was not. Here, as in many
7 of these other cases, we've got lots of evidence that the
8 agreements were separate.

9 I'm happy to go into all this. I hate to take the
10 Court's time when we've got -- this Court's already
11 thoughtfully gone through this case and made a determination,
12 and then we've got court of appeals on the exact same issue.
13 If the Court wants me to continue to take the time to address
14 all these issues, I will, but I don't want to waste the
15 Court's time. So please feel free to stop me at any point in
16 time.

17 But we know that, number one, the admission agreement and
18 the arbitration agreement were separately paginated. That's
19 one of the factors discussed in the appellate court cases that
20 shows evidence of separateness. I believe the admission
21 agreement was paginated as pages 1 through 12 and explicitly
22 states that it is -- at the -- that it terminates it at page
23 12 of 12. It's -- it actually has 12 of 12 there at the end.

24 The arbitration agreement is not contained within those
25 12 pages. It is a separate agreement. As another factor

1 recognized by our appellate courts is the separateness of the
2 agreements and not having merged.

3 Further, there are distinctions between the two
4 documents, including the termination clauses. The admissions
5 agreement can be terminated at any time. The arbitration
6 agreement may not be terminated at any time. The arbitration
7 agreement is alleged to be the binding -- the only binding
8 agreement between two parties.

9 The -- furthermore, I believe that the law governing both
10 of the agreements is different. I believe that the
11 arbitration agreement purports to invoke federal law by virtue
12 of the FAA, which they've already mentioned and brought up
13 this morning. And the admissions agreement is governed by
14 state law.

15 And -- so there's just a number of different pieces of
16 evidence here for which estoppel fails, that produces evidence
17 that the documents did not merge. We can continue to plow
18 those grounds, but I believe that the Court has already
19 addressed those in a very well-crafted order; essentially
20 affirmed in a different case by our court of appeals just a
21 few weeks ago.

22 These same issues have been in front of our court of
23 appeals multiple times with this same chain of nursing homes,
24 where in multiple other unpublished opinions, the court of
25 appeals has yet to find estoppel or merger. And so for all

1 those reasons, we would ask the Court to deny the defendant's
2 motion for reconsideration and affirm the denial of their
3 motion to compel arbitration.

4 THE COURT: Mr. Hines?

5 MR. HINES: Very briefly, Your Honor. I think we've
6 addressed most -- I think we've addressed everything that Mr.
7 Christian had to say in our -- in the written motion. But I
8 just would underscore or make clear the point, Your Honor,
9 that there is, I think respectfully, quite a lot more nuance
10 involved than opposing the counsel is willing to admit.

11 For instance, and this is not the case that -- well,
12 essentially what I understand opposing counsel to be saying,
13 Your Honor, that this is all cut and dry. This is all -- you
14 know, we are just banging our heads against the wall here in
15 asking this -- asking Your Honor to hear us on this. And Your
16 Honor, I think that a close look at the precedent would show
17 that that's not accurate.

18 There are cases, for instance -- it's not true, as I
19 understand case law, that our courts, for instance, have said
20 that the issue of voluntariness -- so the arbitration
21 agreement -- is the death knell to our position. Where that
22 notion comes from is in a case called Hodge v. UniHealth
23 Post-Acute Care of Bamberg, where at best the court -- in that
24 case, the court of appeals -- identified a number of factors
25 that it in total looked at to conclude that there was an

1 intention contrary to merger.

2 Among those factors included the fact that you had the
3 revocation of the -- revocation of a possibility of the
4 arbitration agreement. It also included the fact -- or it
5 didn't include the fact that we have here -- as Mr. Christian,
6 as I understood it -- talked about what was explicitly stated
7 in one of the agreements. Well, what's explicitly stated,
8 again, in the entire agreement -- a portion of the admission
9 agreement -- is about the incorporation herein of other
10 admissions materials, and understand that these documents are
11 made part of this agreement by reference herein. Those are
12 factors that are not present in any of the existing case law.
13 The only case in which -- that I'm aware of -- in which those
14 factors -- those factual points are at issue is in the
15 Solesbee case, which was recently decided.

16 As for unpublished decisions, they obviously don't have
17 any precedential value, so they simply aren't material. But
18 the Solesbee case for instance, Your Honor, I think there's
19 quite a bit of nuance as I read it, respectfully the court of
20 appeals has not addressed. And I think that's exactly the
21 reason why we have the vehicle of petition for rehearing so it
22 will allow us to bring to the Court's attention material
23 points that we believe it's misapprehended or overlooked.

24 And -- oh, and the one last thing, I suppose I've
25 mentioned, Your Honor, is this idea about there being the

1 rule -- the rule being -- well, Mr. Christian says that the
2 rule is, clearly, if there's any evidence suggesting a -- an
3 intention contrary to merger, then the merger ardently loses.

4 Respectfully, that's not my understanding of the rule.
5 But even if it were, Your Honor -- for instance, to further
6 that point, let me say even if it were, if that were the rule,
7 the Hodge court, for instance, wouldn't have had to go through
8 five factors or five -- rise to the level -- factors. There
9 are five factual points that if found, in total, leaned
10 against merger.

11 Again, I think, I won't say any more about distinguishing
12 those factors in this case, but suffice it to say, we believe
13 they are distinguished. And I think that's in our brief and
14 we also touched on all that -- by touching on the Solesbee
15 case earlier in this argument. But even if it were the case
16 that we were talking about it, any evidence -- the idea that
17 ever so tiny amount of evidence would do merger, I think the
18 key word there is evidence. Evidence. And -- as opposed to
19 speculation.

20 Because this whole notion, for instance -- and this is a
21 point the I have yet to see our court of appeals or any
22 appellate authority specifically address this when they --
23 this notion in there that pagination, for instance, can be a
24 factor that cuts against an intent to merge or shows an intent
25 not to merge. Well, here we have in our document, the

1 document that is, again, the Solesbee court is the only one
2 that I've -- that I'm aware of -- that actually has -- where
3 there's a published opinion issued on it and the Solesbee
4 court has not actually addressed this point. It does say page
5 12 of 12. Yet on the very same page as the admission
6 agreement that says 12 of 12, it talks about the incorporation
7 by reference of other materials -- other admissions materials.
8 And in a case, for instance, that we cite in our brief, the
9 court of appeals expressly referred to the admission agreement
10 as an admission material.

11 So Your Honor, I'm trying to draw the distinction between
12 even if it were some -- this -- if the bar could be lowered --
13 and I just -- I don't believe that it's -- that it's lowered.
14 It seems to me that Mr. Christian's suggestion was that
15 there -- with a bar for proving something other than merger
16 was extremely low. I don't think that makes sense
17 considering, number one, that the reason that the presumption
18 even arises to begin with is the confluence of a number of
19 factors: parties, purpose, time, and transaction. All of
20 that would be undermined by some -- just notion to the
21 contrary seems to me to be counterintuitive. But in any
22 event, it's got to be nonspeculative. Speculative.

23 And so, Your Honor, that's -- thank you, again, for your
24 indulgence. That's quite a lot of time that you've allowed
25 and I appreciate that, especially on reconsideration. But I

1 do want to push back, I guess, against the notion that we're
2 just being hard-headed here. I think there are very -- very,
3 certainly, good faith and serious points to be made that what
4 we're dealing with here is not something that's the same as
5 what's already been addressed by other courts. Thank you.

6 THE COURT: All right. Thank you, both. I'll review it
7 and issue an order.

8 MR. HINES: Thank you, Your Honor.

9 MR. CHRISTIAN: Thank you, Your Honor.

10 (End of Transcript of Record)

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CERTIFICATE OF PROOFREADER

State of South Carolina)
)
County of Spartanburg)

I, HAROLD FERGUSON, a court-approved proofreader, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Spartanburg County, South Carolina, on the 21st day of February, 2023.

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

June 14, 2023



Harold Ferguson, CET-541
Proofreader

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
THE ESTATE OF JO EVA RICE,	)	CASE NO. 2021-CP-42-03701
DECEASED, BY HER PERSONAL	)	
REPRESENTATIVE SONYA LOVETT,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
FUNDAMENTAL CLINICAL AND	)	DEFENDANT THI OF SOUTH
OPERATIONAL SERVICESS, LLC;	)	CAROLINA AT MAGNOLIA PLACE AT
FUNDAMENTAL ADMINISTRATIVE	)	SPARTANBURG, LLC D/B/A PHYSICAL
SERVICES, LLC; AND THI OF SOUTH	)	REHABILITATION AND WELLNESS
CAROLINA AT MAGNOLIA PLACE	)	CENTER OF SPARTANBURG'S MOTION
SPARTANBURG, A/K/A PHYSICAL	)	TO COMPEL ARBITRATION
REHAB AND WELLNESS OF	)	
SPARTANBURG ,	)	
	)	
DEFENDANTS.	)	
	)	

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

The Defendant, THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Physical Rehabilitation and Wellness Center of Spartanburg (misidentified in Plaintiff's Complaint as "THI of South Carolina at Magnolia Place Spartanburg a/k/a Physical Rehab and Wellness of Spartanburg" and hereinafter "this Defendant" or "the Facility"), by and through its undersigned counsel, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order dismissing this action pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure and compelling this matter to arbitration, or, alternatively, staying the action pending arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq.

Plaintiff has sued this Defendant for negligence, negligence per se, corporate negligence, negligent misrepresentation, wrongful death and survival action pursuant to her mother's residency at the Facility. However, prior to being admitted to the Facility, Plaintiff's mother, Jo Eva Rice, entered into an Arbitration Agreement with the Facility. (See Arbitration Agreement attached as **Exhibit A**). The Arbitration Agreement was signed on behalf of Jo Eva Rice by Sonya Lovett - her daughter and the Plaintiff in this action. See Ex. A. Ms. Lovett identified herself as Jo Eva Rice's "Durable Power of Attorney for Health Care/Legal Guardian/Responsible Party" in the Arbitration Agreement. Id.

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 Ms. Rice upon her admission to the facility involved interstate commerce. In accordance with the terms of this agreement, the Defendant respectfully requests that this matter be compelled to arbitration. Alternatively, this Defendant requests that these proceedings be stayed pending the outcome of arbitration pursuant to Section 3 of the FAA.

