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SC Court of Appeals

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

Appeal from Marion County
Court of Common Pleas

H. Steven DeBerry IV, Circuit Court Judge

Case No. 2022-CP-33-00183
Appellate Case No. 2023-001712

Rebecca C. Hagood
as Personal Representative of the Estate of Frank D. Chavis, Sr.,

Respondent,

v.

Palmetto Faith Operating, LLC
d/b/a Faith Healthcare Center and
Brooks Arnette,

Appellants.

RECORD ON APPEAL

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INDEX

Orders

Order Denying Defendants’ Motions to Compel Arbitration, filed September 8, 2023	1
Order Denying Defendants’ Motion to Reconsider, filed October 2, 2023	14

Pleadings

Summons and Complaint, filed April 4, 2022.....	16
Affidavit of Karen Coleman	23
Amended Complaint for Damages, filed May 20, 2022.....	41
The Facility’s ¹ Answer to Plaintiff’s Amended Complaint, filed June 8, 2022.....	57
Arnette’s Answer to Plaintiff’s Amended Complaint, filed June 8, 2022.....	69

Transcripts

August 21, 2023, Hearing Transcript.....	80

Other Material

The Facility’s Motion to Compel Arbitration, filed July 13, 2022	127
Exhibit A, Arbitration Agreement	129

¹ The “Facility” refers to Defendant/Appellant Palmetto Faith Operating, LLC d/b/a Faith Healthcare Center.

Arnette’s Motion to Compel Arbitration, filed July 13, 2022	130
Exhibit A, Arbitration Agreement	(see 129)
Plaintiff’s Response in Opposition to Motions to Compel Arbitration, filed August 18, 2023	132
Exhibit 1, Admission Agreement	153
Exhibit 2, Arbitration Agreement	(see 129)
Exhibit 3, Deposition Testimony of Rebecca Hagood ²	165
Exhibit 4, Daily Skilled Nurse’s Note	182
Exhibit 5, Readmission Agreement	183
Exhibit 6, Deposition Testimony of Kelly Dials ³	185
Exhibit 7, Social Service Progress Notes	271
Exhibit 8, Medicare Form	272
Exhibit 9, J. Miller’s Order Denying Motion to Compel Arbitration	273
Exhibit 10, J. Buckner’s Order Denying Motion for Non-Jury Trial	281
Defendants’ Memo in Support of Motion to Compel Arbitration, filed August 18, 2023	288
Exhibit 1, Admission Agreement	(see 153)

² Exhibit 3 consists solely of a condensed transcript, in its entirety, of the deposition of Rebecca C. Hagood. For purposes of this Record on Appeal, the full-sized transcript has been used in place of the condensed version.

³ Exhibit 6 consists solely of a condensed transcript, in its entirety, of the deposition of Kelly Edwards Dials. For purposes of this Record on Appeal, the full-sized transcript has been used in place of the condensed version.

Exhibit 2, Readmission Agreement.....	(see 183)
Exhibit 3, Arbitration Agreement.....	(see 129)
Motion to Alter, Amend, and/or Reconsider Order Denying Defendants’ Motions to Compel Arbitration, filed September 18, 2023.....	329
Notice of Appeal (omitting Orders) and Proof of Service, filed November 1, 2023	359
Certificate of Counsel	366

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF MARION	)	TWELFTH JUDICIAL CIRCUIT
	)	
Rebecca C. Hagood as Personal	)	C/A No. 2022-CP-33-00183
Representative of the Estate of Frank D.	)	
Chavis, Sr.,	)	
	)	
Plaintiff,	)	ORDER DENYING DEFENDANTS'
	)	MOTIONS TO COMPEL
vs.	)	ARBITRATION
	)	
Palmetto Faith Operating, LLC d/b/a Faith	)	
Healthcare Center and Brooks Arnette,	)	
	)	
Defendants.	)	
_____	)	

Hearing Date:	August 21, 2023
Hearing Judge:	H. Steven DeBerry, IV
Counsel for Plaintiff:	A. Keith McAlister, Jr.
Counsel for Defendants:	Russell G. Hines

This matter came before the Court on August 21, 2023, via WebEx, on Defendants Palmetto Faith Operating, LLC d/b/a Faith Healthcare Center and Brooks Arnette's Motions to Compel Arbitration (collectively as "Motion"). Present during the hearing were attorney A. Keith McAlister, Jr., of Hawk Law Group for the Plaintiff, and attorney Russell G. Hines, of Clement Rivers, LLP for the Defendants. After review of the record, consideration of the parties' memoranda, and having heard oral arguments from counsel, the Court hereby DENIES the Defendants' Motion:

PROCEDURAL BACKGROUND

On April 4, 2022, Plaintiff Rebecca C. Hagood ("Plaintiff" or "Mrs. Hagood"), as Personal Representative of the Estate of Frank D. Chavis, Sr., commenced this wrongful death and survival action by filing a Summons and Complaint in the Court of Common Pleas of Marion County, South Carolina. Defendants were timely served. On May 20, 2022, an Amended Complaint was

filed. On June 8, 2022, Defendants Answered the Amended Complaint. On July 13, 2022, Defendants filed the instant Motion. On August 18, 2023, Plaintiff filed her Response in Opposition to Defendants' Motion ("Plaintiff's Resp."). Defendants filed a Memorandum in Support of their Motion ("Defendants' Memo.") later that day. The parties appeared before this Court for the Motion hearing on August 21, 2023.

FACTUAL BACKGROUND

This matter arises out of a wrongful death and survival action brought by Plaintiff. In part, Plaintiff alleges Frank D. Chavis, Sr. ("Mr. Chavis" or the "Resident") was negligently cared for and treated while a resident at Palmetto Faith Operating, LLC d/b/a Faith Healthcare Center (the "Facility") in Florence, South Carolina. On March 14, 2019, Mr. Chavis was initially admitted to the Facility. Medical records maintained by the Facility for Mr. Chavis dated March 15, 2019, indicate he was "a 74 year old man being admitted to the facility for rehabilitation therapy." *Plaintiff's Resp.*, Exhibit 7. The Facility's records also state Mr. Chavis "is able to communicate his thoughts and wants to staff." *Id.* That same day, Facility records also purportedly show Mr. Chavis signing a financial document on his own behalf. *Plaintiff's Resp.*, Exhibit 8.

During the admissions process, Mrs. Hagood¹, as daughter of Mr. Chavis, met with the Facility's Admissions Director, Kelly Dials, who presented an Admission Agreement and Arbitration Agreement to her. Despite having no power of attorney, Mrs. Hagood signed both documents on her father's behalf on March 14, 2019. *Plaintiff's Resp.*, Exhibit 3; R. Hagood Dep. 9:11-19 (Oct. 4, 2022). In relevant part, the Arbitration Agreement was signed by Mrs. Hagood as "Resident/Representative" of Mr. Chavis, and Kelly Dials signed as "Authorized Agent of

¹ At this time, Mrs. Hagood was known as Rebecca "Becky" Stokes.

Facility.” *Plaintiff’s Resp.*, Exhibit 2. Plaintiff contends that the Arbitration Agreement is unenforceable under state contract law.

LAW AND ANALYSIS

The party seeking to force arbitration has the burden of establishing the existence of a valid arbitration agreement. *See Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). It is well established in South Carolina 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[,]” and “[i]f 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 (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).

The party seeking judicial enforcement of a contract bears the burden of persuasion. *Hinson-Barr, Inc. v. Pinckard*, 292 S.C. 267, 268, 356 S.E.2d 115, 116 (1986). Defendants must prove a valid and enforceable arbitration agreement was signed in a “knowing, voluntary and intentional” capacity. In interpreting a jury trial waiver narrowly, some courts have also emphasized “the basic principle that ambiguities in a contract are construed against the drafting party.” *Nat’l Acceptance Co. v. Myca Products, Inc.*, 381 F. Supp. 269, 271 (W.D. Pa. 1974). When faced with a motion to compel arbitration that is opposed based on whether an agreement to arbitrate has been made between the parties, the court must provide the opposing party with the benefit of all reasonable doubts and inferences that may arise. *See Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51, 54 (3d Cir. 1980).

Here, the Arbitration Agreement states it shall be governed by and enforced under Federal law, specifically, the Federal Arbitration Act (9 U.S.C. §§ 1-16) (“FAA”), as opposed to state arbitration law, unless “contrary to state law”. It further provides it is not subject to the South Carolina Uniform Arbitration Act. Under the FAA, however, the Court must look to South Carolina law to decide the threshold questions of contract formation. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360, 364 (2001); *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) (“the court should apply ‘ordinary state-law principles that govern the formation of contracts.’”).

Further, arbitration agreements are subject to the same defenses applicable to all other contracts. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68, 130 S.Ct. 2772, 2776, 177 L.Ed.2d 403 (2010) (quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). In determining whether an arbitration agreement even exists, “trial courts consider ‘general contract defenses to ensure’ a meeting of the minds to arbitrate existed, and that such an agreement was not the result of ‘fraud, duress, [or] unconscionability.’” *York v. Dodgeland*, 406 S.C. 67, 78, 749 S.E.2d 1139, 145 (2013) (citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 593, 553 S.E.2d 110, 116 (2001)). The judicial inquiry may include examination of contractual defects such as mutual assent and want of consideration as well as other equitable grounds. *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d.302, 205 (4th Cir. 2001). The validity of an arbitration agreement must be determined in accordance with the general principles of contract law. *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2011); *Grant v. Magnolia Manor-Greenwood, Inc.*, 387 S.C. 125, 130, 678 S.E.2d 435, 438 (2009).

1. **Mrs. Hagood, as daughter of Mr. Chavis, did not have Actual or Apparent Authority to sign the Arbitration Agreement**

The legal consequences of an agent's actions can only be attributed to the principal when the agent has actual or apparent authority. *Charleston, S.C. Registry v. Young Clement Rivers & Tisdale*, 359 S.C. 635, 642 (2004) (citations omitted). "An agency relationship may be established by evidence of actual or apparent authority." *Id.* "[T]he agency must be clearly established by the facts." *Orphan Aid Society v. Jenkins*, 294 S.C. 106, 109, 362 S.E.2d 885, 887 (Ct. App. 1987) (quoting *McCall v. Finley*, 294 S.C. 1, 362 S.E.2d 26 (Ct. App. 1987)). Further, "the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial. *Thompson v. Pruitt Corp.*, 416 S.C. 43, 57, 784 S.E.2d 679, 687 (Ct. App. 2016); *See Dickerson v. Longoria*, 414 Md. 419, 995 A.2d 721 (Ct. App. 2009). When a facility knows a resident is competent at the time of admission and is allowed to sign other forms, the resident should sign the arbitration agreement. *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 574, 813 S.E.2d 292, 308 (Ct. App. 2018). Here, the facts do not support a finding of actual or apparent authority on behalf of Mrs. Hagood.

A. No Actual Authority

Actual authority is that which is "expressly conferred upon the agent by the principal." *Young Clement*, 359 S.C. at 642. "It is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority." *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996) (quoting *Orphan Aid Society*, 294 S.C. at 109). In South Carolina, a power of attorney is generally recognized to provide actual authority. Power of attorney means a "writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term 'power of attorney' is used." S.C. Code Ann. § 62-8-102(7). The "principal" is "an individual with contractual capacity who grants authority to an agent in a power of attorney." S.C. Code Ann. § 62-8-102(9). The "agent" is a "person granted authority to

act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise.” S.C. Code Ann. § 62-8-102(1).

The power of attorney is an instrument that confers upon the agent “authority to perform certain specified acts or kinds of acts on behalf of the principal.” *Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 573, 828 S.E.2d 82, 85 (Ct. App. 2019) (quoting *Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014)). “The written authorization itself is the power of attorney.” *Id.* Moreover, the power of attorney must be recorded as a deed to become effective. *Id.* at 574; *See* S.C. Code Ann. § 62-8-109(c). Thus, if a resident’s representative does not have a valid power of attorney, which conveys the right to waive the resident’s Constitutional right to a jury trial, the resident’s representative lacks actual authority to bind the resident to arbitration. *See Arredondo v. SNH SE Ashley River Tenant, LLC*, 433 S.C. 69, 856 S.E.2d 550 (2021).

Mrs. Hagood testified she did not have any power of attorney at the time the Arbitration Agreement was signed. *Plaintiff’s Resp.*, Exhibit 3; R. Hagood Dep. 9:11-19. The Facility’s Admission’s Director, Ms. Dials, testified she had no duty to ascertain whether a family member had authority to sign documents on a resident’s behalf. *Plaintiff’s Resp.*, Exhibit 6; K. Dials Dep. 39:16-20 (Oct. 4, 2022). Ms. Dials also testified she did not determine whether Mrs. Hagood had power of attorney to sign the Arbitration Agreement. *Plaintiff’s Resp.*, Exhibit 6; K. Dials Dep. 22:24-24:17, 33:10-35:21, 38:14-39:20. Ms. Dials further testified she was not aware of any instance in which Mr. Chavis, without a power of attorney, gave permission for Mrs. Hagood to sign on his behalf. *Plaintiff’s Resp.*, Exhibit 6; K. Dials Dep. 38:14-39:5. Because no power of attorney existed nor other written authorization granting Mrs. Hagood permission to waive her father’s Constitutional rights, the Arbitration Agreement is unenforceable for lack of actual authority.

B. No Apparent Authority

“[A]pparent authority is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which the principal holds the agent out as possessing.” *Young, Clement*, 359 S.C. at 642. The existence of apparent authority depends upon “manifestations by the principal to the third party and the reasonable belief by the third party that the agent is authorized to bind the principal.” *Id.* The “proper focus” in analyzing a claim of apparent authority is the relationship “between the principal and the third party.” *Id.* at 642-43. Further, “an agency may not be established solely by the declarations and conduct of an alleged agent.” *Id.* at 643; *citing Frasier*, 323 S.C. at 245.

To show apparent authority, Defendants must establish: “(1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party’s detriment.” *Graves v. Serbin Farms, Inc.*, 306 S.C. 60, 63, 409 S.E.2d 769, 771 (1991). “Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him.” *Frasier*, 323 S.C. 244-45; Restatement 2d of Agency § 27 (1958). “[I]t is not enough simply to prove that the purported principal by either affirmative conduct or conscious and voluntary inaction has represented another to be his agent or servant.” *Id.* at 245.

Ms. Dials testified that she never interacted with Mr. Chavis, the principal, prior to his admission to the Facility or his daughter’s execution of the Arbitration Agreement. *Plaintiff’s Resp.*, Exhibit 6; K. Dials Dep. 25:2-5. Mrs. Hagood also testified Mr. Chavis was not present when the agreement was signed. *Plaintiff’s Resp.*, Exhibit 3; R. Hagood Dep. 14:24-15:1. Because

Mr. Chavis, as principal, never interacted with the Facility's representative prior to the execution of the Arbitration Agreement and was not present when the agreement was signed, no apparent authority was conveyed by the principal or could have been conveyed, consciously or impliedly, to the Facility; therefore, the Arbitration Agreement is unenforceable for lack of apparent authority.

C. No Authority Under the Adult Health Care Consent Act

Under the Adult Health Care Consent Act (the "AHCCA"), a surrogate may make health care decisions for a patient who is unable to consent. S.C. Code Ann. § 44-66-30(A). To rely upon a surrogate, the healthcare facility must document in the patient's record its efforts to locate a decision maker who qualifies under subsection (A). S.C. Code Ann. § 44-66-30(B). Further, "[i]f persons of equal priority disagree on whether certain health care should be provided to a patient who is unable to consent, an authorized person, a health care provider involved in the care of the patient, or any other person interested in the welfare of the patient may petition the probate court for an order determining what care is to be provided or for appointment of a temporary or permanent guardian." S.C. Code Ann. § 44-66-30(C).

"[T]he [AHCCA] contemplates that the surrogate's authority extends primarily to traditional health care decisions, and only secondarily to the financial decisions necessitated by those decisions, is illustrated by other provisions of the Act". *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 353, 755 S.E.2d 450, 454 (2014). "[T]he purpose of the Act is to insure that the patient's wishes concerning [his] medical treatment are honored whenever possible, and that decision making by the surrogate is a last resort." *Id.* (emphasis added). Importantly, the Court found a separate arbitration agreement concerns "neither health care nor payment, but instead provided an optional method for dispute resolution between [the] Facility and [the patient or

surrogate] should issues arise in the future.” *Id.* at 354. Therefore, “[u]nder the Act, [the surrogate does] not have the capacity to bind [the patient] to this voluntary arbitration agreement.” *Id.*

Medical records from the Facility show Mr. Chavis was able to “communicate his thoughts and wants to staff.” Plaintiff’s Resp., Exhibit 7. Moreover, even if Mrs. Hagood qualified as a surrogate under the AHCCA, she did not have authority according to *Coleman* to execute an Arbitration Agreement. Therefore, the Arbitration Agreement is unenforceable.

2. The Admission and Arbitration Agreements Do Not Merge

The merger doctrine is not applicable when language in the contracts “recognize[s] the ‘separateness’ of the admission and arbitration agreements.” *Coleman*, 407 S.C. at 355. As set forth in *Coleman*, *Thompson*, *Hodge*, and *Solesbee*, “separateness” of the agreements may be illustrated by several factors, including different titles and pagination, distinct signature pages, differing revocation provisions, and entirety of agreement provisions, amongst other contract language. *Coleman*, 407 S.C. at 355; *Thompson*, 416 S.C. at 52-54; *Hodge*, 422 S.C. at 561-63; *Est. of Solesbee v. Fundamental Clinical & Operational Servs., LLC*, 438 S.C. 638, 648-49, 885 S.E.2d 144, 149 (Ct. App. 2023).

For instance, an admission contract with an “Entirety of Agreement” provision is separate “[o]n its face” from an arbitration contract where the two contracts are identified distinctly. *Coleman*, 407 S.C. at 355. Two contracts may also be considered distinct when they have different titles and independent pagination with different signature pages. *Thompson*, 416 S.C. at 53; *Hodge*, 422 S.C. at 562-63. Separateness is further demonstrated when the nursing home makes clear that agreeing to arbitrate is not required to gain admission to the home. *Thompson*, 416 S.C. at 53. Such factors “‘indicate the parties’ intent for [the arbitration agreement] to stand by itself as an independent contract.” *Thompson*, 416 S.C. at 53 n. 1; *Hodge*, 422 S.C. at 562-63.

In *Solesbee*, the Court of Appeals addressed substantially the same admission and arbitration agreements and determined they did not merge. *Defendants' Memo.* at p. 34. In that case, the Court found “Admission Agreement” was “governed by South Carolina law, and the Arbitration Agreement” was “governed by federal law.” *Solesbee*, 438 S.C. at 648. The Court also found the two agreements were separate because the Arbitration Agreement survived “any termination or breach of [it] or the Admission Agreement.” *Id.* at 649. The Court further held Arbitration Agreement was silent as to revocation, while the Admission Agreement allowed termination “at any time, upon written notice to the Facility.” *Id.* Moreover, the Court held the agreements “were separated paginated” with “their own signature pages.” *Id.* Finally, the Court held the arbitration agreement was voluntary and not necessary for the resident to be admitted to the facility. *Id.* As a result, there was no merger, and the facility’s equitable estoppel argument was properly denied. *Id.*

Here, the Admission Agreement is entitled “Admission Agreement – South Carolina” and is twelve (12) total pages numbered page one (1) to twelve (12). The Arbitration Agreement has a different title: “Facility – Resident/Representative Arbitration Agreement”. The Arbitration Agreement is one (1) page and is numbered page one (1) to one (1). In the opening paragraph of the Admission Agreement, “Agreement” is a defined term, which is limited to the Admission Agreement only. Within the 12-page admission contract, there are vague references to attachments and exhibits within the agreement; however, no such attachments or exhibits are attached, included or appended. Further, the term arbitration is never referenced within the Admission Agreement. Likewise, the Arbitration Agreement contains no label or language indicating it serves as an exhibit or addendum of the Admission Agreement.

The Admission Agreement also contains an entirety of agreement section, which supersedes all previous representations, understandings or agreements. The Admission Agreement further allows for termination at any time. The Arbitration Agreement does not include any revocation provision. As in *Solesbee*, there is no merger between the instant Admission² and Arbitration Agreements.

3. Equitable Estoppel is Denied.

As noted in *Hodge*, the Plaintiff, a third-party who represents the wrongful death beneficiaries and estate, is not suing under the Arbitration Agreement or attempting to invoke the Arbitration Agreement itself. *Hodge*, 422 S.C. at 574. Plaintiff also has filed no action alleging a breach of contract under the Admissions Agreement. Therefore, Plaintiff is not seeking to invoke benefit of either of the contracts executed by the daughter. *See Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167 (2019).

“A nonsignatory should be compelled to arbitrate a claim *only if* it seeks, through the claim, to derive a direct benefit from the contract containing the arbitration provision.” *Wilson*, 426 S.C. at 344; *See In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 740-41 (Tex. 2005). When the benefits to a nonsignatory are merely indirect, an Arbitration Agreement cannot be compelled. *Wilson*, 426 S.C. at 343. Further, the mere fact that the claim would not exist “but for” the contract does not invoke the theory of estoppel. *Id.* “Equitable estoppel is, ultimately, a theory designed to prevent injustice, and it should be used sparingly.” *Wilson*, 426 S.C. at 345; *See Hirsch v. Amper Fin. Servs., LLC*, 215 N.J. 174, 71 A.3d 849, 852 (N.J. 2013) (observing equitable estoppel should

² Evidence also shows the underlying Admission Agreement was terminated, and Mr. Chavis was discharged from the Facility. He later returned to the Facility, and his daughter signed a Readmission Agreement. It also contained a separate title, different pagination, and different signature block. It did not reference arbitration or any such agreement. Despite his readmission, Mrs. Hagood was not presented any additional arbitration agreement for signature. Likewise, this Readmission Agreement does not merge.

be used sparingly to compel arbitration and noting it “is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration”); 28 Am. Jur. 2d *Estoppel and Waiver* § 29 (2011) (stating equitable estoppel should be used with restraint and only in exceptional circumstance). Thus, the equitable estoppel argument is denied.

CONCLUSION

After careful consideration of the pleadings, motions, and arguments of counsel, I find there is no valid Arbitration Agreement. Accordingly, Defendants’ Motion to Compel Arbitration is DENIED.

IT IS SO ORDERED.

The Honorable H. Steven DeBerry, IV
Judge, Twelfth Judicial Circuit

Florence, South Carolina

Dated: _____



Marion Common Pleas

Case Caption: Frank D Chavis Sr , plaintiff, et al VS Palmetto Faith Operating, Llc ,
defendant, et al
Case Number: 2022CP3300183
Type: Order/Other

H. Steven DeBerry, IV

Circuit Court Judge 2771

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF MARION	)	TWELFTH JUDICIAL CIRCUIT
	)	
Rebecca C. Hagood as Personal	)	C/A No. 2022-CP-33-00183
Representative of the Estate of Frank D.	)	
Chavis, Sr.,	)	
	)	
Plaintiff,	)	ORDER DENYING DEFENDANTS'
	)	MOTION TO RECONSIDER
vs.	)	
	)	
Palmetto Faith Operating, LLC d/b/a Faith	)	
Healthcare Center and Brooks Arnette,	)	
	)	
Defendants.	)	
_____	)	

The Defendant, Palmetto Faith Operating, LLC, requests the Court to reconsider the Order dated and filed on September 18, 2023, in the Marion County Clerk of Court's office.

Having duly considered the motion of the Defendant, this Court has determined that its original ruling of September 8, 2023, is fully supported by the law and the evidence and is hereby ratified and reconfirmed. The motion is therefore DENIED.

AND IT IS SO ORDERED.

H. Steven DeBerry, IV
Presiding Circuit Court Judge

Marion, South Carolina
September 19, 2023



Marion Common Pleas

Case Caption: Frank D Chavis Sr , plaintiff, et al VS Palmetto Faith Operating, Llc ,
defendant, et al
Case Number: 2022CP3300183
Type: Order/Other

H. Steven DeBerry, IV

Circuit Court Judge 2771

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF MARION	)	TWELFTH JUDICIAL CIRCUIT
	)	
Rebecca C. Hagood as Personal Representative	)	C/A No. 22-CP-33-
of the Estate of Frank D. Chavis, Sr.,	)	
	)	
	)	
Plaintiff,	)	
	)	SUMMONS
vs.	)	(Jury Trial Demanded)
	)	
Palmetto Faith Operating, LLC d/b/a Faith	)	
Healthcare Center and Brooks Arnette,	)	
	)	
Defendant.	)	

TO: DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to said Complaint on the subscriber at his office at 5 New Orleans Rd., Suite 102, Hilton Head Island, South Carolina, within thirty (30) days after service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

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ATTORNEYS FOR PLAINTIFFS

April 4, 2022

Hilton Head Island, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF MARION	)	TWELFTH JUDICIAL CIRCUIT
	)	
Rebecca C. Hagood as Personal Representative	)	C/A No. 22-CP-33-
of the Estate of Frank D. Chavis, Sr.,	)	
	)	
	)	
Plaintiff,	)	
	)	COMPLAINT
vs.	)	(Jury Trial Demanded)
	)	
Palmetto Faith Operating, LLC d/b/a Faith	)	
Healthcare Center and Brooks Arnette,	)	
	)	
Defendant.	)	

That Plaintiff, complaining of the Defendants, alleges as follows:

1. That Plaintiff is a citizen and resident of Florence County who has been duly appointed as the Personal Representative of the Estate of her father, Frank D. Chavis, Sr. ("Chavis").
2. That at no time was Plaintiff, individually, Frank D. Chavis, Sr.'s power of attorney, or the other wrongful death beneficiaries' power of attorney.
3. That at no time did Plaintiff, individually, have the right or power to waive Frank D. Chavis's or the other wrongful death beneficiaries' right to a jury trial, or to bind Frank D. Chavis or the other wrongful death beneficiaries to an agreement to arbitrate.
4. That, upon information and belief, Defendant Palmetto Faith Operating, LLC d/b/a Faith Healthcare Center ("nursing home") is a limited liability corporation organized and existing under the laws of the state of South Carolina doing business as a nursing home with its principal place of business in Florence County, South Carolina.
5. That upon information and belief, Brooks Arnette is a citizen and resident of Marion County, and at all relevant times herein was the administrator of nursing home ultimately responsible for staffing, training, compliance, and supervision.
6. That, upon information and belief, at all relevant times herein Defendant nursing home was acting by and through its agents and/or employees, who at all such times were acting within the course and scope of their agency and/or employment with Defendant, making

Defendant liable for their actions and omissions pursuant to the doctrines of *respondeat superior*, apparent or ostensible agency, non-delegable duty, or other law.

7. That pursuant to S.C. Code § 15-79-125 Plaintiff filed a Notice of Intent to File Suit with supporting affidavits of expert witnesses subject to the affidavit requirements established in S.C. Code § 15-36-100 in Marion County Court of Common Pleas for purposes of a medical malpractice lawsuit against Defendants; that Plaintiffs and Defendants have participated in a mediation conference as required by S.C. Code § 15-79-125(C). The affidavits that were previously filed pursuant to S.C. Code § 15-36-100 with the Notice of Intent to File Suit in Civil Action No. 21-NI-33-00005 are attached hereto as Exhibits “A” for re-filing, and the contents thereof are incorporated herein.
8. That Chavis, having been a previous resident of Defendant nursing home, was readmitted on April 17, 2019.
9. That, at the time of the readmission, Defendants knew or should have known that Chavis was physically and cognitively impaired, with such impairments exacerbated by medications and orthostatic hypotension, had incontinent episodes, required total staff assistance with toileting, personal hygiene and bathing, needed bed alarms, chair alarms, constant supervision and assistance for his own safety, had a history of falls and wandering, was at risk for night-time elopement attempts, and was a high fall risk.
10. That on May 28, 2019, early in the morning, Defendants’ nurses allowed Chavis to propel himself, unassisted and unsupervised, to the bathroom, and to remain in the bathroom unsupervised and unassisted for an extended period of time.
11. That Chavis fell headfirst out the bathroom window onto the ground outside suffering cervical spine fractures at C1-C3.
12. That Chavis layed on the ground with spine fractures for quite some time before Defendant’s staff discovered him.
13. That Chavis suffered extremity numbness, bowel dysfunction, pain upon inspiration, then respiratory followed by cardiac arrest, neurological slowing and died at the hospital with acute cervical spine fractures the contributing factor.
14. That Defendants undertook the duty to render nursing home care to Mr. Chavis in accordance with prevailing and acceptable standards of care for nursing homes, their administrators, employees and agents.