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

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

[SIGNATURE BLOCK ON THE FOLLOWING PAGE]

CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

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Attorneys for the Defendant THI of South Carolina

at Magnolia Place at Spartanburg, LLC d/b/a

Physical Rehabilitation and Wellness Center of

Spartanburg

Charleston, South Carolina

Dated: January 28, 2022

FACILITY - RESIDENT/REPRESENTATIVE
ARBITRATION AGREEMENT

This Agreement is made between PRWC ("Facility"), its agents, employees and servants, and JOEWA RICE ("Resident") or JOEWA RICE ("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 Sonja Lovett 1-578
Resident/Representative Signature Date
Gay McCallough
Authorized Agent of Facility Date

X Sonja Lovett
Printed Name of Resident/Representative
Tammy McCallough
Printed Name & Title

Original: Business File • Photocopy: Resident/Representative

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

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

The Defendant, THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Physical Rehabilitation and Wellness Center of Spartanburg (misidentified in Plaintiff's Complaint as "THI of South Carolina at Magnolia Place Spartanburg a/k/a Physical Rehab and Wellness of Spartanburg" and hereinafter "this Defendant" or "the Facility"), by and through its undersigned counsel, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order dismissing this action pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure and compelling this matter to arbitration, or, alternatively, staying the action pending arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq.

Plaintiff has sued this Defendant for negligence, negligence per se, corporate negligence, negligent misrepresentation, wrongful death and survival action pursuant to her mother's residency at the Facility. However, prior to being admitted to the Facility, Plaintiff's mother, Jo Eva Rice, entered into an Arbitration Agreement with the Facility. (See Arbitration Agreement attached as **Exhibit A**). The Arbitration Agreement was signed on behalf of Jo Eva Rice by Sonya Lovett - her daughter and the Plaintiff in this action. See Ex. A. Ms. Lovett identified herself as Jo Eva Rice's "Durable Power of Attorney for Health Care/Legal Guardian/Responsible Party" in the Arbitration Agreement. Id.

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 Ms. Rice upon her admission to the facility involved interstate commerce. In accordance with the terms of this agreement, the Defendant respectfully requests that this matter be compelled to arbitration. Alternatively, this Defendant requests that these proceedings be stayed pending the outcome of arbitration pursuant to Section 3 of the FAA.

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

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

[SIGNATURE BLOCK ON THE FOLLOWING PAGE]

CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

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Attorneys for the Defendant THI of South Carolina

at Magnolia Place at Spartanburg, LLC d/b/a

Physical Rehabilitation and Wellness Center of

Spartanburg

Charleston, South Carolina

Dated: January 28, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
THE ESTATE OF JO EVA RICE,	)	CASE NO. 2021-CP-42-03701
DECEASED, BY HER PERSONAL	)	
REPRESENTATIVE SONYA LOVETT,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICESS, LLC;	)	DEFENDANT FUNDAMENTAL
FUNDAMENTAL ADMINISTRATIVE	)	ADMINISTRATIVE SERVICES, LLC'S
SERVICES, LLC; AND THI OF SOUTH	)	MOTION TO STAY
CAROLINA AT MAGNOLIA PLACE	)	
SPARTANBURG, A/K/A PHYSICAL	)	
REHAB AND WELLNESS OF	)	
SPARTANBURG ,	)	
	)	
DEFENDANTS.	)	
	)	

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

PLEASE TAKE NOTICE that Defendant Fundamental Administrative Services, LLC, hereinafter referred to as "this Defendant," by and through its undersigned attorneys, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order staying this action.

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

This Defendant respectfully requests this Honorable Court specifically stay any requirement to file any further responsive pleadings as well as any requirement to respond to any motions or discovery filed or served by Plaintiff until such time as this Court has made a final

decision on the validity of the arbitration agreement and the appellate process, if any, has been exhausted and the arbitration proceedings, if any, are completed in their entirety.

This Motion and Petition will be supported by the pleadings filed in this case, the Motion filed by Facility Defendant and all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

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aphillips@ycrlaw.com
*Attorneys for the Defendant Fundamental
Administrative Services, LLC*

Charleston, South Carolina

Dated: January 28, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
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PLAINTIFF,	)	
	)	
vs.	)	
	)	
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICESS, LLC;	)	DEFENDANT FUNDAMENTAL
FUNDAMENTAL ADMINISTRATIVE	)	CLINICAL AND OPERATIONAL
SERVICES, LLC; AND THI OF SOUTH	)	SERVICES, LLC'S MOTION TO STAY
CAROLINA AT MAGNOLIA PLACE	)	
SPARTANBURG, A/K/A PHYSICAL	)	
REHAB AND WELLNESS OF	)	
SPARTANBURG ,	)	
	)	
DEFENDANTS.	)	
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Charleston, South Carolina

Dated: January 28, 2022

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REPRESENTATIVE SONYA LOVETT,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICESS, LLC;	)	DEFENDANT FUNDAMENTAL
FUNDAMENTAL ADMINISTRATIVE	)	ADMINISTRATIVE SERVICES, LLC'S
SERVICES, LLC; AND THI OF SOUTH	)	MOTION TO STAY
CAROLINA AT MAGNOLIA PLACE	)	
SPARTANBURG, A/K/A PHYSICAL	)	
REHAB AND WELLNESS OF	)	
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Charleston, South Carolina

Dated: January 28, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
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COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
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THE ESTATE OF JO EVA RICE,	)	CASE NO. 2021-CP-42-03701
DECEASED, BY HER PERSONAL	)	
REPRESENTATIVE SONYA LOVETT,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICESS, LLC;	)	DEFENDANT FUNDAMENTAL
FUNDAMENTAL ADMINISTRATIVE	)	CLINICAL AND OPERATIONAL
SERVICES, LLC; AND THI OF SOUTH	)	SERVICES, LLC'S MOTION TO STAY
CAROLINA AT MAGNOLIA PLACE	)	
SPARTANBURG, A/K/A PHYSICAL	)	
REHAB AND WELLNESS OF	)	
SPARTANBURG ,	)	
	)	
DEFENDANTS.	)	
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TO: W. HAROLD CHRISTIAN, ATTORNEY FOR THE PLAINTIFF:

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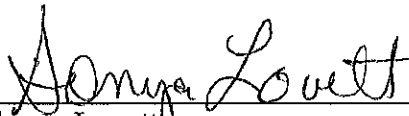
Charleston, South Carolina

Dated: January 28, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C.A. No.: 2012-CP-42-03701
	)	
The Estate of Jo Eva Rice, deceased, by	)	
her Personal Representative Sonya Lovett,	)	
	)	AFFIDAVIT
Plaintiff,	)	
	)	
v.	)	
	)	
Fundamental Clinical and Operational	)	
Services, LLC; Fundamental	)	
Administrative Services, LLC; and THI of	)	
South Carolina at Magnolia Place –	)	
Spartanburg, LLC d/b/a Physical Rehab	)	
and Wellness of Spartanburg	)	
	)	
Defendant(s).	)	
	)	

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

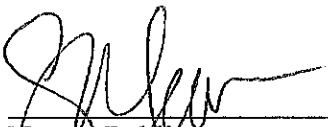
1. That she is the Personal Representative of the Estate of Jo Eva Rice.
2. That at the time her mother, Jo Eva Rice, was admitted to THI of South Carolina at Magnolia Place – Spartanburg, LLC, d/b/a Physical Rehab and Wellness of Spartanburg.
3. That she does not hold any Power of Attorney from Jo Eva Rice, nor has she held a Power of Attorney at any time, as Jo Eva Rice never executed a Power of Attorney nor gave Power of Attorney to her.
4. That at no time, including the time any documents were executed for the admission of her mother to this facility, did she ever represent that she was the Power of Attorney or held Power of Attorney for Jo Eva Rice. Further, that at no time did Jo Eva Rice give her the authority to execute an Arbitration Agreement, and that at no time has she ratified any such alleged Arbitration Agreement.
5. That as a statutory beneficiary of her mother, she hereby asserts her right to a jury trial.


Sonya Lovett
Personal Representative of the Estate
of Jo Eva Rice

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Sworn to and subscribed before me

this the 18th day of March, 2022



Notary Public
State of South Carolina

My Commission Expires: 5/6/31



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C.A. No.: 2012-CP-42-03701
	)	
The Estate of Jo Eva Rice, deceased, by	)	
her Personal Representative Sonya Lovett,	)	
	)	PLAINTIFF'S MEMORANDUM IN
Plaintiff,	)	OPPOSITION TO DEFENDANT THI OF
	)	SOUTH CAROLINA AT MAGNOLIA
v.	)	PLACE-SPARTANBURG, LLC, A/K/A
	)	PHYSICAL REHAB AND WELLNESS OF
Fundamental Clinical and Operational	)	SPARTANBURG'S MOTION TO COMPEL
Services, LLC; Fundamental	)	ARBITRATION AND FUNDAMENTAL
Administrative Services, LLC; and THI of	)	CLINICAL AND OPERATIONAL SERVICES,
South Carolina at Magnolia Place –	)	LLC AND FUNDAMENTAL
Spartanburg, a/k/a Physical Rehab and	)	ADMINISTRATIVE SERVICES, LCC'S
Wellness of Spartanburg	)	MOTIONS TO STAY
	)	
Defendant(s).	)	

INTRODUCTION

This is a Wrongful Death and Survival Action case involving nursing home negligence and corporate negligence ultimately resulting in the death of Jo Eva Rice (hereinafter “Decedent” or “Ms. Rice”). Sonya Lovett (hereinafter “Ms. Lovett”) is the Decedent’s daughter and is now the Personal Representative of the Decedent’s Estate.

On January 5, 2018, Ms. Rice was admitted to THI of South Carolina at Magnolia Place – Spartanburg, a/k/a Physical Rehab and Wellness of Spartanburg (hereinafter “THI” or “the Facility”), a nursing home. Because of seizure activity, she was discharged on March 7, 2018, and admitted to Spartanburg Regional Medical Center for evaluation and treatment of seizures. On March 11, 2018, she was readmitted to THI. On June 17, 2018, at 10:45 p.m., Ms. Rice’s roommate reported to the nursing staff that she was having jerking movements. The facility took no action. At approximately 12:30 a.m., a CNA was in her room who reported that she was having more jerking motions. It was subsequently noted that her body was clammy, she was not

responding to verbal stimuli, nor arousable to touch. Finally, 911 was called and she was transported to Spartanburg Regional Medical Center, where it was noted that she was in cardiac arrest. Resuscitation efforts were made, and she subsequently passed away on June 19, 2018.

The Plaintiff filed suit in this matter through a Notice of Intent. After a brief mediation, the Plaintiff filed a Summons and Complaint.

The Defendants now strangely claim that her daughter held a Power of Attorney at her original admission and that as Power of Attorney that she signed an “Agreement to Arbitrate” any claims. These Defendants submit no evidence that the daughter had a Power of Attorney, and in fact she does not have a Power of Attorney, nor has she ever had such Power of Attorney.

The Defendants are expected to assert that the documents she signed, created by Defendants, represented that she did hold a Power of Attorney, and that by signing, that she was binding her mother, even though she had no authority to do so (Exhibit 1, Affidavit of Ms. Lovett).

First, it is absolutely untrue that Ms. Lovett represented that she held a Power of Attorney. The Defendants rely on a one-page document called an “Arbitration Agreement” signed by Ms. Lovett at the first admission, which, at the top of the document, indicates that the person signing is either the resident’s Durable Power of Attorney, the resident’s Legal Guardian, or the resident’s Responsible Party (Exhibit 2, Alleged Arbitration Agreement). The document at best is misleading and is certainly ambiguous. Nonetheless, in neither event is it enforceable. It does not state that Ms. Lovett held a Power of Attorney and Ms. Lovett never said that she did.

Ms. Lovett signed the Facility’s “Arbitration Agreement” on the same day as the Arbitration Agreement. These were two separate documents. The Admission Agreement was 12

pages and labelled Pages 1-12. On Page 12, it stated that this document constituted the “Entire Agreement.” The arbitration document was a separate document labeled “Page 1 of 1.”

It is further anticipated that the Defendants may argue, in some contorted fashion, that a person who has no authority can then cause the principal to lose her right to a jury trial based upon the person having no authority having represented that she did have such authority. First, such representation never occurred. However, in no case may a person without authority either bind the principal or cause the principal, or her estate, to lose their right to a jury trial by the actions or statements of a person having no authority.

STATEMENT OF THE FACTS

On January 5, 2018, Ms. Rice was discharged from a hospital and admitted to the Facility. At the time of admission, the Facility presented her daughter, Sonya Lovett, with a twelve-page contract designated as an “Admission Agreement” (Exhibit 3). Ms. Lovett signed such Agreement. As previously pointed out, on that same day, the Facility presented Ms. Lovett with a contract identified as “Arbitration Agreement.” There is no evidence that the Facility asked Ms. Lovett if she held a Power of Attorney, and in fact, she did not tell them that she held a Power of Attorney for her mother Ms. Rice (Exhibit 1). The Agreement does not state that she was representing that she holds a Power of Attorney (Exhibit 2). Ms. Rice never signed any document or contract entitled “Arbitration Agreement.” Nonetheless, the Facility has filed a Motion to Dismiss the Plaintiff’s lawsuit based upon an invalid arbitration contract.

ARGUMENT

The parties seeking to enforce an Agreement to Arbitrate have the burden of establishing the existence of a valid Arbitration Agreement. See *Aiken v. World Finance Corp. of S.C.*, 373 SC 144, 149, 644 SE2d 705, 708 (2007) and *MBNA America Bank, N.A. v. Christianson*, 377 SC

210, 659 SE2d 209 (SC Ct. App. 2008). It is well established that “when 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 SC 14, 644 SE 2d 663, 667 (SC 2007). Whether a valid Arbitration Agreement exists is a matter for judicial determination. *York v. Dodgeland of Columbia, Inc.*, 406 SC 67, 78, 749, SE2d 139, 144 (Ct. App. 2013). The Defendants cannot and do not meet their burden of proof.

The Facility’s motion to dismiss sought to deny Plaintiff the constitutionally-guaranteed right to a jury trial based on an invalid arbitration contract should be denied. Arbitration may be favored by federal law but only when the parties voluntarily agree to it. The Facility produced nothing to show Ms. Rice’s daughter (Sonya Lovett) had the authority to bind her mother (or her estate) to the Arbitration Agreement. South Carolina appellate courts have repeatedly rejected nearly all of the legal and equitable theories the Facility now proposes to create a binding contract where there is not one. Just four years ago, this Court also rejected the Facility’s discovery-related argument. *Hodge*, 422 S.C. at 576, 813 S.E.2d at 309 (Ct. App. 2018). In sum, the Facility failed to meet its burden to show a valid arbitration contract.

1. The Independently-Invalid Arbitration Agreement does not Merge with the Admission Agreement.

The Facility argues Ms. Rice’s estate must arbitrate its claims against Defendants, but Ms. Rice never agreed to do so. Ms. Rice never signed or otherwise assented to the Arbitration Agreement on which the Facility relies to support its motion to dismiss the estate’s civil action. Ms. Lovett’s signature on the Arbitration Agreement is ineffective because she did not have authority to bind Ms. Rice to a dispute resolution contract. Moreover, Ms. Rice’s presence at the

Facility does not estop the estate from contesting arbitration under South Carolina or federal equitable estoppel principles.

This Motion centers on core components of contract formation. Since the Facility points only to the Arbitration Agreement as a basis for dismissing Plaintiff's claims, it cannot prevail without first establishing the Arbitration Agreement is a properly formed, binding contract. However, while the Facility offered the Arbitration Agreement as an alternative means for settling disputes, Ms. Rice never accepted that offer. Moreover, as established in South Carolina precedent, Ms. Lovett's statutory authority to admit Ms. Rice to the Facility does not confer authority to enter the Arbitration Agreement, a document the Facility drafted as a separate and distinct contract offered for a completely different purpose.

a. The Facility Cannot Show the Core Requirements to Form a Contract.

A contract is formed only when one party makes an offer, the other manifests acceptance, and the contract's promises are supported by valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). Acceptance requires 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). The Arbitration Agreement was not signed by Ms. Rice. Since Ms. Rice never personally assented to the Arbitration Agreement, the Facility argues the signature of her daughter (Ms. Lovett) assented on her behalf. However, the Facility presents nothing to show Ms. Lovett had authority to contract for Ms. Rice. Instead, the Facility now argues Ms. Lovett had statutory authority to enter Ms. Rice to the Facility and that authority either carries over to the Arbitration Agreement or equitably estops Ms. Rice's estate from opposing arbitration. These arguments have been rejected by South Carolina appellate courts three times in the last six years.

South Carolina's Adult Health Care Consent Act ("the Act") empowers designated family members of some vulnerable adults to sign a contract admitting the vulnerable adult to a skilled nursing facility and agreeing to pay the fees imposed by that facility for its services. S.C. Code Ann. § 44-66-60(A); Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450, 453 (2014). First, the Act is not triggered unless the patient is unable to appreciate the nature and implications of the proposed healthcare and make a reasoned decision concerning same. There is no evidence that this was Ms. Rice's condition (Exhibit 4, Facility evaluations). Secondly, the Act is limited to "health care" decisions, it provides no authority for separate contracts like the Arbitration Agreement. Id. at 354, 755 S.E.2d at 454; Thompson v. Pruitt Corp., 416 S.C. 43, 51, 784 S.E.2d 679, 684 (Ct. App. 2016) (citing Coleman and agreeing an "Arbitration Agreement does not deal with healthcare decisions"). Additionally, a family member signing a nursing home admission contract pursuant to authority derived from the Act does not estop a later argument that the same family member lacked authority to sign a separate arbitration contract. Coleman, 407 S.C. at 354-56, 755 S.E.2d at 455; Thompson, 416 S.C. at 60, 784 S.E.2d at 688. The Act was never meant to affect anything other than "health care" decisions and, the Arbitration Agreement was not a health care decision because Ms. Rice could get all the health care services covered in the Admission Agreement without agreeing to arbitrate.

Coleman did acknowledge the possibility that equitable estoppel could be invoked if the disputed arbitration language was actually or effectively part of the same admission contract. 407 S.C. at 355, 755 S.E.2d at 455. This narrow path to a successful estoppel argument requires several steps. Preliminarily, the Facility must establish the Act empowered Ms. Lovett to enter the Admission Agreement on Ms. Rice's behalf. See Hodge, 422 S.C. at 574, 813 S.E.2d at 308 (finding that there can be no estoppel argument where signatory family member lacked authority

under Act to enter admission contract). As in Hodge, there is no evidence here that The Act allowed Ms. Lovett to execute the admission contract. That should end the inquiry. However, even under the remaining analysis, the Facility must meet multiple requirements to apply the common law contract law interpretation principle by which courts interpret multiple writings as a single contract. Coleman, 407 S.C. at 355, 755 S.E.2d at 455. This “merger” principle cannot apply unless the writings in question were executed “at the same time, by the same parties, for the same purpose, and in the course of the same transaction.” Id. (quoting Klutts Resort Realty, Inc. v. Down’Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)). Even then, merger does not apply if there is “*anything* indicating a contrary intention.” Id. (emphasis added). Thus, simultaneously executed writings relating to the same general subject matter will not be viewed as a single or merged agreement if either their language or the circumstances even hint that the parties actually intended the writings to be distinct, separate contracts. Three nursing homes have previously attempted but failed to meet these robust requirements, and South Carolina’s appellate courts have never applied merger to nursing home admission and arbitration contracts. See generally Coleman, Thompson, and Hodge.

b. The Facility Makes Inconsistent Arguments on Ms. Lovett’s Authority under the Adult Health Care Consent Act.

The Act only applies if Ms. Rice was “unable to consent,” a term defined by the Act as limited to a person who cannot (1) appreciate the nature and implications of both her condition and proposed interventions; (2) form a reasoned decision concerning proposed treatment courses; or (3) communicate her decisions in an unambiguous manner. S.C. Code Ann. § 44-66-20(8). The Facility’s merger argument could only be relevant to this Motion if Ms. Lovett had authority under the Act. If Ms. Rice had the capacity the Facility recorded in its evaluation, then she would not qualify as a person “unable to consent,” the Act would not apply even to the Admission

Agreement, and the merger argument would fail at its initial hurdle. Hodge, 422 S.C. at 574, 813 S.E.2d at 308.

c. The Admission Agreement and Arbitration Agreements Serve Different Purposes.

Second, the Facility cannot show the Admission Agreement and Arbitration Agreement were executed for the same purpose. The Admission Agreement was formed because its “parties wish to admit [Ms. Rice] to” the Facility (Exhibit 3), (Admission Agreement at 1). That purpose is borne out in the Admission Agreement’s twelve pages. The Facility agreed to “[f]urnish room, routine meals, nursing care, personal care, or custodial care” (Admission Agreement at 2, § (A)(3)) to Ms. Rice who, in turn, agreed to “[p]ay all fees and charges” for those skilled nursing services. Id. at 3, § (B)(4). The Admission Agreement’s provisions referred to Medicaid eligibility, bed hold policies, late fees for unpaid service charges, etc. The Arbitration Agreement covers a completely different issue. It is solely devoted to directing an alternative dispute resolution method and purporting to eliminate its parties’ right to seek relief through the courts. (Exhibit 2).

d. The Terms and Context Show the Parties Intended the Admission Agreement and Arbitration Agreement to be Separate Contracts.