15. That notwithstanding the undertaking of that duty, and while Mr. Chavis was under the care of Defendants, such Defendants departed from prevailing and acceptable professional standards of care and treatment of Mr. Chavis, and were thereby negligent, careless, grossly negligent, reckless, willful, wanton, in violation of the duty owed to Mr. Chavis, and are liable for one or more of the following acts of omission or commission, any and all of which are departures from prevailing and acceptable professional standards of care, and one or more of which are violations of applicable statutes and regulations, making Defendants negligent *per se*:

- a. In failing to provide diligent care to prevent falls and injury from occurring.
- b. In failing to provide necessary safety and fall prevention measures.
- c. In failing to adequately assess his ADL needs.
- d. In failing to implement a baseline plan of care.
- e. In failing to provide adequate supervision and staff assistance with toileting.
- f. In failing to comply with the written plan of care.
- g. In failing to provide reliable documentation regarding the level of assistance provided with toileting, prior to the May 28, 2019 incident, which occurred during the 11-7 shift on May 27, 2019.
- h. In failing to adequately re-assess his risk for elopement.
- i. In failing to document attempts to seek alternative placement.
- j. In failing to keep behavior logs.
- k. In failing to provide safety alarm devices.
- l. In failing to report the May 28, 2019 incident resulting in serious injury and subsequent death to the Department of Environmental Control.
- m. In failing to provide window restrictors.
- n. In failing to provide complete, adequate, consistent, and factual documentation.
- o. In failing to sufficiently staff the nursing home;
- p. In failing to adequately train staff;
- q. In failing to adequately supervise staff;
- r. In such other and further ways as may be including in the Affidavit of Karen Coleman, RN attached hereto as Exhibit "C" and incorporated herein by reference.

16. That, therefore, as a direct and proximate result of the aforementioned actions and omissions of Defendant, and as evidenced by the Karen Coleman, RN, attached hereto as Exhibit "C", Chavis died after suffering severe and extreme pain and suffering, mental anguish and emotional distress, and conscious pain and suffering the likes of which no person should have to endure, incurred bills for which his family and/or his Estate are now liable, and such other and further damages, injuries and losses which may be discovered and proven at trial.

FOR A FIRST CAUSE OF ACTION
Survival Action

17. That Plaintiff hereby incorporates all prior paragraphs as if fully reiterated verbatim herein.
18. That, as aforesaid, as a direct and proximate result of the negligence, carelessness, gross negligence, recklessness and departures from the standards of care by the Defendants, their agents, servants and/or employees, Chavis suffered from severe and debilitating injuries which resulted in her death, but prior to his dying Chavis suffered severe and extreme pain and suffering, mental anguish and emotional distress, conscious pain and suffering the likes of which no person should have to endure, as well as significant medical bills, and his Estate has now also incurred the costs of his funeral and burial.
19. That Plaintiff is informed and believes that pursuant to S.C. Code §15-5-90 Chavis' Estate is entitled to compensation for the aforesaid damages, injuries and losses from Defendants, jointly and severally, in addition to an award of punitive damages for said Defendants' collective reckless, willful and wanton disregard of Chavis' health, well-being, rights and life.

FOR A SECOND CAUSE OF ACTION
Wrongful Death Action

20. That Plaintiff hereby incorporates all prior paragraphs as if fully reiterated verbatim herein.
21. That, upon information and belief, the aforesaid negligent, careless, reckless and grossly negligent conduct of the Defendants contributed and proximately caused Chavis' untimely death, and as a result of the wrongful death of Chavis, the statutory beneficiaries/claimants, as determined by S.C. Code §15-51-20 (namely, Pamela Lynch Watson, wife, Rebecca Hagood, daughter, Frank D. Chavis, Jr., son, Brandon Daniel

Chavis, son, James Victor Chavis, son, and Carl Chavis, son) have or will suffer grievous damages, including but not limited to mental shock and suffering, wounded feelings, grief and sorrow, loss of the decedent's companionship and love, deprivation of the use and comfort of the decedent's society, as well as the decedent's support, and such other damage as in the future will so suffer.

22. That Plaintiff is informed and believes that such statutory beneficiaries/claimants (namely, Pamela Lynch Watson, wife, Rebecca Hagood, daughter, Frank D. Chavis, Jr., son, Brandon Daniel Chavis, son, James Victor Chavis, son, and Carl Chavis, son) are entitled to compensation for the aforesaid damages, injuries and losses from Defendants, jointly and severally, in addition to an award of punitive damages for said Defendants' reckless, willful and wanton disregard of Chavis' health, well-being, rights and life, all pursuant to S.C. Code §15-51-10, et seq.

WHEREFORE, Plaintiff demands a jury trial and prays for judgment against the Defendants, jointly and severally, as follows:

- a. An award of actual and punitive damages for the Estate of Frank D. Chavis, Sr. pursuant to S.C. Code §15-5-90 on the First Cause of Action;
- b. An award of actual and punitive damages for the statutory beneficiaries, as determined by S.C. Code §15-51-20 (namely, Pamela Lynch Watson, wife, Rebecca Hagood, daughter, Frank D. Chavis, Jr., son, Brandon Daniel Chavis, son, James Victor Chavis, son, and Carl Chavis, son), and pursuant to S.C. Code §15-51-10, et seq., on the Second Cause of Action;
- d. The costs of this action; and
- e. Such other and further relief as this Court may deem appropriate.

WILLIAM J. TUCK, P.A.

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ATTORNEYS FOR PLAINTIFFS

April 4, 2022
Hilton Head Island, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF MARION

AFFIDAVIT OF KAREN COLEMAN

1. My name is Karen Coleman. I am over the age of eighteen, of sound mind and otherwise competent to make this Affidavit, which I make based upon my background, education, training, and experience. This affidavit is also based upon my own personal knowledge.

2. I am and have been a Registered Nurse, licensed in the State of South Carolina, since 1991. My further qualifications and background are set forth in the attached CV (Exhibit "A"), which is incorporated by reference.

3. I have actual professional knowledge and experience in my area of practice, Registered Nursing, including my specialty within this area, which is nursing home and long term care.

4. I am familiar with the standard of care applicable during the time of Frank Chavis's residency at Faith Healthcare Center, and the standard of care and skill exercised by reasonably prudent skilled nursing facilities under similar conditions as those involving Mr. Chavis.

5. I have reviewed the records relating to Mr. Chavis from Faith Healthcare Center and McLeod Regional Medical Center, as well as the death certificate. Based on my review of these records, I find that there is at least one deviation from the standard of care, during Mr. Chavis's residency at Faith Healthcare Center.

6. Without limitation, my review of records revealed the following:

- In December 2018, Mr. Frank Chavis was admitted to MUSC (Carolinas Hospital System) for shortness of breath related to exacerbation of congestive heart failure due to coronary artery disease with severe left ventricular dysfunction.
- From March 6 – March 14, 2019, Mr. Chavis, who had been living at home with his son, was hospitalized at McLeod Regional Medical Center (MRMC) with severe orthostatic hypotension, syncope, dizziness, and

pulmonary embolism. Additional diagnosis included Chronic Kidney Disease (Stage III-IV), cardiomyopathy with a reduced ejection fraction of 30-35%, coronary artery disease, carotid stenosis, type II diabetes, hypertension, Dementia, and recent, multiple embolic strokes. While hospitalized, Mr. Chavis tried to "escape" and required implementation of fall precautions secondary to decreased safety awareness. To enhance his safety, the hospital staff utilized bed and chair alarms.

- On March 14, 2019, Mr. Chavis was discharged from McLeod Regional Medical Center and admitted to Faith Healthcare Center.
- Upon admission and while in the care of Faith Healthcare Center, Mr. Chavis had cognitive deficits, as evidenced by confusion, long and short-term memory problems, and impairment in decision-making. His cognitive deficits caused him to have decreased safety awareness and made him a poor historian.
- In addition to his cognitive deficits, Mr. Chavis also had physical limitations secondary to decreased endurance, reduced bilateral lower extremity strength, generalized weakness, an amputated left great toe and left toe contractures, and orthostatic hypotension with syncopal episodes. His physical limitations had recently caused him to have an overall decline in his functional mobility, as well as poor standing balance, lack of coordination and an unsteady gait. Given his physical limitations, Mr. Chavis required total staff assistance with toileting, personal hygiene and bathing; he also required varying degrees of staff assistance with his remaining ADLs.
- Mr. Chavis also experienced some incontinent episodes and as noted, he required total staff assistance to toilet.
- Prior to admission to Faith Healthcare Center, Mr. Chavis had a known history of falls.
- On March 14, 2019, the day of his admission to Faith Healthcare Center, staff witnessed Mr. Chavis ambulating independently, climbing over side rails, and attempting to elope from the facility with need for "constant observation." He had orders for Seroquel 12.5 mg nightly to help with his behaviors; he was also on Eliquis, an anticoagulant.
- On the March 16, 2019 MDS, wandering was coding as having occurred on a daily basis, since Mr. Chavis had arrived at the facility.
- From March 14 – 16, 2019, Faith Healthcare Center staff had notice of his risk for falls and injury due to: cognitive deficits, physical limitations,

episodes of incontinence, use of medications (i.e. Seroquel, Eliquis (anticoagulant)), behaviors (i.e. wandering, agitation, impulsiveness, climbing over side rails, and attempts to elope), and a history of falls.

- Around 10:00 am on March 16, 2019, while at Faith Healthcare Center, the nurse on duty, who may have been T. Leonard, LPN, noted a red, 1.5 cm, bleeding laceration to Mr. Chavis's forehead. The nurse further noted that it was "unknown as to what happened" - "Resident unclear as to what happened." Orders were obtained to send Mr. Chavis to the MRMCMC ER for evaluation and report was "called to ER."
- Although not documented in the nursing home record, when EMS arrived to transport Mr. Chavis to MRMCMC, information provided to the EMS crew included that Mr. Chavis "slipped fell" and sustained a laceration to his left eye. It was further reported that Mr. Chavis "got self off floor," after he fell.
- Mr. Chavis left Faith Healthcare Center on March 16, 2019 in the care of Florence County EMS around 10:45 am en route to McLeod Regional Medical Center.
- At McLeod Regional Medical Center, it was reported to the hospital staff that Mr. Chavis had experienced an "UNWITNESSED" fall at Faith Healthcare Center. The fall caused him to sustain a closed head injury, as well as injuries to his face and left eye, as he had a laceration to his left brow, which was repaired with sutures, and swelling and redness around his left eye. Mr. Chavis was admitted for further evaluation due to orthostatic hypotension, which "contributed to his fall."
- During his hospital stay, Mr. Chavis was confused and agitated. He remained a fall risk and had reduced safety awareness. In addition to his risk for falls, he wandered at night and attempted to elope from the hospital.
- While hospitalized and working with therapy at McLeod Regional Medical Center, Mr. Chavis continued to demonstrate cognitive deficits, as he was noted to have disorientation, forgetfulness, and impaired safety awareness – all of which were felt to "impact his ability to safely stay home alone. If returning home, 24/7 by a person educated on orthostatic hypotension would be needed. In other words, he required "constant supervision" due "history of falls, orthostatic hypotension, and impulsivity."

- At discharge on March 19, 2019, Mr. Chavis was allowed to return to Faith Healthcare Center. At the time of discharge, Dr. Rhonda Wallace noted that Mr. Chavis was at “high risk for repeated fall due to hypotension with positional changing. He will need bed alarm and chair alarm at all times. He will need to be assisted at all times while he is out of bed or up ambulating” to prevent falls.
- At the time of Mr. Chavis’s return to Faith Healthcare Center on March 19, 2019, his condition was essentially unchanged, as he remained at “a high risk for future falls” and injury due to: cognitive deficits, physical limitations, medication use (i.e. Seroquel, Eliquis (anticoagulant)), episodes of incontinence, and behaviors (i.e. wandering and exit seeking behaviors). Nursing home staff were well aware of the need to “assist resident w/ADLs, transfer r/t fall risk” and the “need to assist resident w/ambulating due to hypotension w/fall risk.” In addition to the need for hands-on assistance with transfers and ambulation, as well as other ADLs, Mr. Chavis also had to be constantly supervised 24/7, due to his decreased safety awareness. As for locomotion, once in the wheelchair, Mr. Chavis required extensive to total assistance but could, at times, propel himself in the wheelchair with his feet. Furthermore, upon his return, Mr. Chavis also had some difficulty communicating his thoughts and needs to staff.
- Once he returned to Faith Healthcare Center on March 19, 2019, “due to safety precautions”, Mr. Chavis was, at times, provided with “daily” 15 and 30 minute safety checks “throughout the shift.”
- On April 5, 2019, Mr. Chavis was discharged from Faith Healthcare Center; he was sent home in the care of his son, Brandon Chavis.
- About a week after he was discharged from Faith Healthcare Center, Mr. Chavis had to be re-admitted to the hospital.
- From April 12, 2019 – April 17, 2019, Mr. Chavis was at MUSC. His admission to the hospital was prompted due to confusion/altered mental status, and he was subsequently admitted for acute encephalopathy. Additional past medical history included Osteoarthritis and COPD.
- At the time of discharge, on April 17, 2019, his mental status was felt to be at baseline in the presence of “underlying dementia.” His daughter, who was his Power of Attorney, made the decision for skilled nursing

care, and as such, he was discharged and accepted back at Faith Healthcare Center.

- At the time of his readmission to Faith Healthcare Center on April 17, 2019, Mr. Frank Chavis had known medical history of: embolic strokes/CVA, hypertension, CHF, cardiomyopathy with a reduced ejection fraction of "30-35%", CAD, carotid artery stenosis, anemia, type II diabetes, pulmonary embolism, Osteoarthritis, anemia, chronic kidney disease, Dementia, COPD, severe orthostatic hypotension, syncope, and dizziness, and a history of falls and wandering.
- Once he returned to Faith Healthcare Center, staff remained aware of the fact that Mr. Chavis was behavioral and wandered and was at risk for elopement. The staff was also aware that Mr. Chavis continued to be at high risk for falls, due to attempts to ambulate and transfer unsafely and unassisted in combination with other contributing factors: cognitive deficits, physical limitations, episodes of incontinence, and medication use.
- In May 2019, at times, due to Mr. Chavis' risk for elopement, staff provided 15 minute assessments.
- Per the nursing note entry from 6:45 am on May 28, 2019, around "6:30ish" in the morning, Mr. Chavis was sitting in the wheelchair in front of the nursing station. Mr. Chavis then reported to the nurse that he had to go to the bathroom and propelled himself to "middle bathroom and proceeds to go the bathroom per self. This nurse and assigned nurse up to check on him after several minutes. Found one of his shoes on the bathroom floor, bathroom window opened and no sign of resident. Noted resident lying on ground outside of bathroom window. Immediately went to resident and assessed for injuries. Resident had no visible injuries or s/s of injuries."
- Although the nursing note indicated that Mr. Chavis was sitting at the nursing station around 6:30 am, the documentation from Faith Healthcare Center involving the timing of the incident is conflicting with entries within the EMS and McLeod Regional Medical Center records.
- Per the EMS records, Florence County EMS was contacted around 2:46 am on May 28, 2019, and EMS staff arrived at the "patient's side" around 3:01 am.
- When EMS arrived at Faith Healthcare Center, they were directed outside to "rear of Marion Street Side." Report given to EMS by the

nursing home staff included that Mr. Chavis had a history of Dementia and had attempted to escape "several times" and "they are attempting to get the pt. placed at a facility that can handle him."

- Upon arrival to the nursing home, EMS was further told by the staff that Mr. Chavis had "Fall from window for 20 minutes," which inferred that Mr. Chavis fell about 20 minutes before EMS arrived at the nursing home. The fall was from a height of about "3-4 feet" onto the grass and reportedly occurred during an attempt to "escape the nursing home." Staff further stated to EMS that Mr. Chavis "cut the screen out the window and fell out the window" onto the grass/ground. After being secured on the stretcher and loaded onto the ambulance, Mr. Chavis told EMS personnel that his neck was sore and painful.
- Mr. Chavis arrived in the ER at McLeod Regional Medical Center around 3:22 am. During triage, Mr. Chavis complained of neck pain rated, which he rated as a 5, upper extremity numbness, and "bowel dysfunction of sudden onset x 1 hour ago" resulting in him defecating on himself. Additional information given by Mr. Chavis to Toiekka (Toy) Johnson, RN included that "he was attempting to climb out his window, "too see what it was like to be outside," but "he slipped and fell approximately 5 feet onto his neck."
- The History and Physical examination performed by Carmen Cribb, DO reflected that Mr. Chavis was alert and oriented to place and person. During the evaluation, the provider denoted that Mr. Chavis was lying in urine soaked sheets on the stretcher. The provider further noted that Mr. Chavis reported that he was looking out the window and wanted to "see what it was like outside", when he "fell onto his back and laid on the ground for about 10 minutes before anyone found him." After falling, Mr. Chavis reported that his arms and legs were numb (i.e. paresthesia), he had a "warm sensation" all over his body, and he had a headache, along with neck stiffness and pain in his chest upon inspiration. His fall out of the window at Faith Nursing Home resulted in comminuted, cervical spine fractures involving C1-C3, as Mr. Chavis "Apparently" fell onto his head.
- The May 28, 2019 Pulmonology consultation performed by Vlad Apostol, DO, recapped the information documented by Carmen Cribb, DO in that the provider noted that Mr. Chavis fell and was found "outside laying on his back" for "what is an estimated 10 minutes until staff discovered

him." Post fall, Mr. Chavis had neck stiffness, headache, and pain on inspiration. He was admitted to the medical floor for further evaluation and treatment of his cervical spine fractures.

- Dr. Allan Macdonald, who was the attending physician, was under the impression that that Mr. Chavis fell out of a window, "allegedly in an attempt to elope."
- Around 10:30 pm, on May 28, 2019, Mr. Chavis went into respiratory distress (possibly due to hypoxia from a pulmonary embolism) followed by full cardiac arrest with a down time of 10-15 minutes. Post-resuscitation, Mr. Chavis remained intubated and was placed on the ventilator; his subsequent echocardiogram revealed significantly reduced systolic and diastolic dysfunction. In addition, post-code he remained unresponsive and exhibited no motor reflex activity/movements. However, he was sedated and on paralytics creating inability to conduct a thorough neurological exam.
- From May 29 - 31, 2019, post code EEG monitoring revealed "moderate to severe generalized slowing."
- While hospitalized, Mr. Chavis was fed via feeding tube, he remained in a cervical collar, he also remained intubated, and on the ventilator, as Mr. Chavis exhibited difficulty with proper ventilation when his sedation was lessened. Although his prognosis was poor, while hospitalized, Mr. Chavis did show minimal signs of improvement. He was noted to become alert, he was able to follow some simple commands, and he was able to wiggle his toes. In addition, his follow-up EEG also yielded some improvement but "generalized slowing" remained present.
- Mr. Chavis' daughter was "out of the country" and did not arrive at McLeod Regional Medical Center until June 6, 2019 to visit her father. When she arrived the decision was made to attempt to withdraw the ventilator and implement a Do Not Resuscitate/Do Not Intubate, comfort care status.
- Soon after the ventilator was withdrawn on June 6, 2019, Mr. Chavis went into cardiac arrest and was pronounced dead.
- Mr. Chavis's death at McLeod Regional Medical Center on June 6, 2019 was the result of cardiac arrest secondary to acute hypoxic respiratory failure and nasopharyngeal mass. Other contributing factors included acute cervical spine fractures.

7. In my professional opinion, the staff of Faith Healthcare Center breached the standard of care and skill exercised by nurses generally and under similar conditions and circumstances as those presented by Mr. Chavis . In particular, in my opinion, the nursing home staff deviated from the standard of care in the following particulars:

- Failure to provide diligent care to prevent falls and injury from occurring.
- Failure to provide necessary safety and fall prevention measures.
- Failure to adequately assess his ADL needs.
- Failure to implement a baseline plan of care.
- Failure to thoroughly investigate how Mr. Chavis sustained injuries on or prior to March 16, 2019.
- Failure to provide adequate supervision and staff assistance with toileting.
- Failure to comply with the written plan of care.
- Failure to provide reliable documentation, during the 11-7 shift on May 27, 2019, regarding the level of assistance provided with toileting, prior to the May 28, 2019 incident.
- Failure to adequately re-assess his risk for elopement.
- Failure to document attempts to seek alternative placement.
- Failure to keep behavior logs.
- Failure to provide safety alarm devices.
- Failure to report the May 28, 2019 incident resulting in serious injury and subsequent death to the Department of Health and Environmental Control.
- Failure to provide window restrictors.
- Failure to provide complete, adequate, consistent, and factual documentation.

8. In my professional opinion, the staff of Faith Healthcare Center also breached multiple regulatory standards, some of which are as follows:

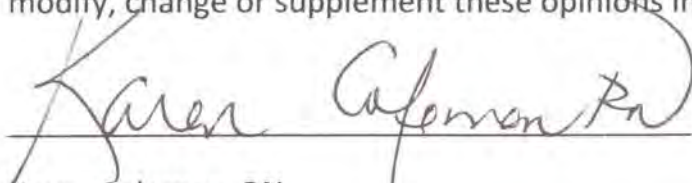
- SC Code of Laws, 43-35-10, Omnibus Adult Protection Act, expects the facility to protect its residents, who are considered vulnerable adults, from neglect.
- SC Code of Laws, Title 40, Chapter 33, Nurse Practice Act, requires nurses to:

- Evaluate data in “order to produce informed decisions, which guide nursing actions.”
 - Implement nursing interventions to achieve desired outcomes & provide safe and effective nursing care either directly or indirectly.
- SC DHEC Regulation Number 61-17, Standards for Licensing Nursing Homes, Administrator, Section 602, requires the administrator to exercise judgment that reflects that he or she is in compliance with regulatory standards and demonstrate knowledge of the regulations.
- SC DHEC Regulation Number 61-17, Standards for Licensing Nursing Homes, Direct Care Staff, Section 603, requires the facility to ensure that direct care staff be sufficient in number and skill at all times to allow staff to provide nursing and related care and services to assist the resident to attain or maintain their highest practicable physical and mental well-being and to ensure the safety of each resident.
- SC DHEC Regulation Number 61-17, Standards for Licensing Nursing Homes, Record Maintenance, Section 804, directs the facility to store records in an orderly manner for up to 6 years after discharge.
- SC DHEC Regulation Number 61-17, Standards for Licensing Nursing Homes, Reporting, Section 701, Accidents and Incidents, expects the facility to:
 - Investigate incident and accidents, as necessary and when the cause of the injury is not known.
 - Report every serious accident and incident involving a resident that results in death, bone fractures, or significant loss of function or damage to a body structure, not related to the natural course of a resident’s illness or underlying condition. Serious accidents and incidents requiring reporting include, but are not limited to, fractures and injuries of unknown origin.
 - Submit written report of every serious accident and incident to the Department within five days of the occurrence; the written report should include the type of accident or incident, date of the occurrence, the identified cause of the accident, a brief description of the accident, and internal investigation reports, when the cause is not known.
- United States Code of Federal Regulations, Title 42, Section 483.70, Administration, requires the facility to:

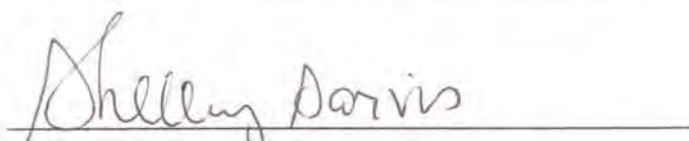
- Be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident residing in the facility.
- Operate and provide services in compliance with all applicable Federal, State, and local laws, regulations, and codes and with accepted professional standards and principles that apply to professionals that provide services in the same type of facility.
- Maintain clinical records on each resident in accordance with accepted professional standards and practices that are complete and accurately documented.
- US Code of Federal Regulations, Section 483.10, Safe Environment, reminds staff that the resident has a right to a safe environment including but not limited to “receiving treatment and supports for daily living safely.”
- US Code of Federal Regulations, Section 483.12, Freedom from Abuse, Neglect and Exploitation, demands the facility to ensure that staff does not neglect the needs of its residents. If the facility is aware of, or should have been aware of, services that a resident(s) requires but fails to provide these services to the resident(s), this may be considered as neglectful behavior.
- United States Federal Code of Regulations, Title 42, Section 483.25, Quality of Care, expects the facility to:
 - Provide appropriate treatment and services to each resident in order to maintain his/her ability.
 - Provide each resident with necessary care and services in an effort to allow each resident to maintain their highest practicable physical, mental, and psychosocial well-being.
 - Ensure that each resident receives adequate supervision and assistance devices to prevent accidents.
 - Keep the residents environment free of accident hazards.
 - Ensure that residents, who are continent of bladder and bowel, receive services to maintain continence.

9. Additionally, it is my opinion that the injuries Mr. Chavis encountered, while in the care of Faith Healthcare Center, can be attributed to breaches from the standard of care.

10. This is not a complete list of all deviations from the standard of care which I have found in reviewing these records. As a result, I reserve the right to modify, change or supplement these opinions in the future.


 Karen Coleman, RN

Sworn to me this 7 day of April, 2021


 Notary Public for South Carolina

My commission expires: 9/07/2021

REDACTED

843-423-2170 (w)

Karen E. Coleman, RN, CLNC

Profession	<u>Registered Nurse and Certified Legal Nurse Consultant</u>
Career Focus	<u>Certified Legal Nurse Consultant</u> to both Plaintiff and Defense attorneys, as well as insurance companies
Experience	December 2000 - present Coleman & Associates of Marion, Inc. Marion, SC <u>Certified Legal Nurse Consultant and Long Term Care Nurse Consultant</u> ▪ Provide consultant services to attorneys and healthcare facilities pertaining to health, illness, and injury ▪ Review medical records to determine if the standard of care has been met and if Regulatory standards governing the healthcare facility are being adhered to ▪ Assists in identifying pre-existing medical conditions and in determining which injuries can be connected in auto accident and worker's compensation claims ▪ Determine if there is a correlation between breaches in the standard of care and the injuries the resident or patient sustained, while residing in a healthcare facility ▪ Identify types of testifying experts needed and assist in the location of experts ▪ Serve as liaison between the attorney, testifying experts, healthcare providers, other consultants, etc. ▪ Assist clients in understanding the standard of care, as outlined by the Nurse Practice Act, State Laws, and Regulatory standards governing the type of facility involved ▪ Summarize, organize, bates stamp, and translate medical records ▪ Identifies missing medical records and medical records that should be requested ▪ Assist with requests for production and responses to interrogatories ▪ Conduct literature searches and integrate the literature, as it pertains to the issues at hand, when necessary ▪ Attend depositions, trials, review panels, arbitrations and mediations ▪ Develop power-point presentations for mediations, trials and arbitration ▪ Provide in-services and seminars on issues frequently seen in nursing home cases and methods the facility may wish to incorporate into practice to reduce the risk for liability November 2014 – 2018 A Peace of Home Marion, SC <u>Geriatric Care Manager</u> ▪ Assess elderly clients to determine actual and/or potential problems ▪ Develop a plan of care to meet the needs of the client and update the plan of care, as needed ▪ Network with others to provide outside resources to allow the resident to remain

safely in their home

- Meet with the family and caregivers, as well as others involved in the client's care, as needed
- Monitor the client for a change in their level of care and assist with placement in a facility (i.e. assisted living, nursing home, etc.) capable of meeting their needs, when and if this need arises
- Monitor the client when and if they are placed in a facility, when and if the family is concerned about the care being provided, and become a part of the interdisciplinary team to help ensure that the needs of the client are being identified and met

January 2003 Cooke Nursing Center (LTC Facility) Florence, SC

Nurse Consultant for Long-Term Care Facility

- Monitor for compliance with federal/state regulations
- Make recommendations, as indicated, to assist with meeting the needs of the residents, the standard of care, and professional standards of practice
- Assist with development of policies and procedures
- Assist with in-services and staff education
- Various other duties

January 2003 – September 2003 Marion Nursing Center (LTC facility)

MDS Coordinator/Nurse Consultant

- Perform MDS Assessments and RAPs in order to develop a plan of care relevant to the needs of each resident
- Assist with performance of Medicare Part-A assessments and ensure that facility is in compliance with Medicare Part-A guidelines
- Assess for appropriate level of care
- Assist with development of policies and procedures, as needed
- Monitor for compliance with federal/state guidelines
- Make recommendations, as indicated, to assist with meeting the resident's needs
- Monitor, along with the interdisciplinary team, to ensure that measures were in place to allow: reduction of restraints, reduction of psychotropic drugs, wound prevention & healing, fall prevention, adequate nutrition, etc.
- Provision of staff in-services and education, when needed
- Work closely with therapy (PT, ST, OT) in an effort to address concerns of residents in an effort to ensure that their needs are met
- Performed quarterly assessments (i.e. fall, pressure ulcer, bowel and bladder, restraint, etc.) and other assessments, when needed
- Various other duties

August 2002 – May 2003 Florence Visiting Nurses (Home Health)

Florence, SC

Home Health Staff Nurse

- Perform skilled nursing care for home bound patients
- Provide teaching to patients and their caregivers as needed
- Perform necessary treatments/procedures as ordered by the treating physician (i.e. wound care, medication management, injections, IV therapy, glucose

monitoring, etc.)