Third, even if the Court were to find the Act applied to Ms. Rice and the prerequisites to merger were present, the Facility’s argument fails because the language and circumstances of the Admission Agreement and Arbitration Agreement show the parties intended they be construed as separate contracts. Coleman, Thompson, and Hodge are the key precedent here because they illustrate the type of contract language or structure showing parties do not intend multiple agreements to be interpreted as one. For example, an arbitration contract does not merge with an admission contract in which a nursing home and its resident chose to insert an “entire

agreement” or integration provision (aka “merger clause”) limiting its parameters and excluding other writings. Coleman, 407 S.C. at 355, 755 S.E.2d at 455. Coleman held one such provision proved “on its face” that merger does not apply. Id. Also, admission and arbitration contracts cannot merge if they contain inconsistent terms, especially provisions related to how each contract may be terminated. Id.; Thompson, 416 S.C. at 53, 784 S.E.2d at 685. Moreover, courts look at the way the contracts are structured, finding it is unlikely parties intended two contracts to be treated as one if they chose separate titles, required separate signatures, and numbered each contract’s pages differently. Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562, 813 S.E.2d at 302. Finally, Hodge held a nursing home cannot argue for merger when it chose to separate arbitration and admission into two agreements while taking the position that agreeing to the former was not required to obtain the benefits of the latter. 422 S.C. at 562-63, 813 S.E.2d at 302.

i. The Admission Agreement’s “Entire Agreement” Provision

The Admission Agreement concludes with an “Entire Agreement” provision identifying the limited scope of that contract. (Admission Agreement at 12, § XVIII). Specifically, this provision states “this Agreement represents the entire . . . understanding between the parties.” “Agreement” is capitalized because it is a defined term, which the Admission Agreement’s opening line limits to “THIS ADMISSION AGREEMENT.” (Admission Agreement at 1) (emphasis in original). Thus, the Admission Agreement’s “Entire Agreement” provision is similar to the admission contracts in Coleman, Thompson, and Hodge. In fact, the Admission Agreement’s “Entire Agreement” provision is just as probative against merger as those in earlier cases. It specifically limits the contract’s interpretation to the “Agreement” and then defines that term narrowly in a way that does not include the Arbitration Agreement or any other writing. In

this sense, the “Entire Agreement” provision is consistent with the fundamental purpose an integration provision serves in a contract. See Palmetto State Sav. Bank of S.C. v. Barr, 293 S.C. 252, 253-54, 359 S.E.2d 531, 532 (Ct. App. 1987) (finding purpose of integration provision is to create “strong implication the whole intentions of the parties has been expressed” in the writing containing the clause); Wilson v. Landstrom, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984) (citing Armour Fertilizer Works v. Hyman, 120 S.C. 375, 113 S.E. 330 (1922) (the terms of a completely integrated contract “cannot be varied or contradicted by parol evidence of prior or contemporaneous agreements not included in the writing”))).

Plus, there is contract language here that tracks Coleman and progeny almost word for word. In Coleman, the court focused on the fact that the admission contract’s “Entire Agreement” provision referenced “[t]his Agreement . . . and the Arbitration Agreement.” Referencing the two writings distinctly was “the admission agreement’s recognition of the arbitration agreement as a separate document.” Thompson, 416 S.C. at 52, 784 S.E.2d at 684 (citing Coleman, 407 S.C. at 355, 755 S.E.2d at 455). Hodge applied the same principle using language from an arbitration contract that referenced an admission contract in distinct terms. 422 S.C. at 562, 813 S.E.2d at 302. If an arbitration contract explains its scope extends to disputes arising from “this Agreement or the . . . Admission Agreement,” then the parties “recognized a separateness” between the two contracts. Id. The Arbitration Agreement in this case does exactly what Coleman, Thompson, and Hodge identify as proof that defeats the Facility’s merger argument. In describing its term, the Arbitration Agreement states that its effect will continue even after the termination of “this Agreement *or the Admission Agreement.*” (Arbitration Agreement) (emphasis added).

Finally, to the extent the Facility implies the Arbitration Agreement was incorporated by reference into the Admission Agreement, the Facility has offered nothing in either contract to support this conclusion. “Admissions Materials” is not a defined term and there is nothing to suggest the Arbitration Agreement was intended to be included within it. Thompson rejected a similar argument when a nursing home argued its admission contract’s “entire agreement” provision incorporated a separate arbitration contract by referring broadly to “exhibits.” Since “exhibit” was undefined and not referenced elsewhere in either contract, the term was ambiguous and was interpreted against the nursing home who drafted it. 416 S.C. at 53-54, 784 S.E.2d at 685 (citing Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455).

ii. Inconsistent Termination Provisions

Two contracts executed at the same time do not merge if they contain inconsistent terms. The parties likely did not intend for the two be read as one if they chose to, for example, apply different substantive law to the two agreements. Hodge, 422 S.C. at 562, 813 S.E.2d at 302. Coleman, Thompson, and Hodge made special note of inconsistent provisions in admission and arbitration contracts regarding when each contract may be cancelled at the resident’s urging. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 551, 813 S.E.2d at 296. In each instance, the arbitration contract allowed the resident to disclaim or revoke its provisions within thirty days but the admission contract did not include a similar right. Id. Here, the Arbitration Agreement does not have a disclaimer provision, and the Facility argues this fact as a means of distinguishing Coleman, Thompson, and Hodge. (R. p. 76, lines 12-25), Tr. of Record (Aug. 16, 2019) at 15:12-25.

However, the contracts’ termination provisions are just as inconsistent here as in those cases. The Arbitration Agreement states that its effect on disputes between the parties would

survive even if both the Admission Agreement and Arbitration Agreement are cancelled. (Arbitration Agreement). As structured by the Facility, there does not seem to be any means by which a resident could unilaterally cancel the Arbitration Agreement. The Admission Agreement is very different in that it allows a resident to unilaterally terminate that contract “at any time.” (Admission Agreement at 6, § IV, ¶ 1). Thus, while the Facility is correct the Arbitration Agreement is technically different than Coleman and progeny because it lacks a disclaimer provision, that distinction makes no difference because the Arbitration Agreement and Admission Agreement still have inconsistent termination provisions that rebut any argument the parties intended these two separate contracts merge into one.

iii. Contract Formatting and Structure

Thompson and Hodge prove it is not just specific contract language that shows a nursing home and its resident did not intend for admission and arbitration contracts to merge. Intent can be derived from the way a contract is formatted or structured. Rather than adding an arbitration provision to the admission contract or attaching that language as an exhibit, the nursing home in Thompson chose to place it in an entirely separate document with its own, distinct “Arbitration Agreement” label. 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1. That choice was in itself further proof of “the parties’ intent for [the arbitration contract] to stand by itself as an independent contract.” Id. The Facility did the same here, and the Arbitration Agreement announces itself as a distinctive contract from its very title. Hodge also noted the importance of formatting choices a nursing home makes when constructing its admission and arbitration contracts. 422 S.C. at 562, 813 S.E.2d at 302. An arbitration contract looks more and more like its own independent document if entering it requires a separate signature than the admission contract and the documents have separate pagination. Id. Here, the Arbitration Agreement required separate

signatures. Plus, the Admission Agreement ran from “Page 1 of 12” to “Page 12 of 12,” while the Arbitration Agreement was all on its own as “Page 1 of 1.”

2. Plaintiff is not Equitably Estopped from Opposing Arbitration.

Ms. Rice did not sign the Arbitration Agreement or authorize anyone to sign for her. Yet, the Facility argues South Carolina Supreme Court precedent suggests Ms. Rice’s estate is equitably estopped from opposing arbitration. (Wilson v. Willis, 426 S.C. 326, 827 S.E.2d 167 (2019)). However, the Facility does not even cite or attempt to apply the elements of equitable estoppel imposed by South Carolina law.¹ Plus, Wilson actually refused to compel arbitration against a non-signatory, holding there is a presumption *against* forcing someone to arbitrate based on a contract she did not sign. 426 S.C. at 338, 827 S.E.2d at 173. Wilson even went on record to say equitable estoppel is rarely appropriate to force arbitration. Id. at 345, 827 S.E.2d at 177 (finding equitable estoppel “should be used sparingly”). Finally, the Facility cannot meet the “direct benefits” test considered in Wilson because Plaintiff’s claims in no sense rely on the Arbitration Agreement’s terms, and the Facility’s argument to the contrary expressly links its estoppel claim to its fatally flawed merger argument.

The “direct benefits estoppel” discussed in Wilson could only apply if Plaintiff has “consistently maintained that other provisions of the same contract should be enforced to

¹ As Wilson recognized, whether a non-signatory may be bound to an arbitration contract is a state law issue. 426 S.C. at 348, 827 S.E.2d at 174 (citing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630-31 n. 5 (2009)). Under South Carolina law, 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. Wilson did not dismiss or eliminate this test for equitable estoppel but only found its application was an issue that had not been preserved for appellate review. The Facility argues Wilson concluded this test only applies to “non-arbitration cases.” Wilson, 426 S.C. at 340 n. 9, 827 S.E.2d at 175 n. 9. However, that could not have been Wilson’s meaning because applying different rules to arbitration and non-arbitration contracts would violate the U.S. Supreme Court’s equal-treatment principle. See Prima Paint Corp. v. Flood Conklin Mfg. Co., 388 U.S. 395, 404 n. 12 (1967) (finding intent of Federal Arbitration Act was “to make arbitration agreements as enforceable as other contracts, but not more so”).

benefit” her. 426 S.C. at 340, 827 S.E.2d at 175 (quoting Pearson, 400 S.C. at 290, 733 S.E.2d at 601). In other words, the Facility’s burden is to show Plaintiff has “knowingly exploit[ed]” the Arbitration Agreement to her benefit. Wilson, 426 S.C. at 340, 827 S.E.2d at 175. The Facility makes no attempt to meet this burden and cannot do so. Plaintiff’s claims do not cite or rely on the Arbitration Agreement. Instead, the Facility argues Plaintiff was the direct benefit of the Admission Agreement and, therefore, should be estopped from denying the Arbitration Agreement.

But, this argument has two key flaws. First, Plaintiff has not obtained a “direct benefit” from the Admission Agreement as that term is used for estoppel purposes. Plaintiff does not allege a breach of contract claim based on the Admission Agreement or otherwise rely on that contract to seek liability against the Facility. The mere fact that Ms. Rice’s relationship with the Facility underlying Plaintiff’s claims was memorialized in the Admission Agreement is not sufficient for the Facility to invoke estoppel. Wilson, 426 S.C. at 343, 827 S.E.2d at 176 (“direct benefits estoppel is not implicated simply because a claim relates to or would not have arisen ‘but for’ a contract’s existence”). Second, this argument shows the Facility’s estoppel claim is wholly dependent on a merger argument it cannot prove. As discussed in the Argument above, there is no merger here because (1) the Facility disputes Ms. Rice’s incompetence and, as a result, her daughter’s statutory authority to enter the Admission Agreement; (2) the contracts were created for different purposes; and (3) there are many indications from the contracts’ language they were not intended to be construed as one.

Finally, this Court has previously rejected a nursing home’s attempt to use direct benefits estoppel to compel a non-signatory nursing home resident to arbitrate. Thompson, 416 S.C. at 58-59, 784 S.E.2d at 687-88; see also Hodge, 422 S.C. at 556-57, 813 S.E.2d at 299-300

(applying Thompson). After surveying Pearson and Fourth Circuit cases, Thompson refused to apply this form of estoppel because it generally requires proof of some benefit to the party opposing estoppel in “*the contract that includes the arbitration provision.*” 416 S.C. at 59, 784 S.E.2d at 688 (emphasis added). The Facility, therefore, cannot build an estoppel argument by citing supposed benefits Ms. Rice gained in the Admission Agreement. Thompson also rejected any effort to argue Ms. Rice gained a “direct benefit” from the Arbitration Agreement. Id. at 60, 784 S.E.2d at 688 (“any possible benefit emanating from the [Arbitration Agreement alone is offset by the [Arbitration Agreement’s] requirement that Mother waive her right of access to the courts . . .”).

In sum, the circuit court correctly rejected the Facility’s equitable estoppel argument because the Facility has not cited or applied the proper elements, cannot show Plaintiff obtained any “direct benefit,” and bases its estoppel claim on its flawed merger argument. As it did in Thompson and Hodge, this Court should reject the Facility’s equitable estoppel argument.

CONCLUSION

Based on the arguments stated above, Plaintiff respectfully requests the Court deny the Facility’s motion to compel arbitration. Ms. Rice never agreed to the Arbitration Agreement and Ms. Lovett lacked legal authority to bind her to arbitration. Even if Ms. Rice had agreed to arbitrate her claims, the wrongful death claim is distinct, independent, and belongs to statutory beneficiaries who did not agree to arbitration.

Respectfully submitted,

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s/ W. Harold Christian, Jr.
W. Harold Christian, Jr.
S.C. Bar No.: 01230
Matthew D. Christian
S.C. Bar No.: 70516
Attorneys for Plaintiff

Greenville, South Carolina
Date: March 28, 2022

Exhibit 3

Admission Agreement

ADMISSION AGREEMENT - SOUTH CAROLINA

RESIDENT NAME:

Jo Ewa Rice

RESIDENT NUMBER:

302305.02

DATE OF ADMISSION:

1.5.18

THIS ADMISSION AGREEMENT ("Agreement") as above dated is by and among
Piano ("Facility"), Jo Ewa Rice
 ("Resident") and/or _____ ("Resident's Durable Power of Attorney for
 Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively
 "Representative").

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

I. GENERAL CONDITIONS

1. **Inducement:** Resident and/or Representative verifies that all information submitted to Facility, including without limitation, financial information, medical history and medical diagnosis is true and correct and acknowledges that providing false information constitutes a breach of this Agreement.

2. **Personal Property:** It is understood that Facility is not responsible for either damage to or theft/loss of Resident's valuables, monies or clothing unless the item(s) are held in trust by Facility and the damage, theft, loss was caused by the negligent or willful conduct of Facility personnel. Personal property will not be considered to be held in trust unless the policies and procedures outlined in the *Admission Handbook*, which is made a part of this Agreement by reference herein, and any future amendments thereto, have been followed. Facility reserves the right to prohibit certain personal effects, funds or other property in accordance with state and federal law. Facility is not liable for either damages to or theft/loss of any personal belongings or personal care items, such as dentures, hearing aides and eyeglasses, except with respect to damage, theft or loss caused by the negligent or willful conduct of Facility personnel.

3. **Emergency Care:** In case of an emergency and Resident's personal physician is not available, Resident and/or Representative allows Facility to retain a physician on Resident's behalf. The physician will bill Resident directly and Facility will not be responsible for payment of the bill for such service.

4. **Representative:** When Resident has a Representative, Representative will act on Resident's behalf for all purposes permitted under applicable law. Representative will pay all fees and charges incurred hereunder by or on behalf of Resident using proceeds from Resident's assets or estate. Representative may act in more than one capacity and will be bound by the applicable terms and conditions of this Agreement. Except when Representative has access to Resident's assets, or as otherwise expressly provided to the contrary herein, or as permitted by state or federal law, Representative will not become personally liable for the payment of Resident's fees and charges by signing this Agreement. To the extent possible, Resident acknowledges and consents to the execution of this Agreement by Representative.

5. **Terms and Conditions:** By signing this Agreement, Resident and/or Representative agree(s) to comply with all terms and conditions set forth in this Agreement and Facility's policies, as same apply and as may change from time to time.

Original: Business File • Photocopy: Resident/Representative

II. AGREEMENT FOR CARE

A. FACILITY AGREES TO:

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

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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.

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

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

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

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

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

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

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

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

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

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

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

III. FINANCIAL AGREEMENT

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

1. Room and board, including meals, laundering of linens and bedding, nursing care, personal care or custodial care for the health, grooming and well-being of Resident in ☒ private) (☐ semi-private) accommodations, for a basic fee of \$ 350.00 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

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

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

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

IV. TERMINATION

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

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

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

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

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

V. MEDICAID BENEFICIARIES

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

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

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

3. **Non-Covered Services.**

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

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

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

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

VI. MEDICARE BENEFICIARIES

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

Original: Business File • Photocopy: Resident/Representative

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

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

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

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

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

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

VII. PRIVATE PAY/INSURANCE

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

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:

PRWC
8020 White Ave
Spartanburg SC 29302

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:

Samuel Lovett
REDACTED

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

Sonya Lovett
Signature of Representative, if any _____ Date _____

Sonya Lovett
Printed Name of Representative _____

Witness Signature _____ Date _____

Printed Name of Witness _____

Representative Social Security No. (Voluntary Info.) _____

Tammy McCullough
Signature of Facility Official _____

Tammy McCullough - Admissions
Printed Name of Facility Official & Title _____

1.5.2018
Date _____

Original: Business File • Photocopy: Resident/Representative

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

Obviously also kept all medical records
Auth - not

Page 12 of 12

Physical Rehab 19

Exhibit 4

Facility Evaluations

Resident **JO EVA RICE**Identifier **302305**Date **01/12/2018****Section C Cognitive Patterns****C0100: Should Brief Interview for Mental Status (C0200-C0500) be Conducted?**

Attempt to conduct interview with all residents

Enter Code

1

0. No (resident is rarely/never understood) → Skip to and complete C0700-C1000, Staff Assessment for Mental Status
 1. Yes → Continue to C0200, Repetition of Three Words

Brief Interview for Mental Status (BIMS)**C0200: Repetition of Three Words**

Enter Code

3

Ask resident: "I am going to say three words for you to remember. Please repeat the words after I have said all three. The words are: **sock, blue, and bed**. Now tell me the three words."

Number of words repeated after first attempt

0. None
 1. One
 2. Two
 3. Three

After the resident's first attempt, repeat the words using cues ("sock, something to wear; blue, a color; bed, a piece of furniture"). You may repeat the words up to two more times.

C0300: Temporal Orientation (orientation to year, month, and day)

Enter Code

3

Ask resident: "Please tell me what year it is right now."

A. Able to report correct year

0. Missed by > 5 years or no answer
 1. Missed by 2-5 years
 2. Missed by 1 year
 3. Correct

Enter Code

2

Ask resident: "What month are we in right now?"

B. Able to report correct month

0. Missed by > 1 month or no answer
 1. Missed by 6 days to 1 month
 2. Accurate within 5 days

Enter Code

1

Ask resident: "What day of the week is today?"

C. Able to report correct day of the week

0. Incorrect or no answer
 1. Correct

C0400: Recall

Enter Code

2

Ask resident: "Let's go back to an earlier question. What were those three words that I asked you to repeat?"
 If unable to remember a word, give cue (something to wear; a color; a piece of furniture) for that word.

A. Able to recall "sock"

0. No - could not recall
 1. Yes, after cueing ("something to wear")
 2. Yes, no cue required

Enter Code

2**B. Able to recall "blue"**

0. No - could not recall
 1. Yes, after cueing ("a color")
 2. Yes, no cue required

Enter Code

1**C. Able to recall "bed"**

0. No - could not recall
 1. Yes, after cueing ("a piece of furniture")
 2. Yes, no cue required

C0500: BIMS Summary Score

Enter Code

1

Add scores for questions C0200-C0400 and fill in total score (00-15)

Enter 99 if the resident was unable to complete the interview

Resident **JO EVA RICE**Identifier **302305**Date **01/12/2018****Section C****Cognitive Patterns****C0600: Should the Staff Assessment for Mental Status (C0700 - C1000) be Conducted?**

Enter Code

☐ 0

0. No (resident was able to complete Brief Interview for Mental Status) → Skip to C1310, Signs and Symptoms of Delirium
 1. Yes (resident was unable to complete Brief Interview for Mental Status) → Continue to C0700, Short-term Memory OK

Staff Assessment for Mental Status

Do not conduct if Brief Interview for Mental Status (C0200-C0500) was completed

C0700: Short-term Memory OK

Enter Code

☐

Seems or appears to recall after 5 minutes

0. Memory OK
 1. Memory problem

C0800: Long-term Memory OK

Enter Code

☐

Seems or appears to recall long past

0. Memory OK
 1. Memory problem

C0900: Memory/Recall Ability

↓ Check all that the resident was normally able to recall

☐

A. Current season

☐

B. Location of own room

☐

C. Staff names and faces

☐

D. That he or she is in a nursing home/hospital swing bed

☐

Z. None of the above were recalled

C1000: Cognitive Skills for Daily Decision Making

Enter Code

☐

Made decisions regarding tasks of daily life

0. Independent - decisions consistent/reasonable
 1. Modified independence - some difficulty in new situations only
 2. Moderately impaired - decisions poor; cues/supervision required
 3. Severely impaired - never/rarely made decisions

Delirium**C1310: Signs and Symptoms of Delirium (from CAM)**

Code after completing Brief Interview for Mental Status or Staff Assessment, and reviewing medical record

A: Acute Onset Mental Status Change

Enter Code

☐ 0

Is there evidence of an acute change in mental status from the resident's baseline?