- Serve as a liaison between physician, patient and other current community resources

October 2000–July 15, 2002 Marion Nursing Center (LTC facility) Marion, SC

MDS/Care Plan Coordinator/Management Team Member

- Perform MDS Assessments and RAPs in order to develop a plan of care relevant to the needs of each resident
- Perform Medicare Part-A assessments, as needed, and ensure that facility is in compliance with Medicare Part-A guidelines
- Assess for appropriate level of care
- Monitor for compliance with federal/state guidelines
- Make recommendations, as indicated, to assist with meeting resident's needs
- Monitor, along with the interdisciplinary team, to ensure that measures were in place to allow: reduction of restraints, reduction of psychotropic drugs, wound prevention & healing, fall prevention, adequate nutrition, etc.
- Provision of staff in-services and education, when needed
- Work closely with therapy (PT, ST, OT) in an effort to address concerns of
- Member of restraint reduction committee (psychotropic drugs/"true restraints")
- Perform quarterly assessments (i.e. fall, pressure ulcer, bowel and bladder, restraint, etc.) and other assessments, when needed
- Acting director of nurses in the absence of the DON
- Knowledge of ICD9/CPT codes
- Assist with development of policies and procedures, as needed

April 2000 - October 2000 Pines Nursing Home (LTC facility) Dillon, SC

MDS/Care Plan Coordinator

- Perform MDS Assessments and RAPs in order to develop plan of care relevant to resident's needs
- Perform Medicare Part-A assessments as needed and ensure that facility is in compliance with Medicare Part-A guidelines.
- Assess for appropriate level of care
- Monitor for compliance with federal/state guidelines
- Make recommendations, as indicated, to assist with meeting resident's needs
- Function as staff nurse every third weekend
- Perform chart audits/reviews to ensure that essential documentation was in place

April 1999 - March 2000 Champus/PGBA (Insurance Company) Florence, SC

Medial Review Nurse/Appeals Department

- Perform medical review of appeals submitted by patients and health care facilities/agencies/physicians offices in order to process/deny/recoup claims that had denied in the system.
- Generate letters to beneficiary regarding appeal decision, based on policies of insurance company/federal guidelines (HCFA)
- Monitor claims submitted for correct billing in an effort to identify fraudulent claims or double billing

- Knowledge of HCFA policies and procedures, as well as CPT and ICD9 codes

1997-1999 Mullins Nursing Center, which is part of Marion County Hospital District (LTC facility), Marion, SC

Nurse Manager in Long-term Care

- Supervise all patient care to ensure that adherences to long-term care standards were adhered to
- Assist with revision and development of policies and procedures
- Participate in care planning of resident care to ensure quality of care
- Perform assessments on residents as needed (restraint, pressure sore, oral, etc...).
- Perform patient care, as needed
- Provide support to families and staff
- Supervise staff
- Provide adequate staffing patterns, as per state and federal regulations
- Perform employee health/infection control, as needed
- Refer patients for PT, OT and ST screens and work with therapist closely to provide adequate patient care and to ensure that resident's needs were being met; act as liaison between nursing and therapy to ensure proper communication
- Work closely with DON and staff in an effort to provide quality care to all residents
- Monitor pressure sores as needed for possible signs/symptoms of infection, need for treatment changes, etc
- Consult with MD, wound care specialist and PT as needed.
- Pronounce death
- Provide in-services to staff as needed on new policies, procedures and equipment
- Assist with MD rounds
- Serve as part of the quality assurance committee
- Assist staff, as needed with patient care needs
- Acting director of nursing in the absence of the DON

1995–1997 Marion County Hospital District Marion, SC

Operating Room/Recovery Room Nurse

- Familiarized self with hospital policies and procedures and standards of care in hospital setting, with emphasis on P & Ps involving the operating room, recovery room and outpatient surgery
- Assist OR techs, surgeons, anesthesia personnel, as needed
- Act as circulating or scrub nurse, whichever was necessary
- Assist in out-patient surgery, as needed
- Provide recovery room monitoring to patients on after hour/weekend call-backs
- Provide patient education prior to surgical procedure, as well as post-surgical education to patient and family as needed
- Monitor consent form for patient acknowledgement of procedure that they were to undergo
- Assess for any discrepancies in the procedure scheduled and consent form

1990-1995

Pee-Dee OB/GYN

Marion, SC

Office Nurse

- Perform external fetal monitoring to ensure fetal well-being
- Obtain Obstetrical and Gynecological patient histories to assess for pertinent information
- Assist, based on patient history, in determining if patient's pregnancy was to be considered high-risk related to: use of medications, age, diagnoses, etc.
- Provide appointments for genetic counseling, when noted by MD that patient's fetus was at increased risk for birth defects
- Contact home health agencies for provision of home health visits for follow-up as needed in relation to: wound care post-operatively, follow-up on gestational diabetics, catheter care, etc.
- Provide patient education regarding: mammograms, pap smears, birth control, sexually transmitted diseases, anemia, gestational diabetes, prenatal testing, surgical procedures, pre-eclampsia, nutrition, fetal kick counts, etc...
- Provide assistance to MD in ultrasound procedures and in-office surgical procedures (amniocentesis, colposcopies, hysteroscopies, cystometrograms, etc....)
- Hospital rounds, along with MD, to ensure that patients' condition meet qualifications for need for continued hospital stay
- Provide necessary patient care, as per MD order (suprapubic, foley, dressing changes, etc...)
- Develop and revise in-office procedures and policies as needed to ensure adherences to standard of care, as well as the development of discharge instructions for different surgical procedures

Education:

Associates degree in nursing from Florence-Darlington Technical College
 Certified Legal Nurse Consultant through the Medical-Legal Consulting Institute
 Long Term Care Nurse Management Certification
 Pre-requisites toward BSN at Francis Marion University and Florence Darlington Technical College

Organizations:

Member of the National Alliance of Certified Legal Nurse Consultants
 Member of National Association Directors of Nursing Administration/Long Term Care (NADONA)
 Wildlife Action Board Member (2016 – 2017)
 Marion Chamber of Commerce Board Member (2016 – 2018)
 Pee Dee Academy Board Member (2014 - 2017)
 Professional Fund-Raiser

Publications:

"The MDS: Unlock the Door to Nursing Home Case Development" - published in the February 2004 edition of **LNC Resource**

Honors:

Biltmore's Who's Who

Presentations:

January 25, 2005 - **Minimizing Your Risks in Nursing Home Litigation in South Carolina** in Columbia, SC (Speaker for Lorman Educational Services, along with Edna Cox, RD, Dale Hudson, Administrator and Attorney Bruce Robinson - my portion of the presentation focused on nursing issues that increase liability risks within the nursing home setting with suggestions on how the staff can assist in limiting their risk for liability)

January 2005: Presentation at Mullins Nursing Center, Mullins, SC on Minimizing Your Risk in Nursing Home Litigation and Dehydration

February 24, 2005: Spoke to the Directors of Nursing and Consultants of Health Management Resources (HMR) in Easley, SC regarding nursing issues that increase your liability risks within the nursing home setting with suggestions on how the staff can assist in limiting their risk for liability

July 11, 2005: Presentation to SC Department of Health and Environmental Control (DHEC) surveyors in Columbia, SC on the most common lawsuits seen in the NH setting and why this is occurring

August 11, 2005: Presentation at Kingston Nursing Home in Conway, SC on Documentation

Continuing Education:

Critical Care - November 19, 1996 - December 17, 1996

Managing Obstetrical Emergencies - July 24 and 25, 1992

Review and Update in Fetal Monitoring - April 4, 1991, May 25, 1994 & May 17, 1995

Fundamentals of Fetal Monitoring - April 3, 1991, May 24, 1994 & May 16, 1995

Current Topics in Perinatal/Neonatal Nutrition - November 8, 1991

OSHA Standards for Physicians Office Staff - September 23, 1992

Electronic Fetal Monitoring: Advanced Principles of Interpretation - October 6 & 7 1994

Perinatal Outreach Program, Vanderbilt University – November 30 & December 1, 1990

Polypharmacy Screening Procedures, Pee Dee AHEC – July 24, 1998

Footprints of Management, Pee Dee AHEC - July 17, 1998

Long Term Care Nurse Management Certification Program- March 1998

NACLNC Conference, March 14- 16, 2003

South Carolina Nursing Law, October 10, 2003

Nursing Home Malpractice in South Carolina - May 27, 2004

NACLNC Conference, November 17, 2004

Educational Training Service Seminar, 10th Annual Summer Healthcare Seminar on Nursing Home Issues, June 2005

Educational Training Service Seminar, 11th Annual Summer Healthcare

Seminar on Nursing Home Issues, June 2006
Nursing Home Malpractice: Evaluating & Addressing Accountability, April 27, 2007
Educational Training Service Seminar, 12th Annual Summer Healthcare Seminar on Nursing Home Issues, June 2007
Educational Training Service Seminar, 13th Annual Summer Healthcare Seminar on Nursing Home Issues, June 2008
NACLNC Conference, December 2008
Educational Training Service Seminar, 14th Annual Summer Healthcare Seminar on Nursing Home Issues, June 2009
NACLNC Conference, December 2009
NACLNC Conference, November 2010
NACLNC Conference, December 2011
NACLNC Conference, December 2012
NACLNC Conference, November 2013
NACLNC Conference, December 2015
NACLNC Conference, November 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF MARION	)	TWELFTH JUDICIAL CIRCUIT
	)	
Rebecca C. Hagood as Personal	)	
Representative of the Estate of Frank D.	)	
Chavis, Sr.,	)	AMENDED COMPLAINT FOR
	)	DAMAGES
Plaintiff,	)	
	)	C/A No. 2022-CP-33-00183
vs.	)	
	)	<i>Jury Trial Demanded</i>
Palmetto Faith Operating, LLC d/b/a Faith	)	
Healthcare Center and Brooks Arnette,	)	
	)	
Defendants.	)	
_____	)	

COMES NOW Rebecca C. Hagood, as Personal Representative of the Estate of Frank D. Chavis, Sr., deceased, and files this Amended Complaint for Damages against Defendants Palmetto Faith Operating, LLC d/b/a Faith Healthcare Center and Brooks Arnette and alleges as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff Rebecca C. Hagood (“Plaintiff” or “Ms. Hagood”), daughter of Frank D. Chavis, Sr., was duly appointed as the Personal Representative of the Estate of Frank D. Chavis, Sr. (“Mr. Chavis”), deceased, on July 7, 2021. Plaintiff’s appointment was issued by the Probate Court in Florence County, South Carolina and is incorporated herein by reference. Plaintiff is therefore authorized to bring this action in tort for Mr. Chavis’ wrongful death including damages to the statutory beneficiaries of Mr. Chavis, and for claims belonging to Mr. Chavis in life and belonging to his estate including, but not limited to, pre-death pain and suffering, mental distress, medical bills, loss of quality of life to decedent, and funeral expenses. S.C. Code Ann. §§ 15-5-90, 15-5-100, and 15-51-10.

2. Upon information and belief, Defendant Palmetto Faith Operating, LLC d/b/a Faith Healthcare Center (“PFO”) was licensed by the State of South Carolina (License No. NCF-0927) to maintain and operate as Faith Healthcare Center (the “Facility”), a skilled nursing and rehabilitation facility located in Florence County at 617 W. Marion Street, Florence, Florence County, South Carolina 29501.

3. Upon information and belief, Defendant PFO, was at all material times a for-profit limited liability company with its principal place of business in Florence County, South Carolina. PFO conducted and engaged in business activities within the State of South Carolina, engaged in substantial and not isolated activities within the State of South Carolina, and purposefully availed itself of the privileges of the South Carolina Constitution. PFO committed tortious acts against Mr. Chavis in the State of South Carolina, which are specifically alleged in the subsequent causes of action. PFO may be served through its attorney, D. Jay Davis, Jr., Young Clement Rivers, LLP, P.O. Box 993, Charleston, South Carolina 29402.

4. Upon information and belief, Defendant Brooks Arnette (“Arnette”) was at all material times the Administrator of the Facility. Defendant Arnette is a resident of Marion County, South Carolina. Defendant Arnette may be served through her attorney, D. Jay Davis, Jr., Young Clement Rivers, LLP, P.O. Box 993, Charleston, South Carolina 29402.

5. Whenever the term “Defendants” is utilized within this Amended Complaint, such term collectively refers to and includes all named Defendants in this lawsuit unless specifically restricted within a cause of action or as further defined below.

6. At all material times, Defendants were responsible for ensuring that the operations of the Facility complied with all applicable state and federal statutes, laws, and regulations.

7. Additionally, at all material times, the Facility was a participant in the Medicare and Medicaid programs and was, therefore, required to comply with the provisions of 42 C.F.R. § 483.1 *et seq.*

8. At all material times, Defendants charged and were paid for services rendered to Mr. Chavis.

9. Whenever in this Amended Complaint it is alleged that the Defendants did any act or failed to do any act, it is meant that the officers, agents, or employees of the Defendants respectively performed, participated in, or failed to perform such acts while in the course and scope of their employment or agency relationship with said Defendants.

10. Defendants are directly liable by virtue of their own conduct for the wrongful acts detailed herein. Defendants are also vicariously or indirectly liable for the for the wrongful conduct detailed herein under one or more of the following alternative legal theories: *respondeat superior*, apparent or ostensible agency, non-delegable duty, joint venture/enterprise, amalgamation of interests, or other law.

11. Defendants are subject to the jurisdiction of this Court. Venue is also proper for all Defendants in Marion County, South Carolina.

12. Pursuant to S.C. Code Ann. § 15-79-125, Plaintiff filed a Notice of Intent to File Suit with supporting affidavit of an expert witness in compliance with S.C. Code Ann. § 15-36-100 on July 15, 2021.

13. Plaintiff and Defendants also completed pre-suit mediation pursuant to S.C. Code Ann. § 15-79-125 on December 3, 2021, but the parties were unable to reach a settlement in this matter. Proof of mediation is incorporated by reference to this Amended Complaint.

FACTUAL BACKGROUND

14. On April 17, 2019, Mr. Chavis, a seventy-five (75) year old man, was readmitted to Faith Healthcare Center for skilled nursing and rehabilitative care following a brief admission at the hospital. His medical history included, but was not limited to, orthostatic hypotension, diabetes with chronic kidney disease, and other comorbidities.

15. At the time of his admission, Mr. Chavis had a known history of falls, history of wandering and was an elopement risk, suffered from cognitive deficits, and had a lack of safety awareness. Mr. Chavis also experienced episodes of incontinence and his physical and mental limitations included, but were not limited to, gait and mobility abnormalities, muscle weakness and other lack of coordination. He required total staff assistance with his activities of daily living, including toileting, personal hygiene and bathing, and assistance with ambulation or transfers.

16. At all material times, Defendants represented that: (a) they were competent to provide Mr. Chavis with the necessary care, treatment and services and would provide the same; and (b) that Mr. Chavis' condition was capable of being successfully managed by them.

17. Despite these representations, during his readmission to the Facility, Mr. Chavis suffered multiple injuries at the hands of the Defendants.

18. At all times relevant to this action, Defendants were fully aware that the delivery of care and custodial services to residents in Faith Healthcare Center, including Mr. Chavis, required: (a) provision of adequate and appropriate staffing at the Facility; and (b) appropriate and manageable census levels and types within the Facility.

19. Despite this knowledge, Defendants made operational, budgetary, and administrative decisions that were determined more by the financial needs and goals of the

Defendants than by the custodial, medical, and nursing needs of residents of the Facility, including Mr. Chavis.

20. Defendants entered into a continuing course of negligent conduct, creating, implementing, and enforcing dangerous operational budgets, practices, and policies at the Facility which deprived residents, including Mr. Chavis, of safe, adequate, and essential care and resources to meet their needs including, but not limited to: appropriate plans of care, assessment and continued monitoring of his condition and changes thereof, appropriate documentation for the care of Mr. Chavis, assistance with activities consistent with daily living, and a safe environment to prevent harm.

21. Notwithstanding the Defendants' decisions, directives, and practices which resulted in inadequate and inappropriate staffing of the Facility, Defendants sought to market, recruit, and admit higher acuity, heavier care, higher pay residents to the Facility, even though the needs of the resident population, including the needs of Mr. Chavis, exceeded the capacity of the staff.

22. At all material times, Defendants had a duty to allocate resources and exercise fiscal and operational policies with reasonable care so as to prevent the infliction of harm on residents of the Facility, including Mr. Chavis.

23. Defendants breached their duty by failing to allocate sufficient financial and operational resources to the Facility, thereby causing harm to residents, including Mr. Chavis. This conduct was specifically directed, controlled, and authorized by Defendants, who knew or should have known that such conduct would likely cause harm to residents at the Facility, including Mr. Chavis.

24. At all material times, Defendants knew or should have known that the delivery of essential and necessary care would suffer due to their budgetary and operational decisions, causing

resident injury if they did not provide needed resources to adequately and appropriately staff and operate the Facility.

25. As a result of the Defendants' conduct, dependent residents, including Mr. Chavis, suffered repeated and ongoing neglect and were subjected to dangerous conditions, including the routine deprivation of basic custodial care.

26. The neglect and injuries of Mr. Chavis were foreseeable to the Defendants.

27. On May 28, 2019, Facility staff permitted Mr. Chavis to propel himself, unassisted and unsupervised, to the bathroom.

28. Mr. Chavis remained in the bathroom, unassisted and unsupervised, for an extended period of time.

29. Eventually, Facility staff went to check on Mr. Chavis and found his shoes on the bathroom floor.

30. While in the bathroom, Mr. Chavis suffered an unwitnessed fall headfirst out of the window onto the ground outside.

31. Mr. Chavis remained on the ground until discovered by Facility staff sometime later.

32. Upon discovery, Facility staff called 911, and Mr. Chavis was emergently transported to McLeod Regional Medical Center in Florence, South Carolina.

33. As a result of the fall, Mr. Chavis suffered cervical spinal fractures at C1-C3 among other injuries, including extremity numbness, bowel dysfunction, pain upon inspiration, neurological slowing, respiratory arrest, and cardiac arrest.

34. On June 6, 2019, only nine (9) days after his traumatic fall with injury at the Facility, Mr. Chavis passed away from related complications, including his acute C1 and C2 fractures.

FIRST CAUSE OF ACTION
Professional Negligence

35. Plaintiff re-alleges and incorporates by reference Paragraphs 1 through 34 as if fully set forth *verbatim*.

36. This cause of action asserts claims of professional negligence perpetrated by providers of nursing services and accompanying breaches of the applicable standard of care.

37. Defendants, individually and collectively, and by virtue of their own independent actions in the establishment, operation, management, and/or control of the Facility, and while acting through the nursing staff employed by them at the Facility, owed a duty to Mr. Chavis to comply with the standard of care and skill exercised by nurses generally under similar conditions and like surrounding circumstances as those presented by Mr. Chavis during his residency at the Facility.

38. Defendants, individually and collectively, and by virtue of their own independent actions in the establishment, operation, management, and/or control of the Facility, and while acting through the nursing staff employed by them at the Facility, violated the standard of care and skill exercised by nurses generally under similar conditions and like surrounding circumstances such as those presented by Mr. Chavis in their care and treatment of him. Their professional negligence includes, but is not limited to, the following:

Systemic Breakdowns

- a. Failure to provide Mr. Chavis a safe environment;

- b. Failure to provide Mr. Chavis with necessary care and services to allow him to attain or maintain the highest practicable physical, mental, and psychological well-being;
- c. Failure to provide adequate and appropriate services in the Facility to accommodate the individual needs of Mr. Chavis;
- d. Failure to provide staff with the knowledge, skills, and competencies to care for residents at risk for falls, including residents such as Mr. Chavis with cognitive deficits and decreased safety awareness;

Assessment

- e. Failure to provide comprehensive and timely assessments and monitoring of Mr. Chavis' physical condition;
- f. Failure to adequately and accurately assess Mr. Chavis' activity of daily living needs, including a recognition and understanding of his fall and elopement risk;
- g. Failure to adequately and accurately reassess Mr. Chavis' risk for elopement;
- h. Failure to obtain and provide timely and appropriate assessments of Mr. Chavis' changes of condition, including his fall with injury on May 28, 2019;
- i. Failure to adequately assess and evaluate Mr. Chavis for injuries, including pain, immediately after his fall on May 28, 2019;

Care Planning

- j. Failure to provide complete care plans individualized to Mr. Chavis' specific needs;
- k. Failure to develop, implement, and update comprehensive and individualized care plans to account for Mr. Chavis' decline, including prevention of falls;
- l. Failure to timely update and revise care plans to ensure interventions were implemented to meet Mr. Chavis' specific care needs, including his risk for falls;
- m. Failure to comply with a written plan of care;

Interventions

- n. Failure to provide appropriate fall interventions to protect Mr. Chavis from injuries related to falls;
- o. Failure to conduct timely rounding to monitor Mr. Chavis' condition and assess the needs of the resident;
- p. Failure to perform bowel movement tracking to ensure Mr. Chavis was toileted as needed;
- q. Failure to provide appropriate assistance with transfers to prevent falls, including supervision and assistance while toileting;
- r. Failure to provide and implement bed and chair alarms and other safety alarm or notification devices;
- s. Failure to provide and implement window restrictors;
- t. Failure to maintain behavior logs;
- u. Failure to timely alert Mr. Chavis' physician of overall physical decline, change in condition, and/or significant injury;

Documentation

- v. Failure to consistently, appropriately and completely document information related to Mr. Chavis' health status, care, treatment, and injuries;
- w. Failure to maintain complete and accurate medical records free from missing records, late entries, and discrepancies in documentation.

Post-Fall Conduct

- x. Failure to perform adequate post-fall assessments, including complete head-to-toe nursing assessment for identification of injuries; and
- y. Failure to report Mr. Chavis' May 28, 2019 fall resulting in serious injury and subsequent death to the South Carolina Department of Health and Environmental Control.

39. As a direct and proximate result of the violations of the standard of care by the Defendants as described above, Mr. Chavis suffered multiple injuries, including but not limited

including, but not limited to: (a) an unwitnessed fall from the Facility window; (b) extremity numbness, headache, neck stiffness, and pain in his chest upon inspiration, self-defecation, and a warm sensation all over his body; (c) painful cervical spine fractures involving C1-C3 requiring emergency transport and hospitalization; (d) respiratory and cardiac arrest; (e) intubation; (f) disability; (g) mental and physical decline; (h) physical pain and suffering; (i) mental anguish; (j) persistent discomfort as a result of his injuries; (k) insults to his human dignity; (l) violation of his rights; (m) loss of enjoyment of life; (n) medical bills and other expenses, and (o) other economic and non-economic damages, all contributing to and hastening Mr. Chavis' untimely death.

40. Defendants are liable to Plaintiff Rebecca C. Hagood, in her capacity as Personal Representative, for wrongful death damages sustained by Mr. Chavis' statutory beneficiaries, including, but not limited to, pecuniary loss, grief and sorrow, mental shock and suffering, wounded feelings, loss of companionship, and deprivation of the use and comfort of Mr. Chavis' society, including the loss of his judgment in managing his affairs. S.C. Code Ann. §§ 15-51-10, 15-51-20, and 15-51-40.

41. Defendants are also liable to Plaintiff Rebecca C. Hagood, in her capacity as Personal Representative for the Estate of Mr. Chavis, for physical and mental pain and suffering experienced by Mr. Chavis prior to his death, as well as his medical, funeral, and burial expenses. S.C. Code Ann. § 15-5-90.

42. To the extent an affidavit pursuant to S.C. Code § 15-36-100 is required, Plaintiff incorporates by reference to this Amended Complaint the affidavit of Karen Coleman, RN, which was previously filed, and who is qualified as an expert on the issues raised in this Amended Complaint. This affidavit specifies at least one negligent act or omission on the part of Defendants and the factual basis for each claim based upon the available evidence at the time of the filing of

the affidavit. The affidavit is not inclusive of each act, error, or omission that has been committed, or may not have been committed by the Defendants, and Plaintiff reserves the right to contend and prove additional acts, errors, and omissions on the part of the Defendants that reflect a departure from the requisite standard of care required by law.

43. In addition to being negligent and breaching the standard of care, the conduct of Defendants violated provisions of applicable federal and state law, including but not limited to provisions of: the Omnibus Budget Reconciliation Act of 1987 and the regulations adopted pursuant thereto (42 C.F.R. § 483.1, *et seq.*) (“OBRA Regulations”); the South Carolina Omnibus Adult Protection Act (S.C. Code Ann. § 43-35-5, *et seq.*); South Carolina Department of Health and Environmental Control’s Regulations for Nursing Homes (S.C. Code Reg. 61-17, *et seq.*); the South Carolina Bill of Rights for Residents of Long-Term Care Facilities (S.C. Code Ann. § 44-81-10, *et seq.*); and the South Carolina Nurse Practice Act (S.C. Code Ann. § 40-33-5, *et seq.*), constituting negligence *per se*.

44. If any of the acts or omissions complained of in Paragraph 38 are deemed by the court to involve ordinary negligence rather than professional negligence, they are alternatively incorporated and averred as part of Paragraph 48 of this Complaint.

SECOND CAUSE OF ACTION

Ordinary Negligence/Simple Negligence

45. Plaintiff re-alleges and incorporates by reference Paragraphs 1 through 44 as if fully set forth *verbatim*.

46. This cause of action asserts claims of ordinary negligence. The acts or omissions complained of herein may be assessed by the trier of fact on the basis of common, everyday experiences and the common knowledge of a lay person. The acts or omissions complained of here do not implicate questions of professional judgment or medical competence, nor do they

involve matters of medical science or art requiring specialized knowledge, training, or skills not possessed by lay persons. Moreover, the acts or omissions complained of herein involve custodial neglect perpetrated by persons who were not medical professionals and/or the acts and omissions complained of herein resulted from the dangerous administrative policies, systems, directives, and/or practices engaged in by Defendants, its leadership, and the Facility Administrator, which affected not only Mr. Chavis, but an entire group of residents in the Facility.

47. Defendants had a duty to exercise ordinary and reasonable care in providing services to Mr. Chavis, including, but not limited to, the following: assisting Mr. Chavis with activities necessary for daily living; transfers and ambulation; bathing, toileting, and grooming; and observing, documenting and reporting abnormal findings to nurses and physicians.

48. Defendants, individually and collectively, and by virtue of their own independent actions in the establishment, operation, management, and/or control of the Facility, and while acting through staff employed by them at the Facility, failed to exercise ordinary and reasonable care in provision of services for Mr. Chavis. Defendants' ordinary negligence included, but was not limited to:

- a. Failure to provide sufficient numbers of staff to meet Mr. Chavis' fundamental needs for care and services;
- b. Ongoing failure to accurately and appropriately document care provided to Mr. Chavis;
- c. Ongoing failure to keep a complete, concise and accurate medical record for Mr. Chavis;
- d. Failure to provide a safe environment, including prevention of falls;
- e. Failure to provide adequate and appropriate supervision to protect against fall-related injuries;
- f. Failure to provide appropriate and available fall prevention measures to protect Mr. Chavis from fall-related injury, including

routine monitoring, window restrictors, and assistance while toileting;

- g. Failure to provide appropriate assistance with transfers to prevent falls;
- h. Failure to hire, adequately screen, and train adequate and appropriate personnel to monitor, supervise, and/or provide custodial care for Mr. Chavis;
- i. Retention and assignment of unfit, unqualified and incompetent direct care staff to monitor, supervise, and/or provide custodial care for Mr. Chavis;
- j. Failure to establish and implement appropriate budgeting policies which were consistent with the needs of residents of the Facility, including Mr. Chavis;
- k. Failure to provide sufficient staff, including numbers, quality and competency, in the Facility, thereby causing harm to Mr. Chavis described above;
- l. Failure to allocate sufficient financial resources, thereby causing harm to Mr. Chavis described above;
- m. Creation and enforcement of operational budgets which deprived residents of adequate staffing and supplies, and caused neglect;
- n. Failure to establish, implement, and/or enforce appropriate safety, training, staffing, and fundamental policies and procedure to prevent harm to Mr. Chavis and avoid the known consequences of inadequate custodial care;
- o. Failure to have systems in place to ensure that that the staff functioned within the scope of their professional practice, education and training to meet the needs of residents, including Mr. Chavis;
- p. Failure to have systems in place to ensure communication between nurses, nursing assistants, and other staff regarding changes in resident condition for all residents to prevent harm to Mr. Chavis;
- q. Failure to investigate and correct known systemic breakdowns in the delivery of care at the Facility to avoid the consequences and harm to Mr. Chavis; and

- r. Failure to provide proper care and services in accordance with Mr. Chavis' rights and needs.

49. As a direct and proximate result of the negligence by the Defendants, Mr. Chavis suffered multiple injuries and death as more particularly described above.

50. Defendants are liable to Plaintiff Rebecca C. Hagood, in her capacity as Personal Representative, for wrongful death damages sustained by Mr. Chavis' statutory beneficiaries, including, but not limited to, pecuniary loss, grief and sorrow, mental shock and suffering, wounded feelings, loss of companionship, and deprivation of the use and comfort of Mr. Chavis' society, including the loss of his judgment in managing his affairs. S.C. Code Ann. §§ 15-51-10, 15-51-20, and 15-51-40.

51. Defendants are also liable to Plaintiff Rebecca C. Hagood, in her capacity as Personal Representative for the Estate of Mr. Chavis, for physical and mental pain and suffering experienced by Mr. Chavis prior to his death, as well as his medical, funeral, and burial expenses. S.C. Code Ann. § 15-5-90.

52. In addition to being negligent and breaching the duty of ordinary reasonable care, the conduct of Defendants violated provisions of applicable federal and state law as more particularly described in Paragraph 43, constituting negligence *per se*.

53. If any of the acts or omissions complained of in Paragraph 48 are deemed by the court to involve professional negligence by the Defendants rather than ordinary negligence, they are alternatively incorporated and averred as part of Paragraph 38 of this Complaint.

THIRD CAUSE OF ACTION ***Punitive Damages***

54. Plaintiff re-alleges and incorporates by reference Paragraphs 1 through 53 as if fully set forth *verbatim*.

55. The acts and omissions of the Defendants were reckless, willful, and wanton, and demonstrate a conscious failure to exercise due care and conscious indifference to and/or reckless disregard to the rights and safety of residents, including the safety, health and welfare of Mr. Chavis. Further, the acts and omissions of the Defendants were extraordinary and outrageous.