0. No
 1. Yes

Codings:

0. Behavior not present
 1. Behavior continuously present, does not fluctuate
 2. Behavior present, fluctuates (comes and goes, changes in severity)

Enter Codes in Boxes☐ 0**B. Inattention** - Did the resident have difficulty focusing attention, for example being easily distractible, or having difficulty keeping track of what was being said?☐ 0**C. Disorganized thinking** - Was the resident's thinking disorganized or incoherent (rambling or irrelevant conversation, unclear or illogical flow of ideas, or unpredictable switching from subject to subject)?☐ 0**D. Altered level of consciousness** - Did the resident have altered level of consciousness as indicated by any of the following criteria?

- **vigilant** - startled easily to any sound or touch
- **lethargic** - repeatedly dozed off when being asked questions, but responded to voice or touch
- **stuporous** - very difficult to arouse and keep aroused for the interview
- **comatose** - could not be aroused

Confusion Assessment Method. ©1988, 2003, Hospital Elder Life Program. All rights reserved. Adapted from: Inouye SK et al. Ann Intern Med. 1990; 113:941-8. Used with permission

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	CASE NO. 2021-CP-42-03701
THE ESTATE OF JO EVA RICE, deceased,	)	
by her personal representative Sonya Lovett,	)	
	)	
Plaintiff,	)	
	)	DEFENDANTS' MOTION
vs.	)	TO ALTER, AMEND, AND/OR
	)	RECONSIDER ORDER DENYING
FUNDAMENTAL CLINICAL AND	)	MOTION TO COMPEL ARBITRATION
OPERATIONAL SERVICES, LLC;	)	AND MOTIONS TO STAY
FUNDAMENTAL ADMINISTRATIVE	)	
SERVICES, LLC; and THI OF SOUTH	)	
CAROLINA AT MAGNOLIA PLACE –	)	
SPARTANBURG, a/k/a Physical Rehab and	)	
Wellness of Spartanburg,	)	
	)	
Defendants.	)	
	)	

TO: THE HONORABLE J. DERHAM COLE, Presiding Judge, and W. HAROLD CHRISTIAN, JR., ESQUIRE, and MATTHEW W. CHRISTIAN, ESQUIRE, CHRISTIAN & CHRISTIAN, LLC, Attorneys for Plaintiff

NOW COMES the Facility¹ and the Other Defendants² (collectively, “Defendants”), by and through their undersigned counsel, pursuant to Rules 52 and/or 59(e), SCRCF, and, on the grounds set forth below, hereby move this Honorable Court to alter, amend, and/or reconsider its Order filed November 21, 2022 (the “Subject Order”), which denied the Facility’s motion to compel arbitration (the “Motion to Compel Arbitration”) and the Other Defendants’ motions to stay this action pending the outcome of the arbitration that the Facility sought to compel (the

¹ The “Facility” refers to Defendant THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Physical Rehabilitation and Wellness Center of Spartanburg (misidentified in Plaintiff’s complaint as “THI of South Carolina at Magnolia Place Spartanburg a/k/a Physical Rehab and Wellness of Spartanburg”).

² The “Other Defendants” refers to Defendants Fundamental Clinical and Operational Services, LLC, and Fundamental Administrative Services, LLC, collectively.

“Motions to Stay”) (collectively, the Motion to Compel Arbitration and the Motions to Stay are the “Underlying Motions”).

1. **Defendants ask the Court to (re)consider and expressly rule on each and every distinct issue/argument raised in support of the Underlying Motions, whether in writing 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. **Without waiving or otherwise lessening the all-encompassing scope of No. 1 above, Defendants respectfully contend that the Subject Order is erroneous and ask the Court to (re)consider and expressly rule on/address the following points.**
 - (a) **The Subject Order misstates the burden on the Facility when it states, “[t]he party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement”³ and, “[f]urther, the party seeking enforcement of the [arbitration] agreement bears the burden to prove a valid arbitration agreement exists that is enforceable, knowing, voluntary, and intentional.”⁴**

This statement is erroneous to the extent that it suggests the only way the proponent of arbitration can prevail is via an arbitration agreement that “enforceable” per se. This is not so. 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. *See Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) (observing that

³ (Subject Order p. 3.)

⁴ (Subject Order p. 4.)

South Carolina has recognized a number of theories that could bind nonsignatories to arbitration agreements, including estoppel).

Conceptually, the Facility's merger/equitable estoppel argument is not an argument for the *enforceability* of the Arbitration Agreement but rather for Plaintiff⁵ to be *estopped to deny the enforceability* of the Arbitration Agreement. *See Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354, 755 S.E.2d 450, 455 (2014) (“Appellants contend that *even if* Sister lacked capacity to execute the [arbitration agreement] under the [Adult Health Care Consent] Act, she is *nevertheless equitably estopped to deny* the [arbitration agreement's] enforceability.”) (emphasis added). In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and because Ms. Rice effectively embraced and directly benefitted from the Admission Agreement, Plaintiff, as personal representative of Ms. Rice's estate, is estopped to deny the enforceability of the Arbitration Agreement merged therewith. Accordingly, any contention about the Arbitration Agreement's supposed lack of enforceability (whether because of Ms. Lovett's lack of authority, actual or apparent, or because of another alleged defect in contract formation, or because of the inapplicability of the South Carolina Adult Health Care Consent Act or of Ms. Lovett's lack of authority thereunder) is beside the point and unavailing to refute the Facility's merger/equitable estoppel argument, which, again, turns not on the question of whether it showed that the Arbitration Agreement is enforceable but whether it showed that Ms. Rice and, in turn, Plaintiff, as personal representative of Ms. Rice's estate, should be estopped to deny that the Arbitration Agreement is enforceable—and, most respectfully, it did so.

⁵ “Plaintiff” refers to Sonya Lovett (“Ms. Lovett”) as personal representative of the Estate of Jo Eva Rice. “Ms. Rice” refers to the decedent, Jo Eva Rice.

Additionally, out of an abundance of caution, to the extent that the “knowing, voluntary, and intentional” part of the statement purports to place any burden on the Facility to prove the absence of a ground for revocation, it is improper burden shifting. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) (“[A] party,” i.e., the party opposing arbitration, not the proponent, “may seek revocation of the contract under ‘such grounds as exist at law or in equity,’ including fraud, duress, and unconscionability.”). For that matter, no such ground for revocation has even been raised here, and indeed, the knowing, voluntary, and intentional nature of Ms. Lovett’s signing of the Arbitration Agreement is presumed by virtue of her signing 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.”).

(b) The Subject Order erroneously states that “unless there is a valid, irrevocable, and enforceable contract, the Federal Arbitration Act does not even apply.”⁶

Without question, the FAA applies here. For one reason, the Arbitration Agreement expressly states that the FAA applies, and 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

⁶ (Subject Order p. 4.)

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). And our Supreme Court 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).

- (c) **The Subject Order, and the unpublished trial court decisions that it cites, misapprehends the Fourth Circuit Court of Appeals’ decision in *Galloway v. Santander Consumer USA, Inc.*, 819 F.3d 79 (4th Cir. 2016)).⁷**

In saying that “[t]his standard is akin to the burden on summary judgment,” the *Galloway* Court was not referring to the standard for the moving party to prevail on a motion to compel arbitration, but rather the standard for a party seeking a jury trial regarding whether there is a binding arbitration agreement to prevail. *See Galloway*, 819 F.3d at 85 (“We first address *Galloway*’s contention that she is entitled to a jury trial regarding whether she and CitiFinancial entered into a binding contract that included the arbitration agreement. Under the FAA, the party seeking a jury trial must make an unequivocal denial that an arbitration agreement exists—and must also . . . provide sufficient evidence in support of its claims such that a reasonable jury could return a favorable verdict under applicable law. Thus, to obtain a jury trial, the parties must show genuine issues of material fact regarding the existence of an agreement to arbitrate.”) (internal

⁷ (Subject Order pp. 4–5 (“‘A motion to compel arbitration pursuant to the FAA is akin to the burden on summary judgment.’ *Thomas v. Progressive Leasing*, Civ. No. 17-1249, 2017 WL 4805235, at (D. Md. Oct. 25, 2017) (internal quotation marks omitted) (quoting *Galloway v. Santander Consumer USA, Inc.*, 819 F.3d 79, 85 (4th Cir. 2016)). Therefore, the burden is on the moving party to demonstrate the absence of any genuine dispute of material fact, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970), and that the movant is ‘entitled to judgment [compelling arbitration] as a matter of law.’ *Burrell v. 911 Restoration Franchise Inc.*, 2017 WL 5517383, at (D. Md. November 17, 2017) (citing Fed. R. Civ. P. 56(a)).”).

citation and quotations marks omitted); *id.* at n.3 (“We have noted that this standard is akin to the burden on summary judgment.”) (internal citation and quotation marks omitted).

(d) Whether or not there is a policy favoring arbitration is inconsequential.

The Subject Order cites our Supreme Court’s decision in *Palmetto Construction Group, LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 856 S.E.2d 150 (2021), wherein it stated that “statements [in our appellate jurisprudence] that the law ‘favors’ arbitration,” which are indeed numerous,⁸ “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.”⁹

Candidly, it is impossible to square this “no public policy . . . ‘favoring’ arbitration” 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

⁸ *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)).

⁹ (Subject Order p. 5 (“Further, ‘there is, however, no public policy – federal or state – favoring arbitration.’ Simmons v. Benson Hyundai, LLC, 2022 S.C. App. LEXIS 37, 22WL791174 quoting Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021).”).)

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.E2d 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 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)).

In any event, however, even in the absence of a public policy favoring arbitration, the Underlying Motions are still meritorious.

- (e) **The FAA requires arbitration agreements to be placed on equal footing with all other contracts under South Carolina law, and the purported presumption, cited in the Subject Order, against arbitration where the party resisting arbitration is a nonsignatory violates the FAA.**

“[T]he basic purpose of the [FAA] is to overcome courts’ refusals to enforce agreements to arbitrate”¹⁰ 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

¹⁰ *Allied–Bruce*, 513 U.S. at 270.

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, 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).

The Subject Order cites *Wilson*, 426 S.C. 326, 827 S.E.2d 167, for the proposition that, under South Carolina law, there is a presumption against arbitration when enforcement is sought against a non-signatory.¹¹ But the FAA requires arbitration agreements to be placed on equal footing with all other contracts under state law and prohibits courts from setting aside arbitration agreements based on state-law defenses “that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue.” *Concepcion*, 563 U.S. at 339. Thus, under the FAA, there cannot be a presumption against enforcement of arbitration agreements against nonsignatories unless the same presumption also applies to enforcement of all other contracts against nonsignatories. The Facility is aware of no such general presumption under South Carolina law, and the Subject Order cites none. Indeed, where the *Wilson* Court itself referenced “a presumption *against* arbitration . . . where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate,”¹² it cited no South Carolina authority and the authority it did cite addressed arbitration in particular, not contracts generally. *Id.* (“*Global Pac., LLC v. Kirkpatrick*, 88 N.E.3d 431, 435 (Ohio Ct. App. 2017) (‘Because no party can be required to submit to arbitration when it has not first agreed to do so, in a case where the party resisting arbitration is not a signatory to any written agreement to arbitrate, a presumption against arbitration arises.’); cf. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1103–04 (9th Cir. 2006) (noting ‘the general rule that a nonsignatory is not bound by an arbitration clause’).”). The supposed presumption against arbitration violates the FAA’s equal footing rule and cannot be applied in this case.