56. As a result of the acts and omissions of the Defendants, Mr. Chavis suffered the injuries, damages and death alleged above.

57. Defendants are liable for punitive damages to Plaintiff Rebecca C. Hagood, as Personal Representative of the Estate of Mr. Chavis.

58. Punitive damages should be awarded to Plaintiff Rebecca C. Hagood, as Personal Representative of the Estate of Mr. Chavis, and against the Defendants to punish them for their reckless, willful and wanton conduct and to deter them from repeated misconduct as set forth in this Amended Complaint.

WHEREFORE, Plaintiff prays for the following relief:

- (a) That a process be issued as to Defendants;
- (b) That Plaintiff recover a judgment against the Defendants, jointly and severally, in the form of compensatory damages in an amount in excess of \$25,000.00 for all causes of action alleged herein as shown by the evidence at the trial of this case;
- (c) That Plaintiff recover a judgment against the Defendants, jointly and severally, in the form of compensatory damages in an amount in excess of \$25,000.00 for the wrongful death damages sustained by Mr. Chavis' statutory beneficiaries, including but not limited to, pecuniary loss, grief and sorrow, mental shock and suffering, wounded feelings, loss of companionship, and deprivation of the use and comfort of Mr. Chavis' society, including the loss of his judgment in managing his affairs, and as shown by the evidence at the trial of this case;
- (d) That Plaintiff, as Personal Representative of the Estate of Mr. Chavis, recover a judgment against the Defendants, jointly and severally, in the form of compensatory damages in an amount in excess of \$25,000.00 for the pain and suffering, medical, funeral and burial expenses of Mr. Chavis and as shown by the evidence at the trial of this case;

- (e) That Plaintiff, as Personal Representative of the Estate of Mr. Chavis, recover punitive damages from the Defendants;
- (f) That Plaintiff recover the costs of this action;
- (g) That Plaintiff be granted a jury to try this case; and
- (h) That the Court and jury grant such other and further relief as may be just and proper.

Respectfully submitted, this the 20th day of May, 2022.

HAWK LAW GROUP

s/ A. Keith McAlister, Jr.
A. Keith McAlister, Jr., SC Bar No. 78213
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Aiken, South Carolina 29801
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF MARION	)	TWELFTH JUDICIAL CIRCUIT
	)	
REBECCA C. HAGOOD AS	)	CASE NO. 2022-CP-33-00183
PERSONAL REPRESENTATIVE OF	)	
THE ESTATE OF FRANK D. CHAVIS,	)	
SR.,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	DEFENDANT PALMETTO FAITH
	)	OPERATING, LLC D/B/A FAITH
PALMETTO FAITH OPERATING, LLC	)	HEALTHCARE CENTER'S ANSWER TO
D/B/A FAITH HEALTHCARE CENTER	)	PLAINTIFF'S AMENDED COMPLAINT
AND BROOKS ARNETTE,	)	
	)	
DEFENDANTS.	)	
	)	

TO: WILLIAM TUCK, ATTORNEY FOR PLAINTIFF:

The Defendant, Palmetto Faith Operating, LLC d/b/a Faith Healthcare Center (hereinafter the "Facility" or "this Defendant"), *subject to and without waiving any and all rights to compel this matter to arbitration*, hereby responds to Plaintiff's Amended Complaint as follows:

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

2. As to any and all allegations in Plaintiff's Amended Complaint wherein Plaintiff uses the conflated term "Defendants" or which are directed towards a defendant other than this Defendant, this Defendant hereby asserts that it is answering only on behalf of itself.

3. As to any and all allegations in Plaintiff's Amended Complaint directed at a party other than this Defendant, no response is required. Any and all such allegations not hereinafter specifically addressed in this manner are hereby answered as no response is required by this

Defendant. To the extent Plaintiff refers to Defendants collectively, this Defendant is answering only on behalf of itself.

4. Answering the allegations in Paragraph 1 of Plaintiff's Amended Complaint, this Defendant admits, upon information and belief, that Plaintiff Rebecca C. Hagood (also known as "Becky Story" and referred to herein as "Plaintiff") is the daughter of Frank D. Chavis, Sr., deceased, and was appointed his Personal Representative on or about July 7, 2021. Defendant further admits, upon information and belief, that the Florence County Probate Court issued Plaintiff's appointment. The remaining allegations in Paragraph 1 state and/or call for legal conclusions, which require no response. To the extent a response is required, Defendant denies any and all allegations intended to assert or imply liability or damages against it.

5. Answering the allegations in Paragraph 2 of Plaintiff's Amended Complaint, this Defendant admits that it was licensed by the State of South Carolina to maintain and operate the skilled nursing facility doing business as Faith Healthcare Center located in Florence County, South Carolina. To the extent any of the allegations in Paragraph 2 state or call for legal conclusions, no response is required. This Defendant denies any remaining allegations in Paragraph 2.

6. Answering the allegations in Paragraph 3 of Plaintiff's Amended Complaint, this Defendant admits the allegations set forth in Paragraph 3 only insofar as it is alleged that this Defendant is a limited liability company with its principal place of business in Florence County, South Carolina. To the extent any of the allegations in Paragraph 3 state or call for legal conclusions, no response is required. Any and all further and remaining allegations are denied and strict proof is demanded thereof.

7. The allegations in Paragraph 4 of Plaintiff's Amended Complaint are directed at a party other than this Defendant and, therefore, do not require a response from this Defendant. To the extent any of the allegations in Paragraph 4 state or call for legal conclusions, no response is required. Further responding, and to the extent a response is required, this Defendant denies any and all allegations intended to assert or imply liability or damages against this Defendant.

8. The allegations in Paragraph 5 of Plaintiff's Amended Complaint are not directed at or against this Defendant and, therefore, do not require any response. To the extent a response is required, this Defendant again asserts that should Plaintiff use the conflated term "Defendants," this Defendant is answering only on behalf of itself and denies any and all allegations intended to assert or imply liability or damages against this Defendant.

9. In responding to the allegations set forth in Paragraphs 6 and 7 of Plaintiff's Amended Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, it is subject to certain applicable statutes and regulations. This Defendant affirmatively states that such statutes and regulations do not establish the standard of care. This Defendant further affirmatively asserts that the care and treatment provided to Mr. Chavis was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages as against this Defendant are denied and strict proof is demanded thereof.

10. Responding to the allegations set forth in Paragraph 8 of Plaintiff's Amended Complaint, this Defendant admits that it provides skilled nursing care and treatment to its residents in compliance with the standard of care, and a fee is provided for services related thereto. Any and

all further allegations, and those inconsistent with the limited admission above, are hereby denied and strict proof is demanded thereof

11. The allegations in Paragraph 9 of Plaintiff's Amended Complaint are not directed at or against this Defendant and, therefore, do not require any response. Further responding, and to the extent any of the allegations in Paragraph 9 state or call for legal conclusions, no response is required. This Defendant denies any and all allegations in Paragraph 9 that are intended to assert or imply liability or damages against this Defendant.

12. The allegations in Paragraph 10 of Plaintiff's Amended Complaint state or call for legal conclusions and, therefore, do not require any response. To the extent a response is required, this Defendant denies the allegations.

13. The allegations in Paragraph 11 of Plaintiff's Amended Complaint state or call for legal conclusions and, therefore, do not require any response. To the extent a response is required, this Defendant denies the allegations in Paragraph 11 and demand strict proof thereof. Further answering the allegations in Paragraph 11, this Defendant affirmatively asserts there is a valid and binding arbitration agreement between Plaintiff's decedent and this Defendant.

14. Answering the allegations in Paragraph 12 of Plaintiff's Amended Complaint, this Defendant admits that Plaintiff filed a Notice of Intent to File Suit as well as the affidavit of Karen Coleman, RN on July 15, 2021. This Defendant denies the sufficiency of the affidavit and denies any and all allegations and assertions contained therein to the extent they allege liability or damages against this Defendant. This Defendant further denies any remaining allegations in Paragraph 12.

15. Answering the allegations in Paragraph 13 of Plaintiff's Amended Complaint, this Defendant admits that the parties completed pre-suit mediation on or about December 3, 2021, and

that the case did not settle at the mediation. The remaining allegations in Paragraph 13 of Plaintiff's Amended Complaint state or call for legal conclusions and, therefore, do not require any response.

16. Answering the allegations in Paragraphs 14 and 15 of Plaintiff's Amended Complaint, this Defendant craves reference to the facility chart and Mr. Chavis' medical records for their contents and denies any allegations inconsistent with those contents and all allegations intended to assert or imply liability or damages against this Defendant.

17. Answering the allegations in Paragraph 16 of Plaintiff's Amended Complaint, this Defendant admits that it provides skilled nursing care and treatment to its residents in compliance with the standard of care. Any and all further allegations, and those inconsistent with the limited admission above, are hereby denied and strict proof is demanded thereof.

18. This Defendant denies the allegations in Paragraph 17 of Plaintiff's Amended Complaint, and demands strict proof thereof.

19. Answering the allegations in Paragraph 18 of Plaintiff's Amended Complaint, this Defendant admits that it provides skilled nursing care and treatment to its residents in compliance with the standard of care. Any and all further allegations, and those inconsistent with the limited admission above, are hereby denied and strict proof is demanded thereof.

20. This Defendant denies the allegations in Paragraphs 19, 20, and 21 of Plaintiff's Amended Complaint, and demands strict proof thereof.

21. Answering the allegations in Paragraph 22 of Plaintiff's Amended Complaint, this Defendant admits only that its providers had a duty to comply with the applicable standard of care. To the extent the allegations in the above paragraph state or call for legal conclusions, no response

is required. Any and all further allegations, and those inconsistent with the limited admission above, are hereby denied and strict proof is demanded thereof.

22. This Defendant denies the allegations in Paragraphs 23, 24, 25, and 26 of Plaintiff's Amended Complaint, and demands strict proof thereof.

23. Answering the allegations in Paragraphs 27, 28, 29, 30, 31, 32, and 33 of Plaintiff's Amended Complaint, this Defendant craves reference to the facility chart and Mr. Chavis's medical records for their contents and denies any allegations inconsistent with those contents. This Defendant further denies all allegations intended to assert or imply liability or damages against this Defendant.

24. Answering the allegations in Paragraph 34 of Plaintiff's Amended Complaint, this Defendant admits, upon information and belief, that Mr. Chavis has passed away. This Defendant lacks information and knowledge sufficient to form a belief as to the remaining allegations and therefore denies the same. Further responding, this Defendant denies any and all allegations intended to assert or imply liability or damages against this Defendant.

25. Answering the allegations in Paragraph 35 of Plaintiff's Amended Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

26. The allegations in Paragraph 36 of Plaintiff's Amended Complaint are not directed at or against this Defendant and, therefore, do not require any response. Further responding, and to the extent any of the allegations in Paragraph 36 state or call for legal conclusions, no response is required. This Defendant denies any and all allegations in Paragraph 36 that are intended to assert or imply liability or damages against this Defendant.

27. Answering the allegations in Paragraph 37 of Plaintiff's Amended Complaint, this Defendant admits only that its providers had a duty to comply with the applicable standard of care at the applicable times. This Defendant denies any remaining allegations in Paragraph 37.

28. This Defendant denies the allegations in Paragraph 38 of Plaintiff's Amended Complaint, including all subparts (a) through (y).

29. This Defendant denies the allegations in Paragraphs 39, 40, and 41 of Plaintiff's Amended Complaint.

30. Answering the allegations in Paragraph 42 of Plaintiff's Amended Complaint, this Defendant denies the sufficiency of, and allegations in, Karen Coleman, RN's affidavit. The remaining allegations in Paragraph 42 of Plaintiff's Amended Complaint state or call for legal conclusions and, therefore, do not require any response. To the extent a response is required, this Defendant denies these allegations.

31. This Defendant denies the allegations in Paragraph 43 of Plaintiff's Amended Complaint.

32. The allegations in Paragraph 44 of Plaintiff's Amended Complaint state or call for legal conclusions and, therefore, do not require any response. To the extent a response is required, this Defendant denies these allegations.

33. Answering the allegations in Paragraph 45 of Plaintiff's Amended Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

34. The allegations in Paragraph 46 of Plaintiff's Amended Complaint state or call for legal conclusions and, therefore, do not require any response. To the extent a response is required, this Defendant denies these allegations.

35. Answering the allegations in Paragraph 47 of Plaintiff's Amended Complaint, this Defendant admits only that its providers had a duty to comply with the applicable standard of care at the applicable times. This Defendant further affirmatively asserts that the care and treatment provided to Mr. Chavis was at all times in compliance with the appropriate standard of care. This Defendant denies any remaining allegations in Paragraph 47.

36. This Defendant denies the allegations in Paragraph 48 of Plaintiff's Amended Complaint, including all subparts (a) through (r).

37. This Defendant denies the allegations in Paragraphs 49, 50, 51, and 52 of Plaintiff's Amended Complaint.

38. The allegations in Paragraph 53 of Plaintiff's Amended Complaint state or call for legal conclusions and, therefore, do not require any response. To the extent a response is required, this Defendant denies these allegations.

39. Answering the allegations in Paragraph 54 of Plaintiff's Amended Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

40. This Defendant denies the allegations in Paragraphs 55, 56, 57, and 58 of Plaintiff's Amended Complaint.

41. This Defendant denies the allegations set forth in Plaintiff's "Prayer for Relief" in full.

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

42. This Court lacks jurisdiction with respect to this Defendant and Plaintiff as to Plaintiff's claims because this matter should be compelled to arbitration pursuant to a valid arbitration agreement entered into between this Defendant and Plaintiff's decedent. Pursuant to § 4 of the Federal Arbitration Act (the "FAA"), 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. Further, pursuant to the South Carolina Rules of Civil Procedure and the FAA, this matter should be dismissed or stayed pending final resolution of all claims pursuant to the valid arbitration agreement. This 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**

43. The Amended Complaint fails to state facts sufficient to constitute a cause of action in several regards and fails to state a claim upon which relief can be granted against this Defendant and should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

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

44. Should this Court determine that it does have jurisdiction to hear Plaintiff's claims, which this Defendant respectfully denies, this Defendant asserts that venue is improper in Marion County and should be transferred to Florence County.

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

45. This Defendant asserts that some or all of the standards, regulations, and statutes which Plaintiff alleges apply do not create any standard of care applicable to Plaintiff's claims or any private right of action in this matter.

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

46. This Defendant would assert that it complied with the applicable standard of care at all times during the timeframe alleged in Plaintiff's Amended Complaint and did not proximately cause any damage to the Plaintiff or her decedent.

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

47. Plaintiff's recovery in the 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.* and 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**

48. This Defendant would affirmatively assert that, to the extent it is liable to Plaintiff, which it vehemently denies, 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 §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**

49. This Defendant would affirmatively assert the defense of intervening and superseding negligence of one or more third parties not a party to this action. This Defendant reserves the right to withdraw this defense at a later time as discovery progresses.

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

50. A claim for punitive damages and an award of punitive damages would violate those clauses of the Constitutions of the United States and South Carolina related to privileges and immunities, due process and equal protection, and this 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, 15-32-540, *et seq.*

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

51. To the extent this 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, this 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**

52. This 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.

WHEREFORE, having fully answered the Plaintiff's Amended Complaint, this 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

Matthew O. Riddle

SC State Bar ID No.: 76650

Kara S. Grevey

SC State Bar ID No.: 101742

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

mriddle@ycrlaw.com; kgrevey@ycrlaw.com

*Attorneys for the Defendant Palmetto Faith
Operating, LLC d/b/a Faith Healthcare Center*

Charleston, South Carolina

Dated: June 8, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF MARION	)	TWELFTH JUDICIAL CIRCUIT
	)	
REBECCA C. HAGOOD AS	)	CASE NO. 2022-CP-33-00183
PERSONAL REPRESENTATIVE OF	)	
THE ESTATE OF FRANK D. CHAVIS,	)	
SR.,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	DEFENDANT BROOKS ARNETTE'S
PALMETTO FAITH OPERATING, LLC	)	ANSWER TO PLAINTIFF'S AMENDED
D/B/A FAITH HEALTHCARE CENTER	)	COMPLAINT
AND BROOKS ARNETTE,	)	
	)	
DEFENDANTS.	)	
	)	

TO: WILLIAM TUCK, ATTORNEY FOR PLAINTIFF:

The Defendant, Brooks Arnette (hereinafter "this Defendant"), by and through his undersigned counsel, *and subject to and without waiving any and all rights to compel this matter to arbitration and any rights to have any and all claims dismissed*, hereby responds to Plaintiff's Amended Complaint as follows:

1. Any and all allegations in Plaintiff's Amended Complaint which are not specifically admitted, qualified, or otherwise explained or denied, are hereby expressly denied and strict proof is demanded thereof.
2. As to any and all allegations in Plaintiff's Amended Complaint wherein Plaintiff uses the conflated term "Defendants" or which are directed towards a defendant other than this Defendant, this Defendant hereby asserts that he is answering only on behalf of himself.
3. As to any and all allegations in Plaintiff's Amended Complaint directed at a party other than this Defendant, no response is required. Any and all such allegations not hereinafter

specifically addressed in this manner are hereby answered as no response is required by this Defendant. To the extent Plaintiff refers to Defendants collectively, this Defendant is answering only on behalf of himself.

4. Answering the allegations in Paragraph 1 of Plaintiff's Amended Complaint, this Defendant is without sufficient information and knowledge to respond to the allegations and, therefore, denies the same and demands strict proof thereof.

5. The allegations in Paragraphs 2 and 3 of Plaintiff's Amended Complaint are directed at a party other than this Defendant and, therefore, no response is required from this Defendant.

6. Answering the allegations in Paragraph 4 of Plaintiff's Amended Complaint, this Defendant admits that he is a resident of Marion County, South Carolina and that he served as the administrator of Faith Healthcare Center ("the Facility") during the residency of Plaintiff's decedent, Frank Chavis ("Mr. Chavis"). To the extent the remaining allegations in Paragraph 4 call for legal conclusions, no response is required. Any and all allegations inconsistent with this response or intended to assert or imply liability or damages against this Defendant are denied and strict proof is demanded.

7. The allegations in Paragraph 5 of Plaintiff's Amended Complaint are not directed at or against this Defendant and, therefore, do not require any response. To the extent a response is required, this Defendant again asserts that should Plaintiff use the conflated term "Defendants," this Defendant is answering only on behalf of himself and denies any and all allegations intended to assert or imply liability or damages against this Defendant.

8. The allegations in Paragraphs 6 and 7 of Plaintiff's Amended Complaint are directed at a party other than this Defendant and, therefore, no response is required from this

Defendant. To the extent a response is required, this Defendant admits upon information and belief that as the licensed operator of a skilled nursing facility, the facility is subject to certain applicable statutes and regulations. This Defendant affirmatively states that such statutes and regulations do not establish the standard of care. This Defendant further affirmatively asserts that the care and treatment provided to Mr. Chavis was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages as against this Defendant are denied and strict proof is demanded thereof.

9. The allegations set forth in Paragraph 8 of Plaintiff's Amended Complaint are directed at a party other than this Defendant and, therefore, no response is required from this Defendant. To the extent a response is required, this Defendant admits that the facility provides skilled nursing care and treatment to its residents in compliance with the standard of care, and a fee is provided for services related thereto. Any and all further allegations, and those inconsistent with the limited admission above, are hereby denied and strict proof is demanded thereof.

10. The allegations in Paragraph 9 of Plaintiff's Amended Complaint are not directed at or against this Defendant and, therefore, do not require any response. Further responding, and to the extent any of the allegations in Paragraph 9 state or call for legal conclusions, no response is required. This Defendant denies any and all allegations in Paragraph 9 that are intended to assert or imply liability or damages against this Defendant.

11. The allegations in Paragraph 10 of Plaintiff's Amended Complaint state or call for legal conclusions and, therefore, do not require any response. To the extent a response is required, this Defendant denies the allegations.

12. The allegations in Paragraph 11 of Plaintiff's Amended Complaint state or call for legal conclusions and, therefore, do not require any response. To the extent a response is required, this Defendant denies the allegations in Paragraph 11 and demand strict proof thereof. Further answering the allegations in Paragraph 11, this Defendant affirmatively asserts there is a valid and binding arbitration agreement between Plaintiff's decedent and this Defendant.

13. Answering the allegations in Paragraph 12 of Plaintiff's Amended Complaint, this Defendant admits that Plaintiff filed a Notice of Intent to File Suit as well as the affidavit of Karen Coleman, RN on July 15, 2021. This Defendant denies the sufficiency of the affidavit and denies any and all allegations and assertions contained therein to the extent they allege liability or damages against this Defendant. This Defendant further denies any remaining allegations in Paragraph 12.

14. Answering the allegations in Paragraph 13 of Plaintiff's Amended Complaint, this Defendant admits that the parties completed pre-suit mediation on or about December 3, 2021, and that the case did not settle at the mediation. The remaining allegations in Paragraph 13 of Plaintiff's Amended Complaint state or call for legal conclusions and, therefore, do not require any response.

15. Answering the allegations in Paragraphs 14 and 15 of Plaintiff's Amended Complaint, this Defendant craves reference to the facility chart and Mr. Chavis's medical records for their contents and denies any allegations inconsistent with those contents and all allegations intended to assert or imply liability or damages against this Defendant.

16. Answering the allegations in Paragraph 16 of Plaintiff's Amended Complaint, this Defendant admits that the facility provides skilled nursing care and treatment to its residents in compliance with the standard of care. Any and all further allegations, and those inconsistent with the limited admission above, are hereby denied and strict proof is demanded thereof.

17. This Defendant denies the allegations in Paragraph 17 of Plaintiff's Amended Complaint, and demands strict proof thereof.

18. Answering the allegations in Paragraph 18 of Plaintiff's Amended Complaint, this Defendant admits that the facility provides skilled nursing care and treatment to its residents in compliance with the standard of care. Any and all further allegations, and those inconsistent with the limited admission above, are hereby denied and strict proof is demanded thereof.

19. This Defendant denies the allegations in Paragraphs 19, 20, and 21 of Plaintiff's Amended Complaint.

20. Answering the allegations in Paragraph 22 of Plaintiff's Amended Complaint, this Defendant admits only that the facility's providers had a duty to comply with the applicable standard of care. To the extent the allegations in the above paragraph state or call for legal conclusions, no response is required. Any and all further allegations, and those inconsistent with the limited admission above, are hereby denied and strict proof is demanded thereof.

21. This Defendant denies the allegations in Paragraphs 23, 24, 25, and 26 of Plaintiff's Amended Complaint.

22. Answering the allegations in Paragraphs 27, 28, 29, 30, 31, 32, and 33 of Plaintiff's Amended Complaint, this Defendant craves reference to the facility chart and Mr. Chavis's medical records for their contents and denies any allegations inconsistent with those contents. This Defendant further denies all allegations intended to assert or imply liability or damages against this Defendant.

23. Answering the allegations in Paragraph 34 of Plaintiff's Amended Complaint, this Defendant admits, upon information and belief, that Mr. Chavis has passed away. This Defendant lacks information and knowledge sufficient to form a belief as to the remaining allegations and

therefore denies the same. Further responding, this Defendant denies any and all allegations intended to assert or imply liability or damages against this Defendant.

24. Answering the allegations in Paragraph 35 of Plaintiff's Amended Complaint, this Defendant reincorporates and restates his previous responses as if fully set forth verbatim herein.

25. The allegations in Paragraph 36 of Plaintiff's Amended Complaint are not directed at or against this Defendant and, therefore, do not require any response. Further responding, and to the extent any of the allegations in Paragraph 36 state or call for legal conclusions, no response is required. This Defendant denies any and all allegations in Paragraph 36 that are intended to assert or imply liability or damages against this Defendant.

26. To the extent the allegations in Paragraph 37 of Plaintiff's Amended Complaint are directed at this Defendant, he admits only that facility staff had a duty to comply with the applicable standard of care at the applicable times. This Defendant denies any remaining allegations in Paragraph 37.

27. This Defendant denies the allegations in Paragraph 38 of Plaintiff's Amended Complaint, including all subparts (a) through (y).

28. This Defendant denies the allegations in Paragraphs 39, 40, and 41 of Plaintiff's Amended Complaint.

29. Answering the allegations in Paragraph 42 of Plaintiff's Amended Complaint, this Defendant denies the sufficiency of, and allegations in, Karen Coleman, RN's affidavit. The remaining allegations in Paragraph 42 of Plaintiff's Amended Complaint state or call for legal conclusions and, therefore, do not require any response. To the extent a response is required, this Defendant denies these allegations.

30. This Defendant denies the allegations in Paragraph 43 of Plaintiff's Amended Complaint.

31. The allegations in Paragraph 44 of Plaintiff's Amended Complaint state or call for legal conclusions and, therefore, do not require any response. To the extent a response is required, this Defendant denies these allegations.

32. Answering the allegations in Paragraph 45 of Plaintiff's Amended Complaint, this Defendant reincorporates and restates his previous responses as if fully set forth verbatim herein.

33. The allegations in Paragraph 46 of Plaintiff's Amended Complaint state or call for legal conclusions and, therefore, do not require any response. To the extent a response is required, this Defendant denies these allegations.

34. To the extent the allegations in Paragraph 47 of Plaintiff's Amended Complaint are directed at this Defendant, he admits only that the facility's providers had a duty to comply with the applicable standard of care at the applicable times. This Defendant further affirmatively asserts that the care and treatment provided to Mr. Chavis was at all times in compliance with the appropriate standard of care. This Defendant denies any remaining allegations in Paragraph 47.

35. This Defendant denies the allegations in Paragraph 48 of Plaintiff's Amended Complaint, including all subparts (a) through (r).

36. This Defendant denies the allegations in Paragraphs 49, 50, 51, and 52 of Plaintiff's Amended Complaint.

37. The allegations in Paragraph 53 of Plaintiff's Amended Complaint state or call for legal conclusions and, therefore, do not require any response. To the extent a response is required, this Defendant denies these allegations.

38. Answering the allegations in Paragraph 54 of Plaintiff's Amended Complaint, this Defendant reincorporates and restates his previous responses as if fully set forth verbatim herein.

39. This Defendant denies the allegations in Paragraphs 55, 56, 57, and 58 of Plaintiff's Amended Complaint.

40. This Defendant denies the allegations set forth in Plaintiff's "Prayer for Relief" in full.

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

41. This Court lacks jurisdiction with respect to the Facility and Plaintiff as to Plaintiff's claims because this matter should be compelled to arbitration pursuant to a valid arbitration agreement entered into between the Facility and Plaintiff, as well as to any intended third party beneficiaries. Pursuant to § 4 of the Federal Arbitration Act (the "FAA"), this action must be stayed until the validity of the arbitration agreement entered into by Plaintiff and the Facility is determined by this Court. Further, pursuant to the South Carolina Rules of Civil Procedure and the FAA, this matter should be dismissed or stayed pending final resolution of all claims pursuant to the valid arbitration agreement. This Defendant hereby provides notice that a Motion to Dismiss or Stay and/or Motion to Stay, as the case may be, is forthcoming.

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

42. The Amended Complaint fails to state facts sufficient to constitute a cause of action in several regards and fails to state a claim upon which relief can be granted against this Defendant and should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

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

43. Should this Court determine that it does have jurisdiction to hear Plaintiff's claims, which this Defendant respectfully denies, this Defendant asserts that venue should be transferred to Florence County.

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

44. This Defendant asserts that some or all of the standards, regulations, and statutes which Plaintiff alleges apply do not create any standard of care applicable to Plaintiff's claims or any private right of action in this matter.

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

45. This Defendant would assert that he complied with the applicable standard of care at all times during the timeframe alleged in Plaintiff's Amended Complaint and did not proximately cause any damage to the Plaintiff or her decedent.

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

46. Plaintiff's recovery in the 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.* and 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**

47. This Defendant would affirmatively assert that, to the extent he is liable to Plaintiff, which he vehemently denies, he 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 §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**

48. This Defendant would affirmatively assert the defense of intervening and superseding negligence of one or more third parties not a party to this action. This Defendant reserves the right to withdraw this defense at a later time as discovery progresses.

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

49. A claim for punitive damages and an award of punitive damages would violate those clauses of the Constitutions of the United States and South Carolina related to privileges and immunities, due process and equal protection, and this 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, 15-32-540, *et seq.*

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

50. To the extent this 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, this 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**

51. This Defendant hereby gives notice that he 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 his Answer to assert any such defenses.

WHEREFORE, having fully answered the Plaintiff's Amended Complaint, this 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 he 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.

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Charleston, South Carolina

Dated: June 8, 2022

STATE OF SOUTH CAROLINA * COURT OF COMMON PLEAS
COUNTY OF MARION * TRANSCRIPT OF RECORD

-----X
FRANK CHAVIS, SR., *
Plaintiff, *
vs. * Case No. 2022-CP-33-00183
PALMETTO FAITH OPERATING, *
LLC, et al. *
Defendants. *
-----X

August 21, 2023

B E F O R E:

The Honorable H. Steven DeBerry, IV, Presiding Judge

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

Keith McAlister, Jr., Esq.
Attorney for the Plaintiff

Russell Hines, Esq.
Attorney for the Defendant

Recorded by: Webex Virtual Courtroom

Transcribed by: Bobbi Fisher, RPR
SC Official Court Reporter III

I N D E X

DESCRIPTION	PAGE
Proceedings	3

E X H I B I T S

(None.)