¹¹ (Subject Order p. 5 (“...A presumption against arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate.” *Wilson v. Willis*, 426 S.C. 326 at 339, 827 S.E.2d 167 (2019).”).)

¹² 426 S.C. at 337–38, 827 S.E.2d at 173 (emphasis in original).

- (f) **The Subject Order erroneously states that there was a “requirement” that Ms. Rice sign the Arbitration Agreement¹³ and that Ms. Lovett did not sign the Arbitration Agreement on her own behalf in addition to on Ms. Rice’s behalf.¹⁴**

The Facility did not “ha[ve]” Ms. Lovett sign the Arbitration Agreement, as the Subject Order states. Rather, Ms. Lovett voluntarily did so, as her own affidavit implicitly admits and, indeed, her own memo in opposition to the Motion to Compel Arbitration expressly states. (*See* Aff. of Sonya Lovett ¶ 4 (implicitly admitting that she, Ms. Lovett, signed the documents in conjunction with Ms. Rice’s admission to the Facility); Pl.’s Mem. in Opp’n p. 2 (“Ms. Lovett signed the Facility’s ‘Arbitration Agreement’ on the same day as the Arbitration Agreement.”).) And she, as “Representative,” did so expressly attesting, by her signature on the Arbitration Agreement, that she “ha[d] the authority to sign on Resident’s behalf so as to bind the Resident as well as the Representative.” (Arbitration Agreement.) This may not mean that it was in fact true that Ms. Lovett was duly authorized to sign for Ms. Rice, but it does mean that Ms. Lovett in fact represented to the Facility that it was true when she signed the Arbitration Agreement, which,

¹³ (Subject Order pp. 13–14 (“[T]he agreement by its very own terms required that the Defendants have Ms. Rice sign the Arbitration Agreement. Arbitration Agreement, p. 7. This section of the Arbitration Agreement required that if the resident was competent, then the resident was required to sign same. However, despite the fact that Ms. Rice was competent, the Defendants failed to have her sign the Arbitration Agreement. Despite knowing the requirement to have Ms. Rice sign the Arbitration Agreement and the knowledge that she was competent, the Defendants instead had Ms. Lovett who had no authority, sign the Arbitration Agreement on Ms. Rice’s behalf. Because Ms. Rice was required to sign the Arbitration Agreement in the first place for it to be enforceable, no arbitration agreement could have existed as to Ms. Lovett as the terms of the Agreement required Ms. Rice, not Ms. Lovett, to sign.”).)

¹⁴ (Subject Order p. 14 (“Additionally, the explicit language in the Arbitration Agreement indicates that the Agreement is between Jo Eva Rice or ‘Durable Power of Attorney for Healthcare’/‘Resident’s Legal Guardian’/‘Resident’s Responsible Party’ (hereinafter collectively ‘Representative’). The signature line does not reflect that Ms. Lovett was signing on behalf of herself individually for her own claims, or that of any Wrongful Death Beneficiaries. Furthermore, in the Arbitration Agreement the paragraph above the signature line, the Arbitration Agreements states, ‘Resident/Representative Signature’. As a result, the Arbitration Agreement is explicitly clear that Ms. Lovett was not attempting to sign on the behalf Herself.”).)

again, she is presumed to have “read, understood, and assented to,”¹⁵ and as to which she owes the Facility a duty of good faith that is no less than that owed to her by the Facility. *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.”).

There was no “requirement” that Ms. Rice sign the Arbitration Agreement herself. Ms. Lovett voluntarily signed for Ms. Rice, expressly representing to the Facility that she was duly authorized to sign for her. Indeed, the citation that the Subject Order gives in support of the idea that there was a “requirement” that Ms. Rice sign the Arbitration Agreement herself is “Arbitration Agreement **p. 7.**” (Subject Order p. 13 (emphasis added).) As the Arbitration Agreement is only a one-page document, there is no page 7, and it contains no requirement that it be signed by Ms. Rice.

(g) The Subject Order erroneously states that the Arbitration Agreement is not enforceable as to wrongful death beneficiaries.¹⁶

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,¹⁷ as indeed our Supreme Court has already recognized in *Dean*, 408 S.C. at 389, 759 S.E. at 737 n.3 (“[C]ourts *may not* refuse to compel arbitration simply because a wrongful death claim is involved.”) (emphasis added).

¹⁵ *Gibson*, 426 S.C. at 352, 827 S.E.2d at 181.

¹⁶ (Subject Order pp. 13–14.)

¹⁷ *See Concepcion*, 563 U.S. at 339.

“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 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].”);¹⁸ *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.”).

¹⁸ 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.*

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. And 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 is erroneous in concluding otherwise.

(h) The Subject Order erroneously rules against the Facility on the basis of authentication.¹⁹

As the Subject Order itself recognizes, the “burden to authenticate is not high.” (Subject Order p. 13.) All that is required is a satisfactory foundation from which it can reasonably be found that the evidence is authentic, i.e., that it is it was it purports to be. *Berry v. Span*, 433 S.C. 1, 10, 855 S.E. 309, 315 (Ct. App. 2021). Here, Ms. Lovett’s own affidavit necessarily admits that she signed all the paperwork in conjunction with Ms. Rice’s admission. (*See* Aff. of Sonya Lovett ¶ 4.) In fact, Plaintiffs’ memo in opposition to the Motion to Compel Arbitration expressly states, “*Ms. Lovett signed the Facility’s ‘Arbitration Agreement’ on the same day as the Arbitration Agreement*”²⁰ and, indeed, accurately describes the documents she admittedly signed, copies of both of which she herself attached to the memo—without ever raising any challenge to their authenticity. (Pl.’s Mem. in Opp’n (“The Admission Agreement was 12 pages and labelled Pages 1-12. . . . The arbitration document was a separate document labeled ‘Page 1 of 1.’”); *id.* at Exs. 2 (Arbitration Agreement) & 3 (Admission Agreement).)

¹⁹ (Subject Order pp. 12–13.)

²⁰ (Pl.’s Mem. in Opp’n p. 2 (emphasis added).)

The Court erred here in not finding the Admission Agreement and Arbitration Agreement authenticated on the existing record, or at least in not allowing the Facility to supplement the record to provide an affidavit to authenticate the documents, as allowing it to do so would have worked zero undue prejudice on Plaintiff and would have furthered the interests of justice—and, indeed, to the extent it is necessary for authentication (which, as explained above, the Facility contends it is not) the Court should allow it to do so even now. *See* Rule 1, SCRCP (“These . . . shall be construed to secure the just, speedy, and inexpensive determination of every action.”).

- (i) **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, and has led the Court to wrongly deny the Motion to Compel Arbitration—and, in turn, the Motions to Stay. The Court should have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Ms. Rice effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.**

The relationship between the Motion to Compel Arbitration and the Motions to Stay is such that, as the Subject Order reflects, the denial of the former dictated the denial (as moot) of the latter. (*See* Subject Order p. 15.) Accordingly, in showing that the Court has erred in denying the Motion to Compel Arbitration, the argument below also shows its error in denying the Motions to Stay. *See* 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.”) (emphasis added); *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.”).

The core question here is this: Is the Arbitration Agreement (which Ms. Lovett signed for Ms. Rice) enforceable against Plaintiff (the personal representative of Ms. Rice’s estate), even though it was not signed by Ms. Rice herself? The answer is yes: The Arbitration Agreement is enforceable against Plaintiff—or more precisely, Plaintiff is now estopped to deny that the Arbitration Agreement is enforceable.

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. Lovett 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.*, 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).

Again, 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 Plaintiff 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 Ms. Rice having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability not only of the Admission Agreement and 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 Ms. Rice received under the Admission Agreement (with which the Arbitration merged), this argument applies with equal force to estop Plaintiff 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. Lovett lacked authority to sign the Admission Agreement/Arbitration Agreement on behalf of Ms. Rice under the law of agency and/or under the South Carolina Adult Health Care Consent Act, and/or because Ms. Lovett lacked power of attorney over Ms. Rice—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 Plaintiff is estopped to deny its enforceability.

Merger

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 [Arbitration Agreement] under the [Adult Health Care Consent] Act, she is nevertheless equitably estopped to deny the [Arbitration

Agreement]'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 [Arbitration Agreement]s 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).

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. 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,”²¹ as indeed the Admission Agreement and the Arbitration

²¹ *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

Agreement were here,²² 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 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.

²² The Subject Order erroneously states, “the [Arbitration Agreement and the Admission Agreement] were created for different purposes.” (Subject Order p. 11.) 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 observes 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).

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* Court²³), 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 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)).

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 Ms. Rice to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It

²³ 407 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).

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 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 Ms. Rice’s relationship with the Facility: the Admission Agreement

setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission. (*Compare* Admission Agreement (setting forth the terms of Ms. Rice’s admission to the Facility) *with* Arbitration Agreement (providing for arbitration of disputes arising out of Ms. Rice’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,²⁴ the respective termination provisions of the Arbitration Agreement and the Admission Agreement provide 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

²⁴ (Subject Order p. 9.)

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 intent contrary to merger. Respectfully, to point to such things, as the Subject Order does,²⁵ 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

²⁵ (Subject Order p. 9.)

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.

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 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, 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 Ms. Rice's admission to the Facility and would not have been done at all but for her 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.

Equitable Estoppel

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 Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Ms. Rice received direct benefits (in the form of her 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, not the six-factor test the Court relied on the Subject Order. (*See* Subject Order p. 10 n.1.)

Moreover, the Subject Order incorrectly interprets *Wilson* as follows:

[T]he Facility cannot meet the “direct benefits” test considered in Wilson because Plaintiff is not attempting to enforce a contractual claim under the Admission Agreement and Plaintiff’s claims in no sense rely on the Arbitration Agreement’s terms, and the Facility’s argument to the contrary expressly links its estoppel claim to its fatally flawed merger argument.