COURT REPORTER LEGEND

Dash (--)	Indicates an interruption in speech
Ellipses (...)	Indicates trailing off in speech
(ph)	Indicates phonetic word
[Verbatim]	Indicates the word is said as written
(Indiscernible)	[Transcription] Indicates word(s) is not known due to audio recording quality

P R O C E E D I N G S

1
2 THE COURT: All right. So we're here on
3 22-CP-33-183, Frank Chavis, Sr., versus Palmetto Faith
4 Operating, LLC, and others; is that right?

5 MR. HINES: That's correct.

6 MR. McALISTER: Yes, sir.

7 THE COURT: And so this is the defendant's motion to
8 compel. Do we have everything or everybody that we're
9 looking for, you think?

10 MR. HINES: We do, Your Honor.

11 THE COURT: Okay. And, Mr. Hines, this is your
12 motion to compel; is that right?

13 MR. HINES: It is.

14 THE COURT: All right. Well, I'll be happy to hear
15 from you.

16 MR. HINES: Thank you, Your Honor. May it please
17 the Court? Russ Hines on behalf of both the defendants in
18 this case, and this is our motion to compel arbitration.

19 There's been, well, a pretty substantial volume of
20 briefing in terms of page numbers filed, and there's a
21 bunch in there, but what I'd like to do is really to focus
22 on the basis -- focus our motion to compel on the argument
23 of merger and equitable estoppel. And what that is, Your
24 Honor -- and I would -- just to lay out a bit of a roadmap
25 because I have to cover a fair amount of ground in

1 explaining this, but is to -- that we primarily are
2 talking about two documents: an admission agreement and an
3 arbitration agreement. And let me say because -- to make
4 that make sense as far as what the admission agreement is.
5 This is a skilled nursing facility, Palmetto Health
6 Operating does business as Faith Healthcare Center, a
7 skilled nursing facility. And this case is a wrongful
8 death and survival action based on allegations of
9 deficiencies in the care and treatment that Mr. Chavis
10 received as a resident of our facility.

11 And the merger and equitable estoppel argument and
12 brief looks at the admission agreement that was signed
13 when Mr. Chavis was admitted and also an arbitration
14 agreement. Now, those two documents were not signed by
15 Mr. Chavis himself. They were signed by his daughter,
16 who -- her name now is Rebecca Hagood. At the time, she
17 was known as Rebecca Stokes or Becky Stokes. I'll refer
18 to her as Ms. Hagood because that's her current name, but
19 the documentation was signed under the name Rebecca C.
20 Stokes back in March of 2019.

21 And in helping her father to be admitted to our
22 facility, she signed an admission agreement and
23 arbitration agreement. And the merger part of this, as I
24 intend to argue to Your Honor, is that those two
25 documents, under South Carolina law, should be deemed

1 merged and considered and construed together as one, and
2 that, on the basis that Mr. Chavis received direct
3 benefits by virtue of his admission to the facility and on
4 the basis that the arbitration agreement is merged and
5 should be considered as one with the admission agreement,
6 the plaintiff, who now represents Mr. Chavis's estate,
7 should be estopped on the basis of what's called direct
8 benefits estoppel because Mr. Chavis received the direct
9 benefits of the admission agreement with which the
10 arbitration is merged, and you can't sort of have your
11 cake and eat it too.

12 That's the basic idea of direct benefits estoppel.
13 You can't receive direct benefits under a contract
14 containing an arbitration clause -- and, in this case, the
15 contract would contain an arbitration provision because of
16 merger. You can't receive direct benefits under such a
17 contract and then deny the enforceability of the
18 arbitration agreement.

19 And what this, again, gets to, Your Honor, I guess
20 if I haven't made the point clear enough, is that,
21 obviously, again, Mr. Chavis himself did not sign this.
22 We're not arguing that he did nor are we arguing that
23 Ms. Hagood signed the arbitration agreement and admission
24 agreement by virtue of a power of attorney, you know,
25 something that would make this, I guess, a bit more

1 straightforward.

2 But, nonetheless, the merger argument starts -- the
3 case that I would think is the most important is a case
4 called Coleman vs. Mariner Healthcare, and we have got all
5 this in our brief, but the -- Coleman vs. Mariner
6 Healthcare supports the proposition that, when you have
7 two instruments that are signed at the same time by the
8 same parties for the same purpose and in the course of the
9 same transaction, there is a presumption that arises of an
10 intent to merge those documents, to merge them such that
11 they -- or those instruments become a single contract, and
12 that's the way that they are considered and construed.

13 Now, in the Coleman case, one thing that's an
14 important similarity here is that Coleman actually was a
15 case that involved an admission agreement and an
16 arbitration agreement that were signed by the resident
17 sister in conjunction with her admission to another
18 similar facility to ours. And the Court acknowledged
19 that, under those circumstances, you did indeed tick off
20 those four boxes: time, parties, purpose, and transaction.
21 In fact, there's a case that I need to distinguish -- and
22 I will in a moment -- called Solesby v. Fundamental
23 Clinical and Operational Services where about -- and
24 Solesby is a case that recently went against the proponent
25 of arbitration, the person -- well, in fact, it's our

1 case. It went against us there. But -- and I will
2 distinguish it in a moment. But the -- about the Coleman
3 case, the Solesby Court said specifically, "The Coleman
4 Court found the documents in that case were executed at
5 the same time by the same parties for the same purpose and
6 in the course of the same transaction; thus, unless there
7 was a contrary intention, there was a merger."

8 And so I say that to make the point that the Solesby
9 Court, even in ruling against us recently back at the
10 beginning of this year, acknowledged that the Coleman
11 Court did indeed say that these two documents -- admission
12 agreement and arbitration agreement, signed in conjunction
13 with an admission to a skilled nursing facility, checked
14 those boxes of time, parties, purpose, and transaction.

15 Now, the rule is that that presumption of merger
16 arises from those circumstances. The presumption would be
17 overcome or can be overcome when there is evidence to
18 indicate an intention contrary to merger, and that's what
19 Solesby found -- and I'll get into that a little more
20 specifically in a moment -- and that's also what Coleman
21 found and some other cases. There's a case called Hodge.
22 There's a case called Thompson. We cite these in our
23 brief. And they found against the parties seeking to
24 compel arbitration on the basis that there was no merger
25 and, therefore, we sort of get off track on trying to

1 argue merger and equitable estoppel. But I'll acknowledge
2 to the Court that my argument is a one-two punch that
3 really relies on that first punch landing of merger. If
4 you don't have a merger, then I'm not asking you to go
5 with me on estoppel when there's no merger.

6 So -- but on the merger point in Coleman, I start
7 there as sort of my bedrock to say that it acknowledged
8 this legal pathway forward, if you will, of all those four
9 boxes checked. But what it said is, in that case, there's
10 no merger -- and, again, I'm speaking specifically to the
11 facts in Coleman because we had a couple of things that
12 were important to Coleman. One was the arbitration
13 agreement had a provision in it that allowed it to be
14 revoked within 30 days, meaning that it's signed, any time
15 within 30 days, the person who signed it could say, "Yeah,
16 I'm not comfortable with that anymore. I'm going to -- I
17 want to revoke that." And there, it vanishes from the
18 deal.

19 And, as I understand the Coleman case, the Coleman
20 Court looked at that and said, "Well, how can we very well
21 say there was an intent to have these documents merged and
22 stuck together, if you will, when one of them might just
23 fall right away -- fall right out within 30 days and not
24 even exist?" In any event, that was one of the things
25 that the Coleman Court cited as evidence of an intent

1 contrary to merger, and the Coleman Court -- and
2 importantly here, we don't have that. In our case, we
3 don't have such a revocation provision.

4 The other thing that Coleman said is that the
5 Coleman Court looked at the -- there was an admission
6 agreement -- there was an entire agreement provision, and
7 in that entire agreement provision, there was language in
8 there that the Coleman Court said reflected a textual
9 recognition of separate -- the Coleman Court used the word
10 "separatedness" -- a textual recognition of a
11 separatedness between admission agreement and arbitration
12 agreement.

13 Now, in our case, there's a very important
14 distinction. Not only do we not have that in the -- we
15 have an entire agreement provision, part of our admission
16 agreement, but what we have there specifically is this:
17 "The undersigned further acknowledges that he/she has
18 received and read the admission handbook and other
19 admissions materials and understands that these documents
20 are made a part of this agreement by reference herein."

21 My point here is that, if you'll follow me -- and I
22 realize I'm giving you a lot of info pretty quickly -- but
23 in Coleman, the Court specifically said there's an entire
24 agreement provision in your admission agreement, and it
25 reflects a textual intention to keep separate these two

1 instruments.

2 Here, we have the opposite. We have -- yes, we have
3 an entire agreement provision, but it expressly
4 contemplates a lack of separatedness by noting that these
5 other admissions materials are included by reference
6 herein. So it's expressly reaching out beyond its four
7 corners.

8 There is no question that, while the arbitration
9 agreement was not -- it's not a condition for admission;
10 we concede that. It's an optional document, optional
11 offer to agree to arbitration, but there's no question
12 that it was a document that was signed in conjunction with
13 the admission of this particular resident. It is an
14 admissions material. That's when it's presented.

15 Again, if you go back to Coleman, you have the same
16 time, parties, purpose, transaction. We know those boxes
17 are all checked.

18 We also cite this in our brief, I think, in -- I
19 know there's a case called Scott v. White Oak Manor. I
20 think the case -- the other case is Hodge, but I know we
21 cite the two cases in our brief -- where, admittedly, the
22 Court of Appeals in those cases was not weighing in on the
23 question of whether or not an arbitration agreement was
24 admissions materials. But just in referring to those two
25 documents and setting out the factual circumstances of

1 those cases, the Court's language said exactly that. What
2 my point is to say, that that is -- well, I need to be
3 clear, to be candid with the Court and say it's not a
4 point that was litigated and the Court said -- you know,
5 whereas -- it was not as if the Court was presented with
6 the question is the arbitration agreement in this case
7 part of the admissions materials and it held or wasn't or
8 wasn't.

9 But just in describing the circumstances of the
10 case, there's language -- and we cite the exact language
11 in the brief to the effect of -- that so-and-so signed the
12 admission agreement and other admissions materials to
13 include the arbitration agreement.

14 My point being is, just in plain, ordinary common
15 language, it's understood that, when these documents are
16 signed in conjunction with the admission, that they're
17 part of the admission materials. And so that's two
18 different ways in which we are materially different than
19 Coleman on the question of an intent contrary to merger.
20 We're exactly in line the Coleman in terms of checking all
21 those four boxes and the Coleman Court explaining, yes,
22 that does create a presumption in favor of merger. But
23 where we depart from Coleman is on the facts where the
24 Coleman Court found there was an intention contrary. We
25 don't have the same facts in Coleman, and, in fact, we

1 have facts -- the particulars I just mentioned -- the fact
2 of an entire agreement provision in the admissions
3 agreement itself that reaches out and defies the idea of
4 separatedness and embraces these other admissions
5 materials, which would certainly include the arbitration
6 agreement which was signed in conjunction with the
7 admission.

8 So I -- there's some other specifics on that, Your
9 Honor. I mentioned the Solesby case. In Solesby, the
10 Court recently -- and I'll have to be candid and say
11 this -- in Solesby, we're dealing with the exact same form
12 documents. This is the same admission agreement as in
13 this case here in front of Your Honor and the same
14 arbitration agreement. No question about that. I can't
15 run from that. They are form documents, and they are the
16 same.

17 The Solesby Court found against us on merger, said
18 there's no merger here, and it ticked off five different
19 reasons why. Solesby is currently, you know, cert pending
20 in front of the Supreme Court, so it's -- you know,
21 there's still a possibility that we -- and we certainly
22 hope to have Solesby reviewed by the Supreme Court and
23 reversed.

24 But the reason why I argued to Your Honor that
25 Solesby is not necessarily determinative of this case is

1 because the Solesby Court, respectfully, is erroneous in
2 its reasoning but also it doesn't really address the
3 arguments that we're making to Your Honor about why it was
4 erroneous.

5 And if you'll allow me to just tick off these five
6 points -- we get into them in our brief, but the Solesby
7 Court, for instance, it said, number one, the admission
8 agreement provides that it's governed by South Carolina
9 law and the arbitration agreement provides it's governed
10 by federal law, and, therefore, that's one indicia of an
11 intent contrary to merger, saying that we have two
12 different governing laws. Well, that's simply incorrect.

13 This is what the two are actually saying: The
14 admission agreement says, "This agreement will be governed
15 by and construed in accordance with the applicable federal
16 regulations and those laws of the state in which the
17 facility is located."

18 So, again, the Solesby Court said that the admission
19 agreement said it was governed by South Carolina law.
20 That's the end. What it actually says is will be governed
21 by applicable federal regulations and those laws of the
22 state in which the facility is located. So it actually is
23 pointing to both federal and state law, whereas the
24 Solesby Court seemed to think it only pointed to state
25 law.

1 And, in any event, let me read what the -- if you'll
2 indulge me -- what the arbitration agreement says. "The
3 parties acknowledge and agree that the cause of services
4 and reimbursement thereof, affects the transaction that
5 involved interstate commerce. The enforcement of this
6 arbitration agreement is not subject to South Carolina
7 Uniform Arbitration Act and shall be governed by the FAA,"
8 the Federal Arbitration Act, "Notwithstanding any contrary
9 provision of this agreement or contrary to state law."

10 The point here, Your Honor, that I'm trying to make
11 is, one, the Solesby Court was wrong on the face in terms
12 of its understanding of what the provisions were.
13 Essentially what both of these two provisions say is that
14 we're governed by federal law -- we're governed by South
15 Carolina law except where that law is preempted by federal
16 law. Because this agreement -- again, our arbitration
17 agreement in this case says that FAA applies. Well, of
18 course the FAA applies. It would apply even if our
19 arbitration agreement didn't say so because this is a
20 transaction involving interstate commerce. It's an
21 arbitration agreement relating to a nursing home
22 admission.

23 There's a case called Dean vs. Heritage Healthcare
24 where, in South Carolina, we specifically recognize the
25 nursing home admissions involve interstate commerce, and,

1 therefore, trigger the applicability of the FAA; we cite
2 that in our brief.

3 And so the idea that this distinction about law here
4 would indicate any intention contrary to merger is --
5 well, it's just off base from the start. It's off base
6 factually on the basis that the Solesby Court didn't
7 actually seem to have an understanding of what the two
8 governing law provisions stated, but then, moreover, it's
9 off base because those provisions aren't actually
10 probative of any sort of intent contrary to merger.

11 And I would go back to saying that, yes, while it is
12 true that the Court could find against merger on the basis
13 there is an intent contrary to merger, it must do so on
14 the basis of some evidence that is not speculation. You
15 know, it can't just speculate about this intent. And,
16 again, that, to me, doesn't make it doubly, I would say,
17 it doesn't make any sense for the Court to do that,
18 considering that the merger presumption only arises under
19 the occurrence of a pretty particular set of circumstances
20 you have got to have same time, parties, purpose, and
21 transaction. If you don't have those, you're not even
22 going to have a merger presumption to begin with. So the
23 idea of upsetting that on the basis of something that's
24 flimsy and speculative, it doesn't even make sense. It
25 would simply -- it would be a situation where the

1 exception totally eviscerates the rule of merger because,
2 again, merger is -- the presumption is earned, so to
3 speak, by the coincidence of all these four things that
4 have to happen at the same time. So, again, that's on the
5 point of governing law.

6 I'd also make this other point here too: imagine
7 that what we have is one instrument that includes an
8 arbitration provision. That arbitration provision is
9 going to be governed by the FAA no matter what, even if
10 it's -- because that's the way the FAA works. The FAA
11 applies to arbitration agreements that involve interstate
12 commerce.

13 So even if it's in the same document -- even if
14 we're not -- so, to me, it's another reason why this
15 doesn't even make sense as a basis to find -- there's an
16 intention contrary to merger.

17 Moreover, the FAA sort of wraps itself right back
18 around into state law. What the FAA really says, Your
19 Honor, is that a state court has to place arbitration
20 agreements on equal footing with any other contract on
21 state law -- any other contract under state law. What FAA
22 is a way -- and this goes back quite some years ago --
23 that Congress found that there was a reluctance on the
24 part of state courts to compel arbitration in accordance
25 with arbitration agreements. And Congress said, "Well,

1 you can't do that. You have to treat these types of
2 contracts, which are contracts that pertain -- or
3 agreements to arbitrate, on equal footing with any other
4 contract. So you can refuse to enforce them under any
5 basis under state law so long as that's applied to any
6 other type of contract. You can't single these out for
7 disfavored treatment.

8 So, in fact, for instance, when the plaintiff in
9 this case argues against us on the basis of
10 unconscionability -- this arbitration agreement, according
11 to the plaintiff, is unconscionable or it is -- it's not
12 supported by consideration, Your Honor's -- you will note
13 those questions are decided under state law. There's not
14 some body of federal law.

15 So, in this way, again -- and I realize this may
16 be -- can get a little long-winded and convoluted -- but
17 there isn't this notion of one agreement under South
18 Carolina law, one under federal law. In fact, what the
19 language actually says is governed by federal law
20 except -- or state law except for when displaced by
21 federal law, which happens in the realm of nursing home
22 regulations. But also even when you're talking about the
23 federal law of the FAA, what the federal law essentially
24 does is makes sure that uniform application of state law,
25 so that arbitration agreements aren't singled out for

1 disparate treatment, which is why the plaintiff is able to
2 argue -- and I'll mention this briefly -- you know,
3 without merit, the plaintiff can argue that there's no
4 consideration, there's no -- they're unconscionable, and
5 those arguments are based on South Carolina state law, not
6 some federal common law or some other federal law.

7 And to read briefly on those two points, Your
8 Honor -- we get into this in our brief -- but the -- it's
9 certainly not unconscionable here when we're talking about
10 this arbitration agreement. The plaintiff, for
11 instance -- in closing that argument out, I want to make
12 this point: In plaintiff's memo, it states, "In agreeing
13 to arbitration on claims of negligence and medical
14 malpractice, Mr. Chavis will not only -- would be not only
15 changing the venue in which he would pursue his claims but
16 also completely transform and diminish the remedies and
17 damages he could seek."

18 Your Honor, that's not true at all, respectfully.
19 The remedies -- this case is seeking money damages.
20 That's what would be issue in arbitration: Money damages.
21 Same remedies. He can argue for every -- every single
22 quantum of money damages that's at stake in state court is
23 also at stake in arbitration. There's no change in
24 remedy. There's no -- so that's just a -- it's just an
25 incorrect premise.

1 But also on the point of unconscionability, Your
2 Honor, unconscionability requires two things: One, an
3 absence of meaningful choice. Well, here, the arbitration
4 agreement specifically acknowledges, "It is understood by
5 resident/representative that he/she is not required to use
6 the aforesaid facility for resident's healthcare use; that
7 there are numerous other healthcare providers in the state
8 or facilities located that are qualified to provide such
9 care to resident."

10 So it's expressly acknowledged -- and I would also
11 note -- and we cite this in our brief with a legal
12 citation -- but, you know, when someone signs an
13 arbitration or any agreement -- anybody signs an
14 agreement, it's presumed that they understood and accepted
15 and agreed with the terms. And of course this was,
16 without question, signed by Ms. Hagood, formally known as
17 Ms. Stokes.

18 The other thing is -- because I mentioned this
19 arbitration agreement wasn't even a condition of
20 admission. It could have been not signed, but it was.
21 And it was signed -- since it was signed, it was certainly
22 signed in conjunction with the admissions process.

23 But even if, Your Honor, you would say that, "Well,
24 there was a lack of meaningful choice," which, again, all
25 those things I mentioned go against that, you still have

1 to have the issue of the terms must be so one-sided and
2 unfair that no reasonable person would accept them and
3 no -- essentially no decent soul would enforce them.

4 Well, as I mentioned earlier at the outset of this
5 segment on unconscionability, you don't have any situation
6 where there's any remedy lost here. The remedy and
7 damages are all the exact same in either forum, whether
8 it's in litigation or arbitration. It's money damages.
9 Plaintiff is not restricted on putting up any money
10 damages in arbitration.

11 But, the other thing is, this arbitration agreement
12 specifically says that it will be governed by or it will
13 be -- again, there's a distinction between governing.
14 This is governed by the FAA, and the since the FAA applies
15 to its -- whether or not it's enforceable. But as far as
16 the procedure to be followed in arbitration, it's
17 governed -- that procedure is to be handled by the South
18 Carolina ADR rules, and those rules specifically state --
19 and I want to make sure I got the language correct -- that
20 "these rules shall be construed to secure the just,
21 speedy, inexpensive, and collaborative resolution in every
22 action to which they apply." Shall be construed. The
23 idea that using the South Carolina ADR rules is
24 unconscionable is essentially saying that the South
25 Carolina ADR rules is unconscionable. I mean, these rules

1 are required to be construed in a just, speedy,
2 collaborative way.

3 So with that -- and I guess the one other point I
4 had on this segment, which is to switch into the point
5 about lack of consideration, Your Honor, that --
6 respectfully, that argument is simply off base. Mutual
7 promises to arbitrate are of sufficient consideration. We
8 cite cases on that. O'Neill v. Hilton Head Hospital.
9 Another case called Rickborn v. Liberty Life Insurance.
10 Mutual promises constitute sufficient consideration to
11 support contracts in South Carolina, and the FAA says that
12 has to be the rule that's applied to arbitration
13 agreements. They can't be singled out as requiring
14 something more than another contract would require.

15 Your Honor, you have been amazingly patient on this,
16 and I really do appreciate that. I could go through and
17 distinguish the Solesby case a little bit more through my
18 oral argument, but I could also do -- and I'm inclined to
19 do it unless Your Honor disagrees -- would be just to rely
20 on what we have said in our briefing, because it's in
21 there very clearly.

22 And, with what, I would move on just very briefly to
23 say if you'll go with me on merger, the equitable estoppel
24 argument is pretty straightforward. It's about direct
25 benefits. Can't receive direct benefits under a contract

1 containing an arbitration agreement, and then, thereafter,
2 deny its enforceability. We explain that in a bit more
3 detail, but that's the basics of the argument, Your Honor.
4 It's merger of the admission in arbitration agreement. If
5 you go that far -- if you don't go that far, I'll agree
6 with you candidly, we lose.

7 But if you go that far with merger, then we're
8 looking at equitable estoppel, and that's under what's
9 called the direct benefits theory. There's a case called
10 Wilson v. Willis, which we get into, and that case puts a
11 little more meat on those bones. But the idea there is
12 simply you certainly get direct benefits -- and I would
13 just -- just to make sure I have made this point clear --
14 in the admission agreement, there are certain
15 responsibilities that the facility has: Furnishing room,
16 routine meals, nursing care, personal care, custodial
17 care. There are others but provide assistance in daily
18 living and restorative nursing care; obtain and administer
19 medication; furnish resident bed linens and hospital
20 gowns. All of those things are benefits that are being
21 received directly by virtue of the arbitration with the
22 admission agreement. And, again, they became one through
23 merger. So if they become one through merger, that's why
24 I'm able to argue this -- you know, this point about how
25 this direct benefits and you can't receive those and then

1 deny the enforceability of the arbitration agreement.

2 And the last point I would make on this, Your Honor,
3 is -- and maybe this is an obvious one but it's been
4 argued against me, so I'll -- at other times -- obviously,
5 we're here because there's a lawsuit that says that the
6 experience that this resident had at this facility was not
7 a good one. That's what they're claiming. But that does
8 not negate the idea of receipt of direct benefits for a
9 couple of different reasons.

10 Number one, that's an allegation that you have to be
11 proven, and this is not a point where Your Honor is,
12 obviously, procedurally in a position to say yay or nay as
13 to whether or not that allegation has been proved. So
14 that's sort of, I guess, maybe the threshold point, which
15 is the mere allegations of that are not enough.

16 But I would also note, even so, the allegations
17 don't even themselves go so far -- and it would be rather
18 odd if they did -- but they don't even themselves go so
19 far as to suggest that there were not benefits received.
20 There was room. There was board. There was -- every
21 single moment, you know, this person received benefits
22 pursuant to this agreement.

23 So it is really, I suppose, just that simple and
24 straightforward in saying those are benefits. You can't
25 receive them and then deny it, the arbitration -- or

1 denying enforceability of the arbitration agreement, if
2 they're merged.

3 With that, Your Honor, I would say to you and also
4 opposing counsel thank you for bearing with me. That's a
5 long road to travel here in a motion hearing, and I
6 appreciate your patience. And I will -- well, I will
7 suspend this argument and allow opposing counsel, of
8 course, to respond, unless Your Honor has questions.

9 THE COURT: No, I don't think so. I appreciate it.
10 I feel like I understand what your argument is and be
11 happy to hear from Mr. McAlister.

12 MR. McALISTER: Thank you, Your Honor. Obviously,
13 Mr. Hines did a nice job of setting forth kind of how it
14 works with respect to potential arbitration in South
15 Carolina. And the one thing that he touched on very, very
16 briefly in the beginning and went straight to this merger
17 argument is this concept that, in order for an arbitration
18 agreement to be valid, it has to be enforceable and it's
19 subject to these state law contract defenses. That can be
20 unconscionability, it can be authority, it can be all
21 these different things under the State law provisions and
22 the precedent that apply.

23 And while he did note to the Court that Ms. Hagood
24 did not have power of attorney, the testimony and evidence
25 in the case is crystal clear that she also didn't have

1 apparent authority to sign any of these agreements.

2 The admissions director for the facility had the
3 opportunity to depose her. Her testimony is appended to
4 my brief. But she said, prior to signing these agreements
5 with Ms. Hagood, he had no interaction with Mr. Chavis
6 whatsoever. She never, you know, discussed signing away
7 his rights with him, and he was not present during the
8 admission. And that goes directly to the issue at hand.
9 At the end of day, Ms. Hagood had no authority whatsoever
10 to sign away his constitutional rights, and the case law
11 is crystal clear in that regard.

12 Now, you know, what is interesting about this case
13 is we also had the financial documents from the facility.
14 There are about 99 pages. And what happens is they bring
15 these family members in. The resident is not there. The
16 resident has no input into the admissions process, and
17 they have this family member sign, you know, 99 different
18 documents during this admissions period. You know, this
19 arbitration agreement is buried within there.

20 Now, they also had Mr. Chavis sign a financial
21 document for Medicare that's within those agreements. So
22 the question really becomes -- and I asked, you know,
23 Ms. Dials, the admissions director, this, "Why is
24 Mr. Chavis allowed to sign a financial document that's
25 submitted to Medicare but he can't sign or make a decision

1 for himself with respect to, you know, this admissions
2 agreement and/or arbitration agreement?" And she didn't
3 really have a response to that. She said, "Well, that's
4 not my deal. That's the business office manager who
5 handles that form. I can't speak to that."

6 But, at the end of the day, that form is made an
7 attachment to our brief as well, and it shows crystal
8 clear. It says, "I, Frank Chavis," and then it has a
9 signature just below that. It certainly is not Ms. Hagood
10 who they contend, you know, entered into these agreements
11 on behalf of her father.

12 Going back to the points on merger -- and I'll touch
13 on this briefly -- but, we have the Thompson case, the
14 Hodge case, the Coleman case, the Solesby case. The
15 Solesby case that has just come down this year from the
16 Court of Appeals and applies to these same corporate
17 defendants with the exact same language in arbitration
18 agreement, exact same language in admission agreement, and
19 they denied all of these arguments that Mr. Hines has made
20 today.

21 There's also a few unpublished opinions that have
22 come down recently for these exact same arguments -- I
23 believe with the exact same agreements -- with these same
24 corporate defendants. Barbara Owens is an unpublished
25 opinion that came down in July 29 -- or, excuse me,

1 July 19th of this year from the Court of Appeals that,
2 again, found no merger with respect to these agreements.

3 There's also the Daniels v. THI case that, again,
4 came down and found there was no merger. There's the
5 Ladson v. THI case. And I believe those THI cases
6 actually -- they petitioned for cert on these very issues
7 and were denied.

8 So I can't speak to the appellate process, but I do
9 know there's established case law with respect to this
10 very agreement under very, very similar circumstances.
11 The difference here is Ms. Hagood had no authority at all
12 to sign these agreements that he says should be merged.

13 But, you know, as indicated in that Solesby case,
14 you have -- these agreements have different page numbers,
15 different titles, different signature pages. The
16 admission agreement has an entirety of agreement, you
17 know, provision. There's different termination. There's
18 a different termination provision within the admission
19 agreement, as Mr. Hines mentioned. There's no reference
20 to termination or revocation in the arbitration agreement,
21 which goes more to an unconscionability argument. That --
22 and I'm not going to get into a lot of details there, but
23 it goes to, you know, the fairness of the terms, the
24 ability to negotiate those terms.

25 The unconscionability side of it is really -- has to

1 do with the fact that this is a pre-drafted, pre-made
2 arbitration agreement that the admissions director hands
3 to, you know, the family member and says, "Sign here."
4 There's no negotiation. There's no bargain for exchange.
5 It's just -- you know, it's just sign, sign, sign. So
6 that really has to do with absence of meaningful choice.

7 You know, in going back to the merger, again, you
8 know, you have different law provisions. Now, Mr. Hines
9 has tried to carefully navigate that -- you know, the
10 references to, "Well, South Carolina law is going to apply
11 but also, you know, federal regulations will." The dirty
12 little secret there is federal regulations apply to this
13 facility. Those are the OBER regulations, 42 C.F.R. 43,
14 because, in order for the facility to get paid by Medicare
15 and Medicaid, they have to comply with those licensing
16 regulations. So that is what he's referencing there.

17 One thing that I didn't necessarily brief but I do
18 want to mention is, you know, there's also a question of
19 whether or not Ms. Hagood is an individual. She's not, at
20 that point in time, power of attorney. She's not
21 designated as a personal representative of the estate and
22 has the authority to sign on behalf of those wrongful
23 death statutory beneficiaries. And there's a body of case
24 law that says that she does not have that authority to
25 sign away their rights. And, in fact, until Mr., you

1 know, Chavis actually dies, that claim doesn't activate,
2 so to speak.

3 But, at the end of the day, the case law is clear.
4 I understand Mr. Hines and his clients want to try to
5 change the case law at the Supreme Court, but we have at
6 least four published opinions on these very issues that
7 deny these merger arguments. There's been other
8 unpublished opinions that deny the merger arguments on
9 these very same agreements, and, as a result, you don't
10 get to the estoppel argument. Under the Flutch (ph) case,
11 when you -- as Mr. Hines mentioned, you have to -- you
12 know, you have to cross the first bridge before you get to
13 the second. And so, as a result, you don't get to the
14 estoppel argument. And there's no evidence here that
15 supports that Ms. Hagood should be estopped from making
16 this argument.

17 Anyway, with that said, you know, just circling back
18 to one other thing that Mr. Hines indicated. You know, he
19 talks about the ADR provisions within the state, and one
20 thing that he said there was the ADR provisions require
21 inexpensive, you know, litigation or inexpensive
22 prosecution of these claims. Well, it's not -- it's not
23 inexpensive for the plaintiff. It costs \$180 for a
24 plaintiff to file a lawsuit -- a wrongful death lawsuit in
25 this state. It will cost thousands of dollars to pay

1 arbitrators, you know, to hear motions to compel
2 discovery, to hear the case itself, to conduct the trial.
3 And here, you're talking about an individual, a family,
4 who express reservations about, you know, having financial
5 burden on her during this admissions process to the
6 admissions director, and now, they'd be expected to pay an
7 arbitrator or panel of arbitrators, you know, thousands of
8 dollars for their time to hear this matter, and that's not
9 equitable with respect to, you know, the disparity and the
10 differences of the parties. You have a corporate party
11 and you have an individual. It's a deal different.
12 Whereas, you know, we're here before the Court because the
13 Court -- you know, as a constitutional right, the Court
14 and the jury can hear these claims without having to pay
15 an arbitrator thousands of dollars to do so.

16 You know, again, just to circle back, the merger
17 question has been litigated. It's been heard. It's been
18 decided. The Solesby case is the latest in January of
19 '23. There's a number of other opinions. You know, we'll
20 see what certainly the Supreme Court ultimately does,
21 whether or not they decide to even take it up. But, at
22 the end of the day, the case law is crystal clear that no
23 merger applies for this particular agreement.

24 THE COURT: Mr. Hines, is there anything you'd like
25 follow up on?

1 MR. HINES: As brief as possible, Your Honor. And I
2 think maybe I'll start with just maybe trying to
3 underscore that -- the reason why I feel very comfortable
4 in arguing these points to you today is that the case law
5 is not crystal clear on this against us. And here's just
6 a very short -- I have talked about Coleman. You have
7 heard about Coleman, Thompson, and Hodge. Every one of
8 those cases, different arbitration agreement, different
9 admission agreement. To be clear, different agreements
10 from the start. The only one that you have the same is
11 Solesby.

12 Now, there's other cases that have mentioned -- that
13 are the same. I mean, candidly, that is true, but as far
14 as -- excuse me, let me be clear. The other unpublished
15 decisions -- mentioned Owens and, I think, Daniels and
16 some other ones -- but unpublished decisions, by rule, are
17 of no precedential value whatsoever. So, you know, as far
18 as I don't -- the benefit of even citing those, you know,
19 I'm not fussing with opposing counsel. I mean, they
20 certainly do exist, but there's also no question they are
21 of zero precedential value. So, you know, as far as them
22 having any weight, it seemed to be not possible to have
23 any weight.

24 So, again, the only published decision that deals
25 with these same agreements is Solesby. And as we

1 explained in the brief, the Solesby Court, one -- I would
2 say it's two-fold. One, it's erroneous. Two, it didn't
3 wrestle with these arguments that I have argued to Your
4 Honor. It didn't.

5 I mean, when you look at that case, that's the thing
6 that caused me the most heartburn about the whole thing.
7 You know, I suppose, as a lawyer, you can tolerate losing
8 as long as you feel like you have been heard, and, on this
9 one, candidly, it's one paragraph that the Court ticks off
10 boom, boom, boom, why you lose. But it doesn't really
11 explain it. It just says we find that, for instance, one
12 is governed by South Carolina law, the other one by
13 federal law. Well, as I mentioned to Your Honor, that's
14 not what they say. But I don't get any more -- so it's
15 both erroneous in terms of I disagree with the reasoning,
16 but it's also faulty or lacking in that it doesn't
17 actually wrestle with these in a meaningful way.

18 For instance, yes, the agreement absolutely says the
19 admission agreement and the arbitration -- or, excuse me.
20 The (indiscernible) says, the agreement -- the admission
21 agreement and the arbitration agreement are separately
22 paginated and had their own separate signature pages.
23 That's all it says.

24 Well, of course, there was -- the idea that separate
25 pagination and separate signature pages is going to

1 undermine the merger presumption, respectfully, doesn't
2 make any sense because all that's really saying they're
3 two separate instruments. You'll never, ever have the
4 question of merger arise unless you have separate
5 instruments. So, to have a rule that says, yes, we
6 presume merger if you check these four boxes, that are not
7 so easy to check, it has to cite particular
8 circumstances -- one, two, three, four -- and you're going
9 to upset that because they have separate pagination and
10 separate signature pages? Well, they're separate
11 instruments. That's a given. You wouldn't be talking
12 merger if they weren't.

13 And I'd like -- you know, I'd like to have -- the
14 opinion doesn't say anything about -- in response to that.
15 So, again, that's -- my point is that I respectfully
16 contend and respectfully to opposing counsel and to the
17 Court that deferred us on these before and of course to
18 Your Honor that it is certainly not so crystal clear. If
19 it were crystal clear and I was just banging my head
20 against the wall, then -- well, I wouldn't feel very good
21 about that. But I think we have fair game to argue --
22 again, Coleman, Thompson, Hodge, completely different
23 agreements. Solesby, the only published opinion with the
24 same agreement, seems to leave some holes in there that at
25 least ought to be plugged or have not yet been plugged,

1 and until they have been plugged against me, I think it's
2 fair game to argue that -- well, for them to go in my
3 favor.

4 The other point I suppose I'd make is just -- maybe
5 the most important point to make at this point is, on
6 authority, this argument about estoppel was just -- we can
7 assume for the purposes of this argument that Ms. Hagood
8 did not have authority. No power, no agency authority
9 under any view of agency. We can assume all that.

10 Estoppel makes that irrelevant because we're not --
11 the estoppel argument is not an argument. This is an
12 enforceable agreement. I mean, I'm talking about the
13 technical nature of it. The nature of estoppel is because
14 estoppel applies, the plaintiff cannot deny that it's an
15 enforceable agreement. Again, that's because of direct
16 benefits estoppel.

17 So I just want to be clear that, yes --

18 THE COURT: But that's a question I have -- and I'm
19 sorry to interrupt you -- even before Mr. McAlister
20 brought up, you know, what would be equitable if I did go
21 with the merger. I'm not saying I will; I'm not
22 indicating that one way or the other. But if we get to
23 the equitable estoppel, I'm trying to figure out why is it
24 more fair for the defense to have this heard in
25 arbitration as it would be in the court?

1 MR. HINES: Well, Your Honor --

2 THE COURT: Isn't that really basically what we're
3 trying to weigh if we get to that point?

4 MR. HINES: Well, Your Honor, I think the first
5 thing you're trying to weigh is whether or not -- and I
6 realize that you're not saying anything one way or the
7 other about your ruling; you're asking a question, which I
8 very much appreciate the chance to address.

9 So let's just assume we're past merger and we're
10 just talking about equitable estoppel -- direct benefits
11 estoppel, then, Your Honor, as I understand the test, the
12 test is do you have direct benefits that were received on
13 the basis of an agreement? In this case, we'll talk about
14 just the agreement because we have -- for the concept of
15 this argument, we're talking they're merged. So now what
16 we have is we have one agreement that includes the
17 admissions parts, and it has the arbitration provision.

18 While there's no question that benefits were
19 received -- direct benefits were received by virtue of the
20 admissions. And I have ticked off a few of those about
21 room, board, and different care treatment -- different
22 things that were provided. My understanding is, is that
23 the type of inequity that that test is designed to prevent
24 operates right there at that moment. Can't have direct
25 benefits under agreement on one hand and deny the

1 provision requiring arbitration in the same agreement.
2 You can't have your cake and eat it too. That's the
3 inequity it's trying to address.

4 What you were talking about, understandably, is
5 about an -- what about an inequity in terms of requiring
6 arbitration after that, you know, is that fair or not
7 fair? Well, I believe that the direct benefits test
8 operates -- sort of heads that off at the pass. But where
9 I can concede to Your Honor that perhaps the equitable
10 test could come up is you could argue, "Well, still I find
11 there's something unconscionable here." And that's why I
12 need to go in to argue unconscionability.

13 But, in that point, Your Honor -- and this is, I
14 think, important to mention -- I have heard a lot from
15 opposing counsel about this idea of an absence of
16 meaningful choice. Well, that's only one of the two-part
17 tests. I disagree that that's the case because, again,
18 this was an optional agreement. It did not have to be
19 signed. Opposing counsel has suggested otherwise, but
20 there's no evidence to that as far as there's -- you know,
21 he mentioned there's a lot of documents they were put in
22 front of somebody and told to sign. Well, that's
23 argumentation, I can understand it, but that's not what
24 the record actually shows.

25 And, furthermore, this is the language from -- the

1 arbitration agreement, by the way, that was said to be
2 buried, it wasn't buried. It's a one-page document. It's
3 not -- and it says, "Arbitration Agreement" right here on
4 the top of it. And this is Exhibit 3 to our memo. And
5 this is what it says, the final line of it: "By his/her
6 signature below, the executing party represents that
7 he/she has the authority to sign on resident's behalf so
8 as to bind the resident as well as the representative."

9 Of course that's right there on it. There's no
10 question -- and it's signed. And this is just South
11 Carolina law. One who has signed a contract is presumed
12 to have read, understood, and assented to its terms. It's
13 been signed. And there's no -- obviously, no question as
14 to whether or not Ms. Hagood is -- her capacity or her
15 ability to understand things. She's operating as the PR
16 here in bringing this lawsuit.

17 So, you know, some of these things that Plaintiff
18 wants to argue about being inequitable, I'm going to have
19 to, obviously, push back on the fact that she signed the
20 agreement. Our law says that, if you do that, you're
21 deemed to have read, understood, and accepted those terms.

22 She's also made a representation that she's
23 authorized to do this, by the way. That's what this is
24 saying.

25 And then, on the point of equity, again, the ADR

1 rules require that they be construed to secure the just,
2 speedy, and -- so I would argue that the way these rules
3 are written is they both -- they require and empower the
4 arbitrator -- again, this agreement only calls for a
5 single arbitrator, not for a panel -- but to carry out
6 arbitration on those terms: just, speedy, inexpensive, and
7 collaborative.

8 So to say that arbitrating under the South Carolina
9 ADR rules is inequitable is to say that the rules are
10 inequitable, respectfully. And so -- and, furthermore, to
11 single out an arbitration agreement for disparate
12 treatment also brings in the equal footing issues with the
13 FAA, meaning that you can't make it harder to enforce an
14 arbitration agreement than you could to enforce some other
15 type of agreement.

16 But the idea of inexpensive -- you know, and talking
17 about the arbitrators' fees, I've always thought that
18 notion is a bit off-base for a couple of reasons. Number
19 one, the rules would empower the arbitrator to make a just
20 determination about who should pay for what in terms of
21 the arbitration costs. I think the arbitrator has power
22 under these rules to make that equitable within the
23 confines of the arbitration.

24 But even so -- regardless of that, you know, it's a
25 bit weird to me when someone who is representing a

1 plaintiff in a medical malpractice case, where, obviously,
2 there are going to be substantial expert fees and all
3 sorts of fees that are going to come along with this, I
4 would venture to say that a streamlined arbitration
5 proceeding -- the whole idea of arbitration is
6 streamlined. You know, that's why we have cases that talk
7 about a policy in favor of arbitration as a means of
8 dispute resolution.

9 So the idea that you're going to have to pay some
10 money to an arbitrator, that's really sort of -- you know,
11 it's just hard -- I don't find that argument very
12 persuasive considering that how much money is -- to bring
13 a case like this -- is involved in paying experts and
14 dealing with deposition transcript costs, all those types
15 of stuff that would go on with -- I mean, you know, I
16 suppose we could have some sort of way of -- and I don't
17 think either of us have said this either way in terms of
18 saying it will be cheaper to move forward in arbitration
19 versus litigation or vice versa, but the idea that paying
20 arbitrator's fees -- you know, if that's the case -- if
21 having to pay arbitrator's fees, when one party is an
22 individual and one party is corporate, makes its
23 unconscionable, then you essentially have knocked out --
24 you have made it unconscionable in any case where you have
25 that setup, individual or corporation. So I push that

1 back against that.

2 And the last thing I push back against, Your Honor,
3 is the idea of wrongful death being somehow different.
4 The way I see the wrongful death is this: A wrongful
5 death claim is derivative of a claim that the decedent had
6 had the decedent lived. I realize there's a difference
7 between wrongful death and survival, but imagine that a
8 case unfolds like this: You have a bad accident and the
9 decedent is, you know, hospitalized and has a -- you know,
10 substantial injuries, and, in the wake of that, the
11 decedent makes -- resolves that claim with whoever the
12 at-fault parties are and gives a full and complete release
13 for any and all damages, and then the decedent dies, you
14 know, after that. That release that was given in life
15 would thwart a wrongful death claim, even though the
16 wrongful death claim didn't arise until after the decedent
17 died because the decedent would have -- and this is the
18 same type of situation. If Your Honor were to go with us
19 on our merger and equitable estoppel arguments, the
20 decedent will be deemed to have agreed to arbitrate in
21 that the decedent cannot deny the enforceability or, in
22 this case, the decedent's representative.

23 So, you know, if you'd like some more briefing on
24 that, I know -- and I don't mind at all opposing counsel
25 making that argument. I have seen it before and I'm

1 familiar with it, but neither of us have briefed it. And
2 so if Your Honor was -- well, if Your Honor is -- and,
3 obviously, the point of that argument would be to say --
4 the ruling would have to be yes, you'd have to arbitrate
5 the survival claims, not the wrongful death because you'd
6 be treating them differently. Our argument, obviously, is
7 that everything would be subject to arbitration and
8 argument; that wrongful death should be treated no
9 different as I have mentioned, that it's derivative of a
10 claim that the decedent had had the decedent not died.
11 And so if the arbitration agreement is enforceable against
12 the decedent's estate or -- the idea is it has -- the
13 enforceability derives from an enforceability based upon
14 benefits the decedent has received during life. So it
15 would be enforceable against the decedent; therefore, it's
16 enforceable against the wrongful death -- essentially say
17 against the wrongful death beneficiaries because they
18 can't even bring the claim anyways. They just have the
19 benefit of the claim. The claim has to be brought
20 statutorily by the PR, so...

21 I can get into that more if Your Honor has any more
22 questions, but I'll just suffice it to say what I have
23 said there.

24 And also, one more thing about the FAA. I think
25 there's a very good question under the Dean v. Heritage

1 Healthcare case. Our Supreme Court -- South Carolina
2 Supreme Court certainly says that you can't deny
3 arbitration in the context of wrongful death claims
4 outright because that would violate the FAA's equal
5 footing rule. I think that applies here.

6 And with that, Your Honor, I'd just -- a very
7 sincere thank you for your incredible patience. I'm glad
8 we were last up today -- I hope we're last up today for
9 you. And I do appreciate very much your and opposing
10 counsel's patience with letting me argue what I have so
11 extensively and --

12 THE COURT: No, I appreciate it.

13 Mr. McAlister, anything you'd like to --

14 MR. McALISTER: Just one final thing, Your Honor, if
15 you don't mind. The Hodge case, at page 558 and 559, is
16 talking about Thompson, and it walks through this
17 equitable estoppel argument. And just because the Court
18 may ultimately merge those documents, the defendant still
19 has to prove -- prove up that equitable estoppel
20 component. And there's some parts to that. It must be
21 that the conduct, which amounts to a false representation
22 or concealment of material facts calculated to convey the
23 impression that the facts are otherwise inconsistent with
24 the party to rely, that sort of thing.

25 And then it goes on to say, it says, "The party

1 asserting estoppel must have lack of knowledge and the
2 means of knowledge of the truth of the facts in question.
3 Reliance upon the conduct of a party estopped and actions
4 therefore..."

5 So, you know, in this particular instance, the
6 admissions director told us in her deposition that she did
7 not ever ask whether or not there was any authority. In
8 fact, she said she didn't need it. She didn't need a
9 power of attorney to move forward. It just -- all she
10 needed was a family member.

11 And so, you can't turn a blind eye to authority and
12 whether or not someone actually should be signing these
13 documents and then say, "No, they're estopped from
14 asserting this defense." So, you know, I think that goes
15 to it.

16 And, finally, I'll leave you with this, Your Honor:
17 Within the testimony from Ms. Dial, the admissions
18 director, at page 61, I asked her point-blank, "I just
19 want to make sure I'm clear. Again, this is separate and
20 apart from the admissions agreement; right?"

21 And there was an objection to form.

22 "This form is the arbitration agreement, and there
23 is an admission agreement, which would be page 1 through
24 12 of -- at the front of this packet. And this is the
25 arbitration agreement."

1 And then I asked her, as a follow-up to that, "And
2 you told us earlier this is not a condition to admission;
3 right?"

4 And she says, "It is not a condition."

5 So that's at page 61, kind of starting at paragraph
6 11 and it goes on to page 62 at the top, paragraph 1.

7 You know, these issues were asked and answered
8 during her testimony, so this concept that these documents
9 aren't separate and apart I think is flawed.

10 MR. HINES: Your Honor, if I may, very briefly,
11 because -- just two points.

12 THE COURT: I understand, and it's your motion, so
13 we'll hear the conclusion from you and then I'll -- we'll
14 move on.

15 MR. HINES: Thank you, Your Honor. This will be
16 very quick.

17 The equitable estoppel principles that opposing
18 counsel just mentioned from the Hodge case, those don't
19 apply here, Your Honor. That's what's called the
20 traditional six-part test. It's three parts on each side.
21 The case Wilson v. Willis gets into that. And that's
22 the -- I just want to be clear. We're talking about
23 direct benefits estoppel. Wilson v. Willis notes that
24 that that traditional six-part test has applied -- been
25 applied generally to non-arbitration cases, and Wilson v.

1 Willis endorses -- I would argue now, in fairness, Wilson
2 v. Willis test did not go so far as to say affirmatively
3 that that -- you know, Wilson v. Willis was argued and
4 presented strictly under the direct benefits test. The
5 Supreme Court favorably analyzed the direct benefits test
6 in arbitration cases. It didn't say -- it didn't reject
7 the six -- the six-part test outright, but it did say --
8 it did certainly say as a footnote that that test -- it
9 expressed its understanding that that test really was
10 misfit for this situation because it didn't -- had not
11 been applied in arbitration cases.

12 So I guess I wanted to make sure. I'm not arguing
13 in favor of the six-part test that Mr. McAlister
14 mentioned. I'm arguing direct benefits. That's Wilson v.
15 Willis.

16 I also -- we didn't ask Ms. Chavis or Ms. Stokes --
17 I mean, by having her sign the agreement -- which, again,
18 she's -- under South Carolina law has deemed to have read,
19 agreed with, understood, and represented her authority,
20 that is asking her. And it also -- it was optional.

21 And the last point about separate -- the questions
22 related to whether these agreements were separate and
23 distinct or whatever that line of questioning was,
24 obviously, as counsel mentioned, there was an objection to
25 the form.

1 And, furthermore, we don't at all disagree that
2 they're separate instruments. They are. That's why we're
3 talking merger. We wouldn't be talking merger if they
4 weren't. So, you know, that's -- that goes back to my
5 point about pagination and signature pages being not
6 probative of intent because you'll never talk merger
7 without separate instruments. We certainly have them
8 here. We have to concede that but we'd argue, for all the
9 other reasons I have mentioned and what we have written,
10 that the merger still applies.

11 Again, Your Honor, a very sincere thank you for such
12 a -- well, such a patient audience. I do very much
13 appreciate it.

14 THE COURT: No problem. Thank y'all.

15 MR. McALISTER: Thank you, Your Honor.

16 THE COURT: All right. Well, I'm going to take a
17 look at this stuff. I actually got it all printed out
18 here. Got a new law clerk on board, and he did a great
19 job with that. I'll read through it and let you know.

20 MR. HINES: Thank you, Your Honor.

21 THE COURT: All right. Thank y'all. Hope you have
22 a good day.

23 MR. HINES: You too.

24 MR. McALISTER: You too.

25 (The above matter concluded at 11:06 p.m.)

1 CERTIFICATE OF TRANSCRIBER

2 CASE NAME/NUMBER: Frank Chavis v. Palmetto Faith

3 Operating, LLC

4 2022-CP-33-183

5 DATE OF HEARING: 8-21-23

6 COURT REPORTER/MONITOR: Webex Virtual Courtroom

7 *****

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

16
17 18 /s/ Bobbi Fisher_____

19 Bobbi Fisher, RPR and Certified Transcriber

20 Date Submitted: 1-4-24

21
22 NOTE: PURSUANT TO RULE 607(h)(1)(B), SCACR, "A COURT
23 REPORTER SHALL RECEIVE THE FEE OF \$1.00 PER PAGE FOR
24 FURNISHING A COPY OF A PREVIOUSLY PREPARED TRANSCRIPT."
25 ALL REQUESTS FOR COPIES OF THE ATTACHED TRANSCRIPT (FORM
800) FROM OPPOSING PARTY OR NON-PARTIES MUST BE SENT TO
THIS REPORTER AT BFISHER@SCCOURTS.ORG.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF MARION	)	TWELFTH JUDICIAL CIRCUIT
	)	
REBECCA C. HAGOOD AS	)	CASE NO. 2022-CP-33-00183
PERSONAL REPRESENTATIVE OF	)	
THE ESTATE OF FRANK D. CHAVIS,	)	
SR.,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
PALMETTO FAITH OPERATING, LLC	)	PALMETTO FAITH OPERATING, LLC
D/B/A FAITH HEALTHCARE CENTER	)	D/B/A FAITH HEALTHCARE CENTER'S
AND BROOKS ARNETTE,	)	MOTION TO COMPEL ARBITRATION
	)	
DEFENDANTS.	)	
	)	

TO: WILLIAM TUCK, ATTORNEY FOR PLAINTIFF:

PLEASE TAKE NOTICE that Defendant Palmetto Faith Operating, LLC d/b/a Faith Healthcare Center (hereinafter referred to as “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 and compelling arbitration pursuant to the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, *et seq.* and South Carolina Rules of Civil Procedure 12(b)(1) and (6). This Motion is based on the terms and provisions of a valid and binding Arbitration Agreement executed by Plaintiff at the time of Frank D. Chavis’ admission to the Facility. (See Arbitration Agreement attached as **Exhibit A**). The Arbitration Agreement is expressly binding on all parties and requires that Plaintiff’s claims be submitted to arbitration.

This Defendant further requests that this Honorable Court specifically stay any further requirement to file any responsive pleading as well as any requirement to respond to any motions

or discovery filed or served by Plaintiff while the current motion is pending. This Motion is 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.

CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.
D. Jay Davis, Jr.
Matthew O. Riddle
Kara S. Grevey
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com
mriddle@ycrlaw.com; kgrevey@ycrlaw.com
*Attorney for Defendant Palmetto Faith Operating,
LLC d/b/a Faith Healthcare Center*

Charleston, South Carolina

Dated: July 13, 2022

PLEASE READ CAREFULLY

FACILITY - RESIDENT/REPRESENTATIVE
ARBITRATION AGREEMENT

This Agreement is made between Faith Healthcare ("Facility"), its agents, employees and servants, and Frank Chavis ("Resident") or Becky Stokes ("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.

* Rebecca C. Stokes 03/14/19
Resident/Representative Signature Date
Kelly M. Dials 3/14/19
Authorized Agent of Facility Date

Rebecca C. Stokes
Printed Name of Resident/Representative
Kelly Dials AD
Printed Name & Title

Original: Business File • Photocopy: Resident/Representative

DEFENDANT'S
EXHIBIT

A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF MARION	)	TWELFTH JUDICIAL CIRCUIT
	)	
REBECCA C. HAGOOD AS	)	CASE NO. 2022-CP-33-00183
PERSONAL REPRESENTATIVE OF	)	
THE ESTATE OF FRANK D. CHAVIS,	)	
SR.,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
PALMETTO FAITH OPERATING, LLC	)	BROOKS ARNETTE'S
D/B/A FAITH HEALTHCARE CENTER	)	MOTION TO COMPEL ARBITRATION
AND BROOKS ARNETTE,	)	
	)	
DEFENDANTS.	)	
	)	

TO: WILLIAM TUCK, ATTORNEY FOR PLAINTIFF:

PLEASE TAKE NOTICE that Defendant Brooks Arnette (hereinafter referred to as “this Defendant”), by and through his 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 and compelling arbitration pursuant to the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, *et seq.* and South Carolina Rules of Civil Procedure 12(b)(1) and (6). This Motion is based on the terms and provisions of a valid and binding Arbitration Agreement executed by Plaintiff at the time of Frank D. Chavis’ admission to the Facility. (*See* Arbitration Agreement attached as **Exhibit A**). The Arbitration Agreement is expressly binding on all parties and requires that Plaintiff’s claims be submitted to arbitration.

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

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.

CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.
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Attorney for Defendant Brooks Arnette

Charleston, South Carolina

Dated: July 13, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF MARION	)	TWELFTH JUDICIAL CIRCUIT
	)	
Rebecca C. Hagood as Personal Representative of the Estate of Frank D. Chavis, Sr.,	)	C/A No. 2022-CP-33-00183
	)	
Plaintiff,	)	PLAINTIFF'S RESPONSE IN
	)	OPPOSITION TO DEFENDANTS
vs.	)	PALMETTO FAITH OPERATING,
	)	LLC AND BROOKS ARNETTE'S
Palmetto Faith Operating, LLC d/b/a Faith Healthcare Center and Brooks Arnette,	)	MOTIONS TO COMPEL
	)	ARBITRATION
Defendants.	)	
	)	

COMES NOW, the Plaintiff Rebecca C. Hagood, as Personal Representative of the Estate of Frank D. Chavis, Sr., deceased, and files her Response in Opposition to Defendants Palmetto Faith Operating, LLC d/b/a Faith Healthcare Center and Brooks Arnette's (collectively as "Defendants") Motions to Compel Arbitration ("Motions") and alleges as follows¹:

I. BACKGROUND

This is a wrongful death and survival action instituted pursuant to S.C. Code Ann. §§ 15-5-90, 15-5-100, and 15-51-10 by Rebecca C. Hagood ("Plaintiff" or "Mrs. Hagood")², as Personal Representative of the Estate of Frank D. Chavis, Sr. ("Mr. Chavis"). As set forth in the Amended Complaint, Mr. Chavis died as a result of negligent care he received while a resident at Palmetto Faith Operating, LLC d/b/a Faith Healthcare Center ("Faith HC" or the "Facility") located in Florence County at 617 W. Marion Street in Florence, South Carolina. *See generally*, Am. Compl. Plaintiff alleges that Defendants established, operated, managed, and/or controlled the Facility

¹ At the time of filing, it remains unclear the basis of Defendants' Motions; therefore, Plaintiff reserves the right to supplement her brief and/or argument to address any arguments not contained herein.

² Mrs. Hagood was formerly known as Rebecca "Becky" Stokes.

during the residence of Mr. Chavis. Am. Compl. ¶ 2, 37-38, 48. By their Motions, Defendants seek the benefit of arbitration based upon an unenforceable agreement purportedly signed by Rebecca Hagood, the daughter of Mr. Chavis.

In this case, Mr. Chavis was initially admitted to the Faith HC on March 14, 2019. During this process, Mrs. Hagood, as daughter, met with representatives of Faith HC and signed the Admission Agreement and purported Arbitration Agreement. **[Exhibits 1 & 2]**. At that time, Mrs. Hagood did not have power of attorney for her father and lacked authority to execute any agreement to arbitrate. R. Hagood Dep. 9:11-19 (Oct. 4, 2022) **[Exhibit 3]**. On April 5, 2019, Mr. Chavis was discharged home from the Facility with his son, terminating his initial residency. **[Exhibit 4]**. On April 12, 2019, Mr. Chavis presented to Carolinas Hospital System, where he remained hospitalized for five (5) days. On April 17, 2019, Mr. Chavis was discharged from the hospital back to the Faith HC. After his readmission on April 17th, Faith HC asked Mrs. Hagood to sign a Readmission Agreement. **[Exhibit 5]**. This document was signed on April 23, 2019, approximately seven (7) days later. No additional arbitration agreement was offered or executed at that time.

Plaintiff opposes Defendants' Motions and denies a valid agreement to arbitrate exists. Arbitration agreements are subject to the same defenses applicable to all other contracts. Applying general (and basic) principles of contract law, Plaintiff contests whether a contract exists, and contends Mrs. Hagood lacked the requisite authority to execute the purported contract. Further, other factors, defects, and defenses recognized in the State of South Carolina render the purported agreement unenforceable. Accordingly, Plaintiff contends the Motions should be denied.

II. CITATION OF AUTHORITY AND ARGUMENT

The party seeking to force arbitration has the burden of establishing the existence of a valid arbitration agreement. *See Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). The proponent of the jury waiver bears the burden of proving a valid agreement exists because the right to trial by jury is fundamental and should not be waived absent clear evidence. *See e.g., Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986) (“Where waiver is claimed under a contract executed before litigation is contemplated, we agree with those courts that have held that the party seeking enforcement of the waiver must prove that consent was both voluntary and informed.”). It is well established in South Carolina 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[,]” and “[i]f 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 (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).

The party seeking judicial enforcement of a contract bears the burden of persuasion. *Hinson-Barr, Inc. v. Pinckard*, 292 S.C. 267, 268, 356 S.E.2d 115, 116 (1986). Defendants must prove a valid and enforceable arbitration agreement was signed in a “knowing, voluntary and intentional” capacity. In interpreting a jury trial waiver narrowly, some courts have also emphasized “the basic principle that ambiguities in a contract are construed against the drafting party.” *Nat’l Acceptance Co. v. Myca Products, Inc.*, 381 F. Supp. 269, 271 (W.D. Pa. 1974). When faced with a motion to compel arbitration that is opposed based on whether an agreement to arbitrate has been made between the parties, the court must provide the opposing party with the

benefit of all reasonable doubts and inferences that may arise. *See Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51, 54 (3d Cir. 1980).

In this case, the purported Arbitration Agreement states it shall be governed by and enforced under Federal law, specifically, the Federal Arbitration Act (9 U.S.C. §§ 1-16) (“FAA”), as opposed to state arbitration law, unless “contrary to state law”. It further provides it is not subject to the South Carolina Uniform Arbitration Act. Under the FAA, however, the Court must look to South Carolina law to decide the threshold questions of contract formation. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360, 364 (2001); *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) (“the court should apply ‘ordinary state-law principles that govern the formation of contracts.’”).

Importantly, arbitration agreements are subject to the same defenses applicable to all other contracts. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68, 130 S.Ct. 2772, 2776, 177 L.Ed.2d 403 (2010) (*quoting Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). In determining whether an arbitration agreement even exists, “trial courts consider ‘general contract defenses to ensure’ a meeting of the minds to arbitrate existed, and that such an agreement was not the result of ‘fraud, duress, [or] unconscionability.’” *York v. Dodgeland*, 406 S.C. 67, 78, 749 S.E.2d 1139, 145 (2013) (*citing Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 593, 553 S.E.2d 110, 116 (2001)). The judicial inquiry may include examination of contractual defects such as mutual assent and want of consideration as well as other equitable grounds. *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d.302, 205 (4th Cir. 2001). The validity of an arbitration agreement must be determined in accordance with the general principles of contract law. *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2011); *Grant v. Magnolia Manor-Greenwood, Inc.*, 387 S.C. 125, 130, 678 S.E.2d 435, 438 (2009).

A. No Enforceable Agreement Exists

Arbitration agreements are a matter of contract, and a “party cannot be required to submit to arbitration any dispute which he has not agreed to submit.” *World Finance Corp. of S.C.*, 373 S.C. at 149 (citing *Zabinski*, 346 S.C. at 596). A valid and enforceable agreement requires “a meeting of the minds between the parties with regard to all essential and material terms of the agreement.” *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) (citing *Hughes v. Edwards*, 265 S.C. 529, 220 S.E.2d 231 (1975)). As set forth recently in *Thompson v. Pruitt Corp.*, a valid contract must exist to create an enforceable arbitration agreement. *Thompson v. Pruitt Corp.*, 416 S.C. 43, 57, 784 S.E.2d 679, 687 (Ct. App. 2016).

As shown herein, no valid arbitration contract exists. In this case, the Facility initially presented two (2) separate and distinct agreements: (1) the initial Admission Agreement; and (2) the Arbitration Agreement. The Admission Agreement was dated and signed on March 14, 2019. **[Exhibit 1]**. The purported Arbitration Agreement was presented separately during the admissions process and signed that same day. **[Exhibit 2]**. The Facility’s Admissions Director, Kelly Dials (“Ms. Dials”, was tasked with presenting the Arbitration Agreement to any new resident or their representatives. As noted in her testimony, the “pre-drafted” Arbitration Agreement was buried within a “pre-made” business file or admissions packet, which totaled approximately ninety-nine (99) pages. K. Dials Dep. 15:16-16:2, 18:20-2, 19:8-10 (Oct. 4, 2022) **[Exhibit 6]**. While she claimed the purported Arbitration Agreement was “voluntary”, Ms. Dials testified she was specifically “trained” by the Facility’s corporate representatives on what documents “have to be signed” during the admissions process. K. Dials Dep. 19:3-18, 22:10-11. Ms. Dials confirmed in her deposition that “[i]t would be wrong for the resident to sign [an agreement,] if they didn’t understand” they were waiving their Constitutional right to a jury trial. K. Dials Dep. 21:3-7.

Likewise, Ms. Dials testified she should not ask a patient's representative to sign an arbitration agreement if they "did not understand" it. K. Dials Dep. 21:8-12.

During the deposition of Mrs. Hagood, she testified she did not recall signing any Arbitration Agreement. R. Hagood Dep. 15:6-8. She also testified that no one explained the Arbitration Agreement to her, and she did not understand she was waiving her father's right to a jury trial during the admissions process. Hagood Dep. 15:9-15. In fact, Mrs. Hagood did not even know the Arbitration Agreement existed. Hagood Dep. 15:16-17. During the admissions process, Mrs. Hagood further expressed reservations about signing certain documents. Hagood Dep. 15:18-25. Clearly, there was no "meeting of the minds" between the parties; therefore, no enforceable contract exists.

B. Lack of Requisite Authority

The legal consequences of an agent's actions can only be attributed to the principal when the agent has actual or apparent authority. *Charleston, S.C. Registry v. Young Clement Rivers & Tisdale*, 359 S.C. 635, 642 (2004) (citations omitted). "An agency relationship may be established by evidence of actual or apparent authority." *Id.* "[T]he agency must be clearly established by the facts." *Orphan Aid Society v. Jenkins*, 294 S.C. 106, 109, 362 S.E.2d 885, 887 (Ct. App. 1987) (quoting *McCall v. Finley*, 294 S.C. 1, 362 S.E.2d 26 (Ct. App. 1987)). Importantly, "the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial. *Thompson v. Pruitt Corp.*, 416 S.C. 43, 57, 784 S.E.2d 679, 687 (Ct. App. 2016); *See Dickerson v. Longoria*, 414 Md. 419, 995 A.2d 721.

Here, Mrs. Hagood lacked actual or apparent authority to execute the purported Arbitration Agreement on Mr. Chavis's behalf. Such lack of authority was known or should have been known

by the Defendants at the time of its purported execution. Ms. Dials acknowledged it was her duty on behalf of the Facility to “determine if the patient is competent to sign.” K. Dials Dep. 22:24-23:4. Ms. Dials also wrongfully testified she **does not** “have to have **any necessary power of attorney** . . . to be able to **get paperwork signed** by a particular family member.” K. Dials Dep. 23:12-16 (emphasis added).

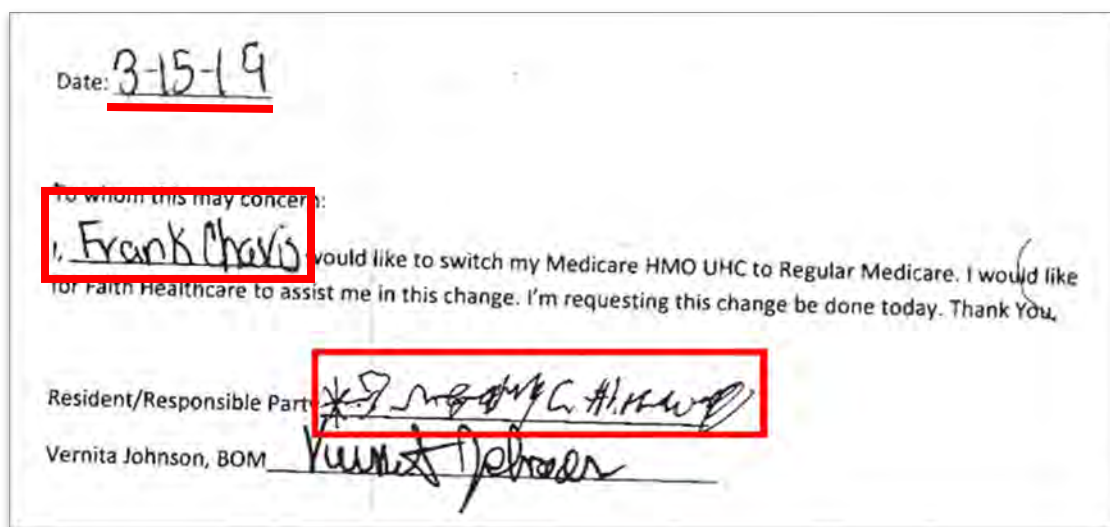
When addressing Mr. Chavis specifically, Ms. Dials, an administrative employee with no “clinical training”, license or certification, testified she determined he was unable to sign documents or make decisions on his own based upon her review of his hospital records. K. Dials Dep. 23:23-24:11, 25:6-19. She also confirmed Mr. Chavis **never directly conveyed any authority** to her with respect to his family. K. Dials Dep. 24:18-19:1. In fact, Ms. Dials confirmed she **did not interact with Mr. Chavis at any point prior to his admission** to the Facility. K. Dials Dep. 25:2-5.

Despite her determination regarding Mr. Chavis’s competency and capability to sign documents for himself, medical records from the Facility illustrate Mr. Chavis was “able to communicate his thoughts and wants to staff” and “has express[ed] his desires to notify his son of his plans”:

SOCIAL SERVICE PROGRESS NOTES		
DATE/TIME	PROGRESS NOTES & COMMENTS	SIGNATURE
03-15-2019	Resident is a 74 year old man being admitted to the facility for rehabilitation therapy. The daughter reported discharge plans will be determined by his progress in therapy. Social services will assist with the discharge. Resident is able to communicate his thoughts and wants to staff. At this present time resident has expressed his desire to notify his son of his plans. Resident's daughter reported she will be the contact person. Social Services Director explained to the daughter the resident has rights to communicate with others if he shall desire. The daughter stated she understood however will follow up with family. M. Paul, BSW	

[Exhibit 7]; K. Dials Dep. Exhibit 1. When pressed on Mr. Chavis's ability to communicate his wishes and desires, Ms. Dials stated she believed "competency and being able to communicate thoughts and wants are different." K. Dials Dep. 28:15-20. She then backtracked stating she does not make a determination regarding competency. K. Dials Dep. 28:21-24.

Other admissions records also illustrate Mr. Chavis was capable of determining whether he should waive his Constitutional right to a jury trial. On March 15, 2019, the Facility obtained Mr. Chavis's signature on financial documents submitted to Medicare under penalty of perjury:



[Exhibit 8]. While Ms. Dials stated she was not sure whether this document showed Mr. Chavis's signature, his name was identified in the letter as "**I, Frank Chavis**". K. Dials Dep. 72:4-18. She confirmed the document was not signed by Mrs. Hagood. K. Dials Dep. 72:19-20. She also confirmed it was signed by Vernita Johnson, the Facility's business office manager. K. Dials Dep. 72:21-23. As set forth in *Hodge*, when the Facility knows a resident is competent at the time of admission and is allowed to sign other forms, the resident should sign the purported Arbitration Agreement. *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 574, 813 S.E.2d 292, 308 (Ct. App. 2018).

Clearly, evidence illustrates Mr. Chavis was capable and competent to execute an Arbitration Agreement under his own volition but no such agreement was presented to him. Alternatively, as shown below, Mrs. Hagood was not authorized, by either actual or apparent authority, to execute any Arbitration Agreement; therefore, the Arbitration Agreement is unenforceable.

i. No Actual Authority

Actual authority is that which is “expressly conferred upon the agent by the principal.” *Young Clement*, 359 S.C. at 642. “A party asserting agency as a basis of liability must prove the existence of the agency, and the agency must be clearly established by the facts.” *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996) (quoting *Orphan Aid Society v. Jenkins*, 294 S.C. 106, 109, 362 S.E.2d 885, 887 (Ct. App. 1987). “It is the duty of one dealing with an agent to use due care to ascertain the scope of the agent’s authority.” *Id.*

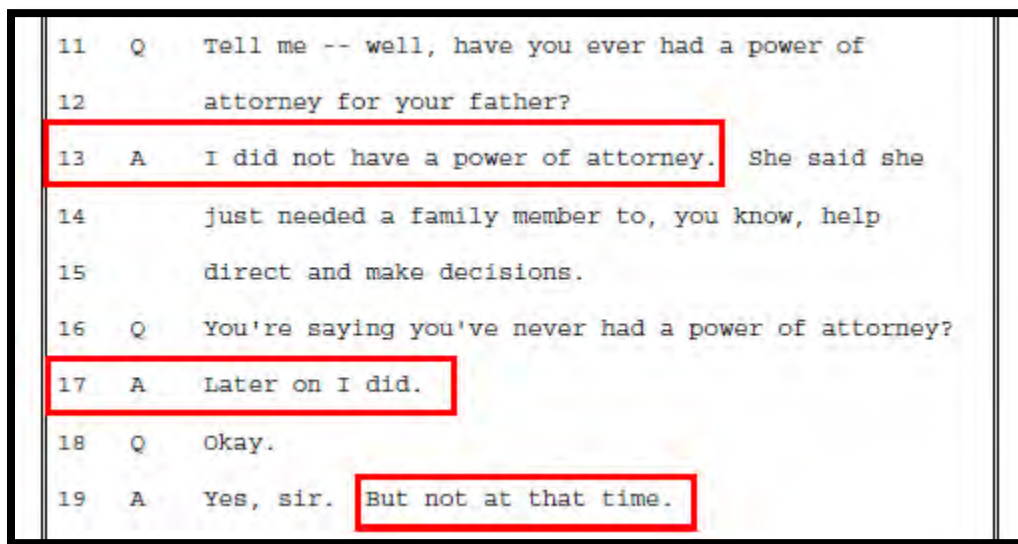
In South Carolina, a power of attorney is generally recognized to provide such “actual authority.” Power of attorney means a “**writing or other record** that grants authority to an agent to act in the place of the principal, whether or not the term ‘power of attorney’ is used.” S.C. Code Ann. § 62-8-102(7) (emphasis added). The “principal” is “an individual with contractual capacity who grants authority to an agent in a power of attorney.” S.C. Code Ann. § 62-8-102(9). The “agent” is a “person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise.” S.C. Code Ann. § 62-8-102(1).

As set forth in *Stott*, the power of attorney is an instrument that confers upon the agent “authority to perform certain specified acts or kinds of acts on behalf of the principal.” *Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 573, 828 S.E.2d 82, 85 (Ct. App. 2019) (quoting *Watson v.*

Underwood, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014). “The written authorization itself is the power of attorney.” *Id.* Moreover, the power of attorney must be recorded as a deed to become effective. *Id.* at 574; *See* S.C. Code Ann. § 62-8-109(c).

Thus, if a patient’s representative does not have a “valid durable power of attorney”, which conveys the right to waive the resident’s Constitutional right to a jury trial, or a “court appointed guardianship”, the patient’s representative lacks “actual authority to bind the [r]esident to arbitration.” J. Miller Order, *Walsh v. Windsor House Greenville-Fhe*, 2019-CP-23-02050, 2019 S.C. C.P. LEXIS 8060, *4 (2019) [Exhibit 9]; *See also Arredondo v. SNH SE Ashley River Tenant, LLC*, 433 S.C. 69, 856 S.E.2d 550 (2021). “Without proper authority to bind the [r]esident to arbitration, the arbitration agreement itself is unenforceable.” *Id.*

Here, at the time the purported Arbitration Agreement was executed, Mrs. Hagood did not have power of attorney for her father:



R. Hagood Dep. 9:11-19. Mrs. Hagood also indicated she did not recall signing any documents related to his medical care at McLeod Regional Medical Center before his admission to the Facility. R. Hagood Dep. 12:19-24. Mrs. Hagood also made clear that the Facility instructed her

they needed a family member to help make decisions, and she was following their lead. R. Hagood Dep. 9:13-15. According to Mrs. Hagood, the *later* acquired a healthcare power of attorney, but it was not prepared by a lawyer and was not recorded at the courthouse. R. Hagood Dep. 10:13-11:6. Importantly, Mrs. Hagood did not have it at the time the purported Arbitration Agreement was signed.

In this case, the Facility made no attempt to ascertain the scope of Mrs. Hagood's supposed actual authority. K. Dials Dep. 23:12-16. When asked how she determines the scope of an agent's authority, the Facility's Admissions Director, Ms. Dials, testified: "I don't make those decisions." K. Dials Dep. 37:1-4. Later in her testimony, Ms. Dials confirmed a patient may grant power of attorney to an authorized representative. K. Dials Dep. 38:14-20. She also testified there is a form that is used which gives a patient's family permission to sign without a power of attorney; however, she confirmed no such form exists in this case. K. Dials Dep. 38:21-39:5. Because no power of attorney existed nor other form granting Mrs. Hagood permission to waive her father's Constitutional rights, the purported Arbitration Agreement is unenforceable for lack of actual authority.

ii. No Apparent Authority

"[A]pparent authority is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which the principal holds the agent out as possessing." *Young, Clement*, 359 S.C. at 642. The existence of apparent authority depends upon "manifestations by the **principal** to the third party and the reasonable belief by the third party that the agent is authorized to bind the principal." *Id.* The "proper focus" in analyzing a claim of apparent authority is the relationship "between the principal and the third party." *Id.* at 642-43. Further, "an agency

may not be established solely by the declarations and conduct of an alleged agent.” *Id.* at 643; citing *Frasier*, 323 S.C. at 245.

To show apparent authority, Defendants must establish: “(1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party’s detriment.” *Graves v. Serbin Farms, Inc.*, 306 S.C. 60, 63, 409 S.E.2d 769, 771 (1991). “Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him.” *Frasier*, 323 S.C. 244-45; Restatement 2d of Agency § 27 (1958). “[I]t is not enough simply to prove that the purported principal by either affirmative conduct or conscious and voluntary inaction has represented another to be his agent or servant.” *Id.* at 245.

Here, there is no evidence Mr. Chavis, as principal, either consciously or impliedly, represented that Mrs. Hagood was his agent. There is also no evidence he created any apparent authority by written or spoken word. To the contrary, Ms. Dials testified she relied solely upon representations of the hospital and confirmed Mr. Chavis never communicated or conveyed any authority to her with respect to his family before the subject agreement was signed:

Q. You’ve also indicated that you don’t need a power of attorney for a family member to sign on that patient’s behalf?

A. If that patient’s family comes in and they are accepting – signing responsibility for that patient, they are signing on his behalf.

Q. Okay. Based on what?

A. I – from the hospital telling me that this is his only relative that has stepped up on his behalf and based off of her word she is his representative.

Q. Okay. So not from Mr. Chavis –

A. Right.

Q. -- conveying that to you, right?

A. Not from Mr. Chavis.

K. Dials Dep. 22:24-25:1 (emphasis added). In fact, Ms. Dials confirmed she did not interact with Mr. Chavis at any point prior to his admission to the Facility or execution of the purported Arbitration Agreement. K. Dials Dep. 25:2-5.

Moreover, Mrs. Hagood testified that her father was not present during the admissions process. R. Hagood Dep. 14:24-15:1. Mrs. Hagood also confirmed that she never discussed the admissions paperwork, including the purported Arbitration Agreement, with her father. R. Hagood Dep. 16:12-14. Because Mr. Chavis never interacted with the Facility prior to the execution of the purported Arbitration Agreement and was not present when it was signed, no apparent authority was conveyed or could have been conveyed; therefore, the purported Arbitration Agreement is unenforceable.

iii. No Authority Under the Adult Health Care Consent Act

Under the Adult Health Care Consent Act (the “Act”), a surrogate may make health care decisions for a patient who is unable to consent. S.C. Code Ann. § 44-66-30(A). To rely upon a surrogate, the healthcare facility must document in the patient’s record its efforts to locate a decision maker who qualifies under subsection (A). S.C. Code Ann. § 44-66-30(B). Further, [i]f persons of equal priority disagree on whether certain health care should be provided to a patient who is unable to consent, an authorized person, a health care provider involved in the care of the patient, or any other person interested in the welfare of the patient may petition the probate court

for an order determining what care is to be provided or for appointment of a temporary or permanent guardian.” S.C. Code Ann. § 44-66-30(C).

As explained by our Supreme Court in *Coleman*, “the Act contemplates that the surrogate’s authority extends primarily to traditional health care decisions, and only secondarily to the financial decisions necessitated by those decisions, is illustrated by other provisions of the Act”. *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 353, 755 S.E.2d 450, 454 (2014). “[T]he purpose of the Act is to insure that the patient’s **wishes concerning [his] medical treatment** are honored whenever possible, and that decision making by the surrogate is a last resort.” *Id.* (emphasis added). Importantly, the Court found a separate arbitration agreement concerns “neither health care nor payment, but instead provided an optional method for dispute resolution between [the] Facility and [the patient or surrogate] should issues arise in the future.” *Id.* at 354. Therefore, “[u]nder the Act, [the surrogate does] not have the capacity to bind [the patient] to this voluntary arbitration agreement.” *Id.*

Here, evidence shows that Mr. Chavis was able to make his “wishes” known to the Facility. As illustrated in **[Exhibit 7]**, Mr. Chavis was able to “communicate his thoughts and wants to staff.” In fact, on April 5, 2019, records also show the Facility allowed Mr. Chavis to discharge himself with his son. **[Exhibit 4]**. The Facility’s business office manager, Vernita Johnson, also had Mr. Chavis sign a financial document following his admission, further evincing his ability to consent and direct decision-making. **[Exhibit 8]**. Moreover, even if Mrs. Hagood qualified as a surrogate under the Act, she did not have authority according to *Coleman* to execute an arbitration agreement.

C. No Merger

The purported Arbitration Agreement and Admission Agreement are distinct documents that do not merge. As explained by our Supreme Court in *Coleman*, the merger doctrine is not applicable when language in the contracts “recognized the ‘separateness’ of the admission and arbitration agreements.” *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355, 755 S.E.2d 455 (2014). Moreover, our Courts in *Thompson* and *Hodge*, applied *Coleman*, and provided further examples of factors demonstrating “separateness” and preventing merger, including the fact that the Arbitration Agreement at issue was not necessary for admission and that there was no bargained for exchange nor consideration (see further argument in Section D below) to the Arbitration Agreement. *Thompson v. Pruitt Corp.*, 416 S.C. 43, 52, 784 S.E.2d 679, 684 (Ct. App. 2016); *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 563, 813 S.E.2d 292, 302 (Ct. App. 2018) (cert. denied Aug. 21, 2018).

As addressed in *Coleman*, an admission contract with an “Entirety of Agreement” provision is separate “on its face” from an arbitration contract especially where the provision identifies the two contracts distinctly – i.e. “this Admission Agreement or in the Arbitration Agreement.” *Coleman*, 407 S.C. at 355. In fact, when the arbitration and admission contracts have different pagination with different signature pages and the arbitration contract has “Arbitration Agreement” atop its first page, these factors further “‘indicate the parties’ intent for it to stand by itself as an independent contract.” *Thompson*, 416 S.C. at 53 n. 1; *Hodge*, 422 S.C. at 562-63. Separateness is further demonstrated when the nursing home makes clear that agreeing to arbitrate is not required to gain admission to the home (See Section D below). *Thompson*, 416 S.C. at 53. Moreover, if the “Entirety” clause creates ambiguity, “the law is clear that any ambiguity in such a clause is construed against the drafter” – Defendants in this instance. *Coleman*, 407 S.C. at 355-56.

Here, the initial Admission Agreement was signed on March 14, 2019, and was separate and apart from the Arbitration Agreement.³ The Admission Agreement is entitled “Admission Agreement – South Carolina” and is twelve (12) total pages numbered as “Page 1 of 12.” **[Exhibit 1]**. In the opening paragraph, “Agreement” is a defined term, which is limited to the Admission Agreement only. *Id.* at p. 1. Within the 12-page contract, there are vague references to attachments and exhibits within the agreement; however, no such attachments or exhibits are attached, included or appended. Further, the term arbitration is never referenced within the Admission Agreement. The Admission Agreement also contains an ENTIRE AGREEMENT section, which provides in part:

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.

Id. at p. 12 (emphasis added). The ENTIRE AGREEMENT section later includes an ambiguous provision which states: “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.” *Id.*

The separate and distinct Arbitration Agreement is entitled:

**FACILITY – RESIDENT/REPRESENTATIVE
ARBITRATION AGREEMENT**

³ Importantly, the initial Admission Agreement states, in part, the resident can terminate the agreement at any time. Exhibit 1 at p. 6 of 12, Sec. IV. It further states the agreement terminates immediately upon the resident’s condition improving such that he no longer requires the services provided by the facility. *Id.* at Sec. IV.3.a. As previously noted, Mr. Chavis terminated the contractual relationship with the Facility on April 5, 2019, when he was discharged home with his son. At that time, the underlying agreements no longer applied.

[**Exhibit 2**]. The Arbitration Agreement is one (1) page and numbered as “Page 1 of 1.” *Id.* The Arbitration Agreement provides it applies to “any controversy or dispute between the parties arising out of or relating to Facility’s Admission Agreement, or breach thereof. . . .” *Id.* It further provides: “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.” *Id.*

Upon Mr. Chavis’s return to the Facility, the Facility had Mrs. Hagood sign a Readmission Agreement. [**Exhibit 5**]. It was not signed until seven (7) days after his readmission. It is entitled: “READMISSION AGREEMENT” and contains two (2) pages numbered “Page 1 of 2”. In the Readmission Agreement, it provides: “[b]y execution of this Readmission Agreement, the parties acknowledge and reaffirm the terms of the original Admission Agreement between the parties and acknowledge that this Readmission Agreement does not replace or supersede the original Admission Agreement.”

It is unclear based upon the Motions whether or not the Defendants contend the Admission Agreement and/or Readmission Agreement are in some way applicable. While there appears to be some effort in the Readmission Agreement to encompass “the original Admission Agreement” and its “attachments”, there is no reference to arbitration in either agreement, and the Arbitration Agreement was not made an attachment. In fact, the Readmission Agreement lists items purportedly provided to the family with the Admission Handbook; however, an arbitration agreement is not identified. It is also conflicting and ambiguous. Nonetheless, all agreements are separate and distinct; therefore, the Arbitration Agreement is unenforceable.

D. Lack of Consideration and Mutuality

Assuming the Defendants argue the agreements “merge”, then there is no additional consideration for the Arbitration Agreement. The necessary elements of a contract are an offer, acceptance, and valuable consideration. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). To be legally enforceable, a contract must have an offer, acceptance, consideration, and mutual assent or meeting of the minds on all material terms. It is well settled that to be valid and enforceable, a contract must be supported by valuable consideration. *Benya v. Gamble*, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984). “Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.” *Plantation A.O., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009). Consideration is a promise to do something that a party has no legal obligation to do or to forbear from doing something it has a legal right to do. A valid contract requires that both sides provide consideration. Therefore, an arbitration agreement is only enforceable if it contains bargained for consideration and a mutuality of obligations between its parties.

Here, the Facility offers no additional, bargained for consideration or mutuality for Mr. Chavis’s waiver of his Constitutional right to a jury trial. Ms. Dials acknowledged the arbitration agreement cannot be a condition for admission to the nursing home. K. Dials Dep. 21:13-16. Thus, if the jury waiver was not a precondition to admission, then the Arbitration Agreement fails for lack of consideration because the waiver works “only in one direction.” Order, *Estate of David Holmes v. Bayview Manor, LLC*, 2017-CP-07-02636, at *4 (May 15, 2018) [**Exhibit 10**]. While Mr. Chavis purportedly waived his Constitutional right to a jury trial, the Facility provided no additional consideration separate and apart from the admission and care of the resident. *Id.* “Defendants cannot have it both ways. They cannot, on one hand, argue that the waiver was not

consideration for the admission but, on the other hand, argue that the admission was valuable consideration for the waiver. For the waiver to be enforceable as a non-pre-condition to admission, it must be supported by some other valuable consideration, which it is not.” *Id.*

E. The Purported Arbitration Agreement is Unconscionable

South Carolina courts will not enforce unconscionable contracts or unconscionable terms within a contract. In South Carolina, unconscionability is defined “as the absence of meaningful choice on the part of one party, due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Herron v. Century BMW*, 387 S.C. 525, 532, 693 S.E.2d 394, 398 (citing *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007)). Furthermore, “[a]bsence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining power in the contract at issue.” *Id.* In determining whether there is an absence of meaningful choice, courts consider: the relative disparity of the parties’ bargaining power; the parties’ relative sophistication; the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. *Id.*

The purported Arbitration Agreement at issue in this case meets the definition of unconscionable for several reasons. First, the bargaining power between the parties in this case is severely disparate and fundamentally unfair. Neither Mr. Chavis nor Rebecca Hagood had input into the terms of the purported agreement or had any realistic opportunity to negotiate the terms of this agreement. Ms. Dials testified the Arbitration Agreement was “predrafted” and provided by corporate management in a “ready-made” admissions packet, consisting of documents which “have to be signed.” K. Dials Dep. 18:20-19:23. Mrs. Hagood testified the process was “very”

stressful, and she did not recall signing an arbitration agreement, no one walked her through such an agreement, and no one explained she was waiving her father's Constitutional right to a jury trial. R. Hagood Dep. 15:6-15, 16:3-4. In fact, Mrs. Hagood expressed reservations about signing certain documents that were financial in nature. R. Hagood Dep. 15:18-21. Ultimately, she did not know such an agreement even existed. R. Hagood Dep. 15:16-17. Even if she did, the Arbitration Agreement provides no mechanism for revocation.

The contrast in the sophistication and bargaining power in this case could not be more evident. Defendants, a provider of long-term care services with corporate management and oversight by Fundamentals Group – presented Rebecca Hagood with a form contract prepared solely by them, with terms heavily weighted to their favor and with no opportunity for meaningful review, discussion or negotiation of terms. Rebecca Hagood, on the other hand, was an individual in desperate need of the Defendants' services who was not aware of arbitration or of the law regarding requirements for admission and who was taken by surprise when presented with a mountain of documents, with this take it or leave it situation. In light of the one-sidedness of the preparation of this agreement and its surprise presentation, it is apparent that the bargaining power of the parties in this case is grossly inequitable.

Additionally, the purported Arbitration Agreement provides that any controversy or dispute arising out of or relating in any way to the Resident's stay, between the parties brought by either party are to be settled by arbitration. The claims that the Facility could conceivably bring against Mr. Chavis would be financial in nature, relating to unpaid bills for services. That same agreement, however, if valid, would require Mr. Chavis to waive his constitutional right to a jury trial on claims as serious as negligence, medical malpractice, and even wrongful death. This allocation of risk is patently unconscionable, making the contract provisions completely one-sided.

By agreeing to arbitration on financial claims, the Facility is merely changing the venue in which these claims are being pursued, with little change in the remedies or damages that they could seek and receive. In agreeing to arbitration on claims of negligence and medical malpractice, Mr. Chavis would be not only changing the venue in which he would pursue his claims but would also completely transform and diminish the remedies and damages he could seek. Based on all of the reasons above, the purported Arbitration Agreement appears unconscionable and, therefore, unenforceable. As a result, Defendants' Motion should be denied.

III. CONCLUSION

For the foregoing reasons, including oral arguments at the hearing, Defendants' Motion should be denied.

Respectfully submitted this 18th day of August 2023.

HAWK LAW GROUP

s/ A. Keith McAlister, Jr.

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Attorney for Plaintiff

ADMISSION AGREEMENT - SOUTH CAROLINA

RESIDENT NAME:

Frank Chavis

RESIDENT NUMBER:

255846

DATE OF ADMISSION:

3/14/19

THIS ADMISSION AGREEMENT ("Agreement") as above dated is by and among Faith Healthcare Center ("Facility"), Frank Chavis ("Resident") and/or Becky Stokes ("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.

Original: Business File • Photocopy: Resident/Representative

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

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

Original: Business File • Photocopy: Resident/Representative

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

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

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

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

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

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

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

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

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

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

Original: Business File • Photocopy: Resident/Representative

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

III. FINANCIAL AGREEMENT

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

1. Room and board, including meals, laundering of linens and bedding, nursing care, personal care or custodial care for the health, grooming and well-being of Resident in (☐-private) (☒-semi-private) accommodations, for a basic fee of \$ 206.⁰⁰ 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,

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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.

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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:

Faith Healthcare
617 W. Marion St
Florence SC 29501

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

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

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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.

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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.

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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.

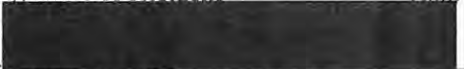
XVIII. ENTIRE AGREEMENT

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 _____



Resident Social Security Number _____

Frank Chavis
Printed Name of Resident

Witness Signature _____ Date _____

Printed Name of Witness _____

OR
*Rebecca C. Stokes 03/14/19
Signature of Representative, if any Date

Rebecca C. Stokes
Printed Name of Representative

Witness Signature _____ Date _____

Printed Name of Witness _____

Representative Social Security No. (Voluntary Info.) _____

Kelly Dials
Signature of Facility Official

Kelly Dials AD
Printed Name of Facility Official & Title

Date

3/14/19

Original: Business File • Photocopy: Resident/Representative

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF MARION	)	TWELFTH JUDICIAL CIRCUIT
	)	
Rebecca C. Hagood as	)	Case No: 2022-CP-33-00183
Personal Representative	)	
of the Estate of Frank D.	)	
Chavis, Sr.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Palmetto Faith Operating,	)	DEPOSITION OF
LLC d/b/a Faith Healthcare)	)	
Center and Brooks Arnette,	)	Rebecca C. Hagood
	)	
Defendants.	)	

Date: Tuesday, October 4, 2022

Time: 12:18 p.m.

Location: Hatfield Temple Law, LLC
170 Courthouse Square
Florence, South Carolina

Reported by:
Darlene Pastel, CVR-CM

APPEARANCES

For the Plaintiff:

A. Keith McAlister, Jr., Esq.
Hawk Law Group
Aiken, South Carolina

For the Defendants: Russell G. Hines, Esq.
Clement Rivers, LLP
Charleston, South Carolina

INDEX

Stipulations:	3
Examination by Mr. Hines:	3
Examination by Mr. McAlister:	14

EXHIBITS

Defendants' Exhibit No. 1, Admission Agreement	5
Defendants' Exhibit No. 2, Arbitration Agreement	5
Defendants' Exhibit No. 3, Readmission Agreement	5

1

STIPULATIONS

2

It is stipulated by and between counsel for the respective parties that all objections are reserved until the time of trial, except as to the form of the questions.

6

— — — —

7

The reading and signing of this deposition is waived by the deponent and counsel for the respective parties.

8

9

10 Whereupon,

11

Rebecca C. Hagood, being duly sworn and cautioned to speak the truth, the whole truth, and nothing but the truth, testified as follows:

12

13

14

EXAMINATION

15

BY MR. HINES:

16

Q Ms. Hagood, my name, again, is Russ Hines. I'm a lawyer with the firm Clement Rivers in Charleston. I'm here representing the defendants in this lawsuit and to take your deposition.

17

18

19

20

As I mentioned before we got started on the record, I don't expect this to take very long at all. But that being said, I certainly want you to be as comfortable as possible for as long as it may take. So if you need to take a break or stretch your legs or whatever it might be while we're going

21

22

23

24

25

1 along, just let me know. We'll stop and you can do
2 that however it may be best for you.

3 I want to give you a few little ground rules
4 that I'm supposed to go over. One of them is that
5 if you do take a break, which you're welcome to do,
6 it's just that I'm supposed to remind you not to
7 discuss the subject matter of this case with your
8 attorney while -- during any breaks.

9 Also, I'm going to try to ask you questions
10 that are -- that make sense and that are
11 intelligible. But if you -- if I ask a question
12 that confuses you or that you would like for me to
13 repeat it, you're welcome to do that.

14 Do you understand that?

15 A I do.

16 Q Okay. And so really with that, let me get a little
17 bit of basic information. Would you state your
18 full name, please, for the record.

19 A Rebecca C. Hagood.

20 Q Now, were you formerly known as Rebecca Stokes?

21 A Yes, sir.

22 Q Looks like -- do you go by Becky?

23 A Yes, sir.

24 Q Okay. So how long have you been Hagood?

25 A May 2019.

1 Q Okay. And what is your address?

2 A We actually split time between Texas and
3 South Carolina. The South Carolina address is
4 172 Bay Branch Road in Lamar.

5 Q This case is -- well, it has to do with claims
6 against a nursing facility where your father,
7 Frank Chavis, was a resident.

8 A Yes, sir.

9 (Defendant's Exhibit Nos. 1, 2 and 3 marked for
10 identification.)

11 Q (MR. HINES) And let me -- I've marked some
12 exhibits. They are Exhibit 1, Exhibit 2, and
13 Exhibit 3.

14 A Okay.

15 Q And just for our record -- I'm going to hand them
16 to you. But before I do, Exhibit 1 is the
17 admission agreement. Exhibit 2 is the arbitration
18 agreement. And Exhibit 3 is a readmission
19 agreement. I'm going to hand all those to you now,
20 Ms. Hagood.

21 Would you look at Exhibit 1 for me, please.
22 It should be on top of that stack. Do you see it
23 there in front of you?

24 A Yes, sir.

25 Q And that's the admission agreement; correct?

1 A Yes, sir.

2 Q Do you see the date of admission? It says 3/14/19.

3 A Yes, sir.

4 Q And if you would, please flip with me to the last
5 page of that. I think it's page 12 of 12. Are you
6 there on page 12 of Exhibit 1?

7 A Yes, sir.

8 Q A little more than midway down the page, it appears
9 to me to be signed by Rebecca C. Stokes and dated
10 March 14, 2019. Is that your signature?

11 A Yes, sir.

12 Q And your handwriting there all across that line for
13 your signature and the date and then your printed
14 name?

15 A Yes, sir.

16 Q Now if you'll flip with me -- just going to the
17 second exhibit, please, which is the arbitration
18 agreement. Are you with me there on Exhibit 2?

19 A Yes, sir.

20 Q And down near the bottom, again, signature is
21 Rebecca C. Stokes, dated March 14, 2019, and
22 written out is Rebecca C. Stokes. Is that all of
23 your handwriting?

24 A Yes, sir.

25 Q Then finally, we'll do the same drill, if you don't

1 mind, for Exhibit 3, which is the readmission
2 agreement. This one, if you would, please -- this
3 is Exhibit 3, the readmission agreement. If you'll
4 flip to page 2 of 2, please. And do you see on
5 there the signature Rebecca C. Stokes dated
6 April 23, 2019?

7 A Yes, sir.

8 Q That's your signature and date?

9 A That's my signature.

10 Q Okay. Now, Ms. Hagood, tell me, how did your --
11 what role did you play in your father's admission
12 to the -- well, to Faith Healthcare Center?

13 A He had fallen, and he went to the hospital. And
14 they said that he was such a fall risk and his
15 other health conditions that he didn't need to be
16 left by himself.

17 I was actually in Texas and got the call and
18 flew to South Carolina to see about him because the
19 social worker in the hospital said he can't go back
20 home by himself.

21 Q Let me make sure I understand, Ms. Hagood. When
22 had he fallen?

23 A I don't remember the date. I want to say it
24 started in February. I'm not positive.

25 Q So you're speaking right now of a time before he

1 had ever been admitted to Faith Healthcare?

2 A Correct.

3 Q And I realize in this case, we need to make it --
4 because of the documents we just went through, we
5 have an admission agreement dated March 14. That's
6 Exhibit 1. And then we also have an Exhibit 3, a
7 readmission agreement, and the date of readmission
8 is April 17, 2019.

9 So what you've been speaking of is before
10 either of those agreements; is that right?

11 A Correct. It's what led up to him being admitted.

12 Q Yes. So you were in Texas at the time that he
13 fell?

14 A Yes, sir.

15 Q And did he first go to the hospital?

16 A It's my understanding he went to McLeod.

17 Q Okay.

18 A And -- yeah, that was the first hospital. And I
19 spoke with the social worker. And like I said, she
20 said there's no way he can go back home by himself,
21 that he needs to be in a facility.

22 Q Was that on a telephone call or was that in person
23 with the social worker?

24 A Some -- both. By the time I got here, I actually
25 was able to go to the hospital. And she said based

1 on his type of insurance he had, he had two
2 options. He could go to a facility in Lake City or
3 Faith Healthcare in Florence.

4 And since his family mostly lives this way, I
5 picked that one only because it was closer. And I
6 figured that would encourage people to come visit
7 him as opposed to being in Lake City.

8 Q So you were here at the time when that decision was
9 made for him to go to Faith Healthcare Center?

10 A Yes, sir.

11 Q Tell me -- well, have you ever had a power of
12 attorney for your father?

13 A I did not have a power of attorney. She said she
14 just needed a family member to, you know, help
15 direct and make decisions.

16 Q You're saying you've never had a power of attorney?

17 A Later on I did.

18 Q Okay.

19 A Yes, sir. But not at that time.

20 Q When did you have a power of attorney?

21 A It was -- I don't know the date. But he was
22 released from Faith Healthcare and taken to
23 North Carolina. And I knew that he didn't need to
24 be on his own. It was my brother who checked him
25 out.

1 He brought him back, and Daddy refused to go
2 back to Faith. So I started taking the steps to
3 get a health care power of attorney and talked to
4 him and told him, you know, this is to be able to
5 help you make health care decisions and that kind
6 of thing. And got that all signed. And he still
7 didn't want to go back up. So I wasn't going to
8 force him to go.

9 Well, he fell again. And I was back in Texas
10 at this point. And so my brother called the
11 hospital, and I think he went to MUSC, which was
12 Carolinas at the time. And they said he can't go
13 back home. There's no way. And I said, "Well, I
14 now have a health care power of attorney. Will
15 that help?" So I had to fax it to whoever, you
16 know, needed to see it. And she looked it over,
17 and she said that that was sufficient to be able to
18 put him back at Faith.

19 Q And is the only -- you mentioned a health care
20 power of attorney. Did a lawyer prepare that for
21 you?

22 A No, sir.

23 Q How did you actually come to have -- to get the
24 actual document prepared?

25 A I remember my husband -- you know, we knew that we

1 had to do something. And I don't know if it was a
2 general form online. I don't exactly remember that
3 part.

4 Q Okay. Was that power of attorney ever recorded?

5 A We took it to the courthouse, and they said they
6 don't do that anymore.

7 Q Okay. Do you still have a copy of the power of
8 attorney?

9 A I think so. I'm not positive.

10 Q Okay. How did you -- can you tell me about your
11 discussions with your dad? Because obviously, he
12 had to agree to make you the power of attorney.

13 A Uh-huh.

14 Q How did -- and he was obviously in agreement with
15 making you the power of attorney; is that right?

16 A Uh-huh, yes, sir.

17 Q Just how did that -- how did you approach him about
18 doing that?

19 A Just that he knew he had some health issues. And
20 he always considered me the most responsible of his
21 kids, for lack of a better term. And he said, you
22 know, "Well, darling, I know you'll do the right
23 thing." You know, that kind of stuff. And I said,
24 "This is going to help you get better if you get
25 sick, if you fall." And that's how that happened.

1 Q And how about -- have you done anything or other
2 things to help your father in the past in terms of
3 signing any documents on his behalf? I'm giving
4 you examples now. For instance, helping him with
5 his banking or helping him with any other paperwork
6 needs that might be in his life?

7 I realize that question might be a little bit
8 sort of clumsy. But let me just sort of call this
9 the prequestion. I'm trying to give a feel for
10 what I'm talking about. Have you -- had you helped
11 your dad with any of his affairs? And I would
12 include in that affairs, you know, his banking
13 or -- I don't know -- making sure he had insurance
14 taken care of or paying bills, things of that
15 nature, prior to him being admitted to Faith
16 Healthcare?

17 MR. McALISTER: Object to form.

18 A No, sir.

19 Q (MR. HINES) Did you sign any documents on your
20 dad's behalf when he was at -- prior to him coming
21 to Faith Healthcare? Did you sign any documents
22 related when he was at McLeod, I think it was,
23 before you went to Faith?

24 A I don't recall signing anything at McLeod.

25 Q Okay. Tell me, how did it come about that you

1 handled the paperwork in conjunction with your
2 dad's admission to Faith Healthcare?

3 A The social worker at the hospital said he's, you
4 know, going to need somebody to, I guess, kind of
5 assist him. They didn't believe that he, I guess,
6 was cognitive enough. And I told her I didn't have
7 a health care power of attorney. And I don't know.
8 It just seemed to be they needed somebody to do
9 things on his behalf, I guess. I don't know what
10 the wording is. But I was put in touch with Faith,
11 and they allowed me to, you know, kind of make the
12 plans, I guess.

13 Q Did you tell your dad about that?

14 A No, sir.

15 Q So what did he know about the plans that were being
16 made?

17 A I just knew that he had -- just personal
18 conversations. I told him, you know, "you're going
19 to have to be at this rehab place to help you get
20 stronger, you know, and maybe you'll be able to go
21 home." Those were the type of conversations I had.

22 I don't know what he was told by the nursing
23 staff.

24 Q Did he know you were helping with that process?

25 A I think he -- I guess he felt like I was. Because

1 I was visiting him in the hospital. And he just
2 wanted to go home.

3 Q Did he object to you helping him with that process?

4 MR. McALISTER: Object to the form.

5 Leading.

6 A I don't know that he objected. He didn't express
7 that. Not that I can remember.

8 MR. HINES: I told you a moment ago,
9 Ms. Hagood, that this was likely to be very short.
10 And so if you'll just give me a moment while I sit
11 here and think about a few things to see if I've
12 got any more questions. We'll be able to wrap it
13 up.

14 No, I don't think I have anything else for
15 you. Depending on -- if your counsel has some
16 questions, that might prompt some more for me. But
17 at least for now, I'll turn it over to him to see
18 if he's got any questions. Otherwise, I'll tell
19 you thank you very much. I do appreciate you being
20 here and taking time to answer these questions.

21 THE DEPONENT: Yes, sir.

22 EXAMINATION

23 BY MR. McALISTER:

24 Q Just a couple of follow-ups. During the admissions
25 process at the facility, was your father present?

1 A No, sir.

2 Q Okay. And during that admissions process, were you
3 given a number of documents for purposes of
4 signature?

5 A Yes, sir.

6 Q Do you ever recall signing an arbitration
7 agreement?

8 A No, sir.

9 Q Did anyone from the facility walk you through that
10 arbitration agreement?

11 A No, sir.

12 Q Okay. Did anyone from the facility ever explain to
13 you that you could be waiving your father's
14 Constitutional right to a jury trial?

15 A No, sir.

16 Q Did you even know if such a document existed?

17 A I did not.

18 Q Okay. During this admissions process, did you
19 express any reservation about signing documents?

20 A I specifically expressed reservation about not
21 being financially responsible in signing anything.

22 Q Okay. And why was that?

23 A Because I couldn't afford to, you know, pay
24 anything above what his coverage would take care
25 of.

1 Q Okay.

2 A I wasn't in a position to do that.

3 Q Was this process stressful for you?

4 A Very.

5 Q Are you aware of anyone from the facility walking
6 your father through documents including an
7 arbitration agreement?

8 A Not at all.

9 Q Did you consult with any attorney during this
10 admissions process?

11 A No, sir.

12 Q Did you discuss any paperwork with your father
13 before signing it?

14 A No, sir.

15 MR. McALISTER: No further questions at this
16 time.

17 MR. HINES: No, that's all. We're done.

18 FURTHER DEPONENT SAITH NOT.

19 (Whereupon, there being no further questions, the
20 deposition was concluded at 12:38 p.m.)

21 (*This transcript may contain quoted material.

22 Such material is reproduced as read or quoted by
23 the speaker.)

24

25

State of South Carolina)
)
County of York) CERTIFICATE

Be it known that Darlene Pastel took the foregoing proceeding and hereby attests:

That I was then and there a notary public in and for the State of South Carolina at-large and that by virtue thereof I was duly authorized to administer an oath;

That the deponent/witness was first duly sworn to testify to the truth, the whole truth, and nothing but the truth concerning the matter in the controversy aforesaid;

That the foregoing transcript represents a true, accurate, and complete transcription of the testimony so given at the time and place aforesaid to the best of my skill and ability;

That I am neither a relative nor an employee of any of the parties hereto, nor of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action.

Unless otherwise noted, this notary public administered the oath. Please refer to the transcript for any exceptions.

In witness thereof, I have hereunto affixed my signature and title.



Darlene Pastel, CVR-CM

Date: 10/10/2022
Notary public for South Carolina
My Commission expires 09/20/2027

SIDE TWO

DAILY SKILLED NURSE'S NOTE

SIGN ALL ENTRIES

SERVICES PROVIDED	Provide statement regarding residents skilled services and address issues related to diagnoses, wound care, pain, progress in therapy, condition changes and nursing interventions.
(/ appropriate response)	Comments/Concerns DAY Shift
☐ Management/Evaluation of Resident Care Plan	Resident alert & confusion noted. Assist x1 to ADLs + transfers. Cont of Bx/B assist x1. Take meds whole tolerated well denie any pain when asked no discomfort or no distress noted. Able to tie self while in WC + while in bed. Feels self truly set up. Cont of Bx/B assist x1. Resident is pleasant + cooperative. Resident is on 15 min checks due to safety precautions. Resident at times will wander. Redirect + offer a snack.
☐ Observation/Assessment of Resident's Condition	Resident sitting in WC waiting on son to pick him up and be discharged. No concerns noted at this time.
☐ Teaching/Training to Manage Resident's Treatment Regimen:	3:10pm - Resident discharged home & son Brandon Chavis.
☐ Self-Administration of Injectable Meds	Resident appears to be happy + ready to go. No concerns noted.
☐ Diabetic Care (diet, foot care, etc.)	Pain: ☐ Numeric: 0 (none) - 10 (worst) _____
☐ Self-Administration of Medications	☐ Verbal: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Very severe
☐ Gait Training/Prosthesis Care	Signature/Title: <u>[Signature]</u> Signature/Title: _____ Date: <u>04/05/19</u>
☐ Ostomy/Ileo Care	Comments/Concerns EVENING Shift
☐ Use and Care of Braces, Splints, Orthotics	At this time.
☐ Proper Care of Specialized Dressings/Skin Treatments	Body Audit Completed. Open areas on areas of concern. Resident pleasant and cooperative. Discharge instructions and medications discussed with son Brandon Chavis. States understanding. Scripts signed Discharge Summary and med list sent to son. Personal Belongings TV and clothing sent to son. No acute distress. Denies pain or discomfort at time of discharge.
☐ Monitor Fluid Intake to Prevent Dehydration	Pain: ☐ Numeric: 0 (none) - 10 (worst) _____
☐ IV, IM injections and intravenous feeding	☐ Verbal: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Very severe
☐ Enteral feeding comprising $\geq 26\%$ of daily calorie requirements and provides at least 501 mL of fluid per day	Signature/Title: <u>[Signature]</u> Signature/Title: _____ Date: <u>04/05/19</u>
☐ Naso-pharyngeal and tracheotomy aspirations	Comments/Concerns NIGHT Shift
☐ Insertion, sterile irrigation/replacement of suprapubic catheters	
☐ Application of dressings involving prescription meds/aseptic techniques	
☐ Treatment of pressure ulcer Stage 3 or worse	
☐ Treatment of widespread skin disorder	
☐ Institution/supervision of bowel/bladder training program	
☐ Therapy (PT, OT, ST)	Pain: ☐ Numeric: 0 (none) - 10 (worst) _____
	☐ Verbal: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Very severe
	Signature/Title: _____ Signature/Title: _____ Date: _____

Chavis000269

Resident's Name Last

First

Initial

ID #

Room #

Attending Physician

ELECTRONICALLY FILED - 2023 Aug 18 9:31 AM - MARION - COMMON PLEAS - CASE#2022013500183

READMISSION AGREEMENT

RESIDENT NAME: Frank Charis
 RESIDENT NUMBER: 255846
 DATE OF READMISSION: 4/17/19

THIS READMISSION AGREEMENT ("Agreement") is made this 17 day of April, 2019, by and between Faith Healthcare ("Facility") AND Becky Stokes ("Resident") AND/OR ("Resident's Durable Power of Attorney for Health Care"/ "Resident's Legal Guardian"/ "Resident's Responsible Party", hereinafter collectively "Representative").

For the purposes of readmitting Resident to the Facility and in consideration of the mutual promises contained in this Agreement and the original Admission Agreement by and between the parties, executed by the undersigned on 3/14/19, the parties agree as follows:

1. By execution of this Readmission Agreement, the parties acknowledge and reaffirm the terms of the original Admission Agreement between the parties and acknowledge that this Readmission Agreement does not replace or supersede the original Admission Agreement.

2. The terms, conditions, and obligations of the parties as stated in the original Admission Agreement, along with each of its attachments, are incorporated in this Readmission Agreement by reference thereto and shall be effective as if rewritten fully herein.

3. **THIS READMISSION AGREEMENT IS TO BE USED ONLY WHEN RESIDENT WAS AN OCCUPANT OF THE FACILITY WITHIN THE LAST THIRTY (30) DAYS, WHERE SUCH RESIDENT HAS BEEN ABSENT FROM THE FACILITY AND FOR WHICH AN ADMISSION AGREEMENT AND RELATED DOCUMENTS WERE PREVIOUSLY COMPLETED AND SIGNED.**

4. The undersigned may review the original Admission Agreement and its attachments thereto which were signed/reviewed by the undersigned at the time of Resident's initial admission AND the undersigned may request additional copies of same.

5. The undersigned acknowledges that, as part of Resident's initial admission, he/she received the following documents, in addition to the Admission Agreement:

- Admission Handbook, outlining the Facility's rules and regulations along with written explanations of the following:
 - ♦ Admission, Discharge and Readmission policies
 - ♦ Bed assignment, reservation, and refund policies
 - ♦ Protection of resident funds
 - ♦ Resident's rights under federal law
 - ♦ Bed hold policies
 - ♦ Policies/procedures for bringing personal items into the Facility, such as food, appliances, furniture, valuables, etc.
 - ♦ Policies for securing personal belongings, valuables and money
 - ♦ Special services available, such as laundry, barbers and activities
 - ♦ Resident's right to choose their own care providers
 - ♦ Policies/procedures for filing grievances
 - ♦ Medicare/Medicaid Funding
 - ♦ Smoking policies

Original: Business File • Photocopy: Resident/Representative

- Resident's rights under applicable state laws.
- Information and policies regarding Advance Directives
- Outline of Services available at the Facility and accompanying price list
- Listing of local and governmental resources/ advocacy groups
- Listing of all medical professionals available to provide on-site services
- Information and policies for the use of physical/chemical restraints, including bed rails.

6. This Readmission Agreement is being provided at the convenience of the undersigned and the undersigned may request that a new admission be processed, which would entail the execution of all Facility admission forms.

7. The undersigned has been orally informed of the current ancillary prices, the current charges of the Facility's services and the Resident's rights at the Facility. Copies of all related documents have been provided herewith.

THE UNDERSIGNED ACKNOWLEDGES THAT HE/SHE HAS READ THIS AGREEMENT AND AFFIRMS THAT HE/SHE IS EXECUTING THE INSTRUMENT VOLUNTARILY AND FREELY, WITH A FULL UNDERSTANDING AND IN AGREEMENT OF ITS TERMS.

Signature of Resident _____ Date _____

Resident Social Security Number _____

Frank Chavis
Printed Name of Resident

Witness Signature _____ Date _____

Printed Name of Witness _____

AND/OR

Rebecca C. Stokes 04/23/19
Signature of Representative, if any Date

Rebecca C Stokes
Printed Name of Representative

Witness Signature _____ Date _____

Printed Name of Witness _____

Representative Social Security No. (Voluntary Info.) _____

Kelly Dials 4/17/19
Signature of Facility Official Date

Kelly Dials AD
Printed Name of Facility Official & Title

Original: Business File • Photocopy: Resident/Representative

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF MARION	)	TWELFTH JUDICIAL CIRCUIT
	)	
Rebecca C. Hagood as	)	Case No: 2022-CP-33-00183
Personal Representative	)	
of the Estate of Frank D.	)	
Chavis, Sr.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Palmetto Faith Operating,	)	DEPOSITION OF
LLC d/b/a Faith Healthcare)	)	
Center and Brooks Arnette,	)	Kelly Edwards Dials
	)	
Defendants.	)	

Date: Tuesday, October 4, 2022

Time: 10:18 a.m.

Location: Hatfield Temple Law, LLC
170 Courthouse Square
Florence, South Carolina

Reported by:
Darlene Pastel, CVR-CM

APPEARANCES

For the Plaintiff:

A. Keith McAlister, Jr., Esq.
Hawk Law Group
Aiken, South Carolina

For the Defendants: Russell G. Hines, Esq.
Clement Rivers, LLP
Charleston, South Carolina

INDEX

Stipulations:	3
Examination by Mr. McAlister:	3
Examination by Mr. Hines:	81
Reexamination by Mr. McAlister:	83

EXHIBITS

Plaintiff's Exhibit No. 1, Progress Note 3/15/18	26
Plaintiff's Exhibit No. 2, Admission Packet	43

1

STIPULATIONS

2

It is stipulated by and between counsel for the respective parties that all objections are reserved until the time of trial, except as to the form of the questions.

6

— — — —

7

The reading and signing of this deposition is waived by the deponent and counsel for the respective parties