The “direct benefits estoppel” discussed in Wilson could only apply if Plaintiff has “consistently maintained that other provisions of the same contract should be enforced to benefit” her. 426 S.C. at 340, 827 S.E.2d at 175 (quoting Pearson, 400 S.C. at 290, 733 S.E.2d at 601). In other words, the Facility’s burden is to show Plaintiff has “knowingly exploit[ed]” the Arbitration Agreement to her benefit. Wilson, 426 S.C. at 340, 827 S.E.2d at 175. The Facility makes no attempt to meet this burden and cannot do so. Plaintiff’s claims do not cite or rely on the Arbitration Agreement. Instead, the Facility argues Plaintiff received direct benefit of the Admission Agreement and, therefore, should be estopped from denying the Arbitration Agreement.

But, this argument has two key flaws. First, Plaintiff has not obtained a “direct benefit” from the Admission Agreement as that term is used for estoppel purposes. Plaintiff does not allege a breach of contract claim based on the Admission Agreement or otherwise rely on that contract to seek liability against the Facility. The mere fact that Ms. Rice’s relationship with the Facility underlying Plaintiff’s claims was memorialized in the Admission Agreement is not sufficient for the Facility to invoke estoppel. Wilson, 426 S.C. at 343, 827 S.E.2d at 176 (“direct benefits estoppel is not implicated simply because a claim relates to or would not have arisen ‘but for’ a contract’s existence”).

(Subject Order pp. 10–11.)

What *Wilson* says 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 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, Ms. Rice was a direct beneficiary. Indeed, to deny her receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of her 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 Compl.*)

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Ms. Rice received the benefit of her admission to the Facility, including, without limitation, the room, board, care, and treatment she received therein. Respectfully, the Court should have found that the Arbitration Agreement merged with the Admission Agreement and that Plaintiff is estopped to deny the Admission Agreement/Arbitration Agreement's enforceability, Ms. Rice having effectively embraced the contract with the Facility for the purpose of her admission and receipt of the benefits thereof.

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 Motions, in writing and/or via oral argument, all of which are incorporated by reference herein and the Court to is asked (re)consider and expressly rule upon in full—Defendants ask that the Court alter, amend, and/or reconsider the Subject Order in favor of an order granting the Underlying Motions.

PLEASE NOTE: Defendants reserve 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.

<SIGNED ON THE FOLLOWING PAGE>

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December 1, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C.A. No.: 2021-CP-42-03701
	)	
The Estate of Jo Eva Rice, deceased,	)	
by her Personal Representative Sonya	)	PLAINTIFF'S REPLY TO
Lovett,	)	DEFENDANT'S MOTION
	)	TO ALTER, AMEND, OR
Plaintiff,	)	RECONSIDER ORDER
	)	DENYING MOTION TO
v.	)	COMPEL ARBITRATION
	)	AND MOTIONS TO STAY
Fundamental Clinical and Operational	)	
Services, LLC; Fundamental	)	
Administrative Services, LLC; and	)	
THI of South Carolina at Magnolia	)	
Place – Spartanburg, a/k/a Physical	)	
Rehab and Wellness of Spartanburg,	)	
	)	
Defendant(s).	)	

TO THE HONORABLE J. DERHAM COLE, Presiding Judge and RUSSELL G. HINES, D. JAY DAVIS JR., JAMES D. GANDY III, AND T. ASHTON PHILLIPS III, Attorneys for Defendant

On February 1, 2022, the Defendant THI of South Carolina at Magnolia Place – Spartanburg, LLC d/b/a Physical Rehab and Wellness of Spartanburg filed its Motion to Compel Arbitration. On that same day, Defendants Fundamental Clinical and Operational Services, LLC and Fundamental Administrative Services, LLC filed their Motion to Stay the proceedings until such time as the court made a final decision on the validity of the alleged arbitration agreement, until the completion of the appellate process and until such arbitration proceedings were completed or exhausted.

At the hearing on these Motions at no time did any of these Defendants present any documentation, evidence or support for the claim contending that there existed a valid and enforceable Arbitration Agreement. Defendants did not even present evidence or affidavits to establish authenticity of the document.

Plaintiff timely filed her Memorandum in Opposition to these motions together four exhibits supporting her opposition to these motions, which proved that such motions were without merit. The Plaintiff would hereby crave and incorporate her Memorandum in Opposition to the Motion previously filed.

On April 01, 2022, these Defendants' motions came unto be heard before the Honorable J. Derham Cole presiding Judge in the Court of Common Pleas. After hearing arguments by the parties and reviewing the Plaintiff's Memorandum and evidence presented by the Plaintiff Judge Cole issued a Form 4 Order on October 7, 2022, filed October 12, 2022, denying these Defendants' motions. Subsequently Judge Cole issued his Order signed on November 21, 2022, addressing each of the Defendants' arguments and considering the facts and evidence which had been presented.

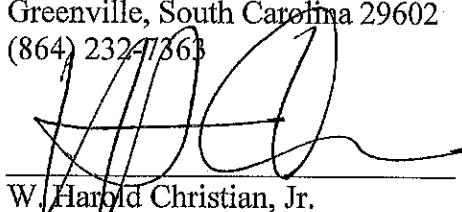
Therefore, the Plaintiff would show that, the Defendants presented no evidence to support any of its contention as alleged. Secondly, the Courts Order covered each and everyone of the Defendants' arguments and all issues raised by the Defendants. Thirdly, the Order of the Court correctly applied the law to facts of this case and denied the Defendants' Motion.

These Defendants now raise arguments not supported by any evidence. These arguments were addressed in the Court's order and this motion is without merit.

The Plaintiff would request that the court timely dismiss these Defendants' Motions as being completely without merit, as was the Defendant's initial Motion to Compel Arbitration, and to respectfully stay the matter.

Respectfully submitted,

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W. Harold Christian, Jr.
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Attorney for Plaintiff

Greenville, South Carolina
Date: January 24, 2023

RECEIVED

Mar 14 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2021-CP-42-03701

The Estate of Jo Eva Rice, deceased,
by her Personal Representative Sonya Lovett,

Respondent,

v.

Fundamental Clinical and Operational Services, LLC;
Fundamental Administrative Services, LLC; and
THI of South Carolina at Magnolia Place–Spartanburg, a/k/a
Physical Rehab and Wellness of Spartanburg,

Appellants,

NOTICE OF APPEAL

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Defendants/Appellants, Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Physical Rehabilitation and Wellness Center of Spartanburg (misidentified in this action as “THI of South Carolina at Magnolia Place – Spartanburg, a/k/a Physical Rehab and Wellness of Spartanburg”) (collectively, “Appellants”), hereby appeal the following orders of the Honorable J. Derham Cole, Circuit Court Judge:

- **Order [Denying Motion to Compel Arbitration and Motions to Stay]** filed November 21, 2022, and
- **Form 4 Order [Denying Motion to Alter, Amend and/or Reconsider]** filed March 1, 2023.

Copies of the appealed orders are attached hereto and incorporated herein by reference. Appellants received written notice of entry of the most recent order on March 1, 2023.

Respectfully submitted,
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March 14, 2023

Mar 14 2023

SC Court of Appeals

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

Appeal from Spartanburg County
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2021-CP-42-03701

The Estate of Jo Eva Rice, deceased,
by her Personal Representative Sonya Lovett,

Respondent,

v.

Fundamental Clinical and Operational Services, LLC;
Fundamental Administrative Services, LLC; and
THI of South Carolina at Magnolia Place–Spartanburg, a/k/a
Physical Rehab and Wellness of Spartanburg,

Appellants,

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Attorneys for Appellants

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellants, hereby certify that Appellants' **NOTICE OF APPEAL** was served on Respondent on March 14, 2023, by emailing (see attached service email) a copy of the same to Respondent's counsel of record:

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CHRISTIAN & CHRISTIAN, LLC
Attorneys for Respondent

I also certify that a copy of this **NOTICE OF APPEAL** was today, March 14, 2023, E-Filed with the lower court (see attached NEF), which also, i.e., in addition to service by email, effected service of the notice today on Respondent's above-identified counsel of record via the E-Filing System.

Respectfully submitted,
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By: s/Russell G. Hines
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Attorneys for Appellants

Charleston, South Carolina

March 14, 2023

From: [Hines, Russell](#)
To: hchristian@cclawfirm.com; mchristian@cclawfirm.com
Cc: ["Brown, Steve"](#); [Davis, Jay](#); [Gandy, III, James D. \(Tripp\)](#); [Phillips, Ashton](#); [Wakeham, Rebecca \(Becky\)](#); [Peterson, Susan](#); [Justman, Aimee](#); [Bell, Pollyana \(Polly\)](#); jbogle@cclawfirm.com; avenable@cclawfirm.com
Subject: Rice v. Fundamental (Case No. 2021-CP-42-03701) -- Notice of Appeal
Date: Tuesday, March 14, 2023 10:48:36 AM
Attachments: [image001.png](#)
[Rice v. Fundamental -- Notice of Appeal.pdf](#)
[Appealed Order 1 -- Order filed 11-21-22 Denying MTCA and Mots. to Stay.pdf](#)
[Appealed Order 2 -- Order filed 3-1-23 Denying MTR.pdf](#)

Attached for service please find Defendants'/Appellants' **Notice of Appeal** in the above-referenced matter.

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******* IMPORTANT NOTICE - READ THIS INFORMATION *******
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2021CP4203701

Official File Stamp: 03-14-2023 10:57:28 AM
Court: CIRCUIT COURT
Common Pleas
Spartanburg
Case Caption: Sonya Lovett , plaintiff, et al VS Fundamental Clinical And Operational Services, Llc ,
defendant, et al
Document(s) Submitted: Appeal/Notice of Appeal to Court of Appeals
- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits
Filed by or on behalf of: Russell Grainger Hines

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Donald Jay Davis, Jr. for Thi Of South Carolina At Magnolia Place - Spartanburg
Russell Grainger Hines for Fundamental Clinical And Operational Services, Llc et al
Joshua David Christian for Sonya Lovett
Matthew W. Christian for Sonya Lovett et al
Warren H. Christian, Jr. for Sonya Lovett
James D. Gandy, III for Fundamental Clinical And Operational Services, Llc et al

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

Donald Jay Davis, Jr. for Fundamental Administrative Services, Llc
Donald Jay Davis, Jr. for Fundamental Clinical And Operational Services, Llc, Thi Of South
Carolina At Magnolia Place - Spartanburg, Fundamental Administrative Services, Llc

Dec 15 2023

SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned counsel for Appellants certifies that, in accordance with Rule 210(c), SCACR, this **Record on Appeal** contains all material proposed to be included by any party that was presented to the lower court and not any other material. The undersigned also certifies that this **Record on Appeal** complies with the Supreme Court of South Carolina's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings issued April 15, 2014.

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December 15, 2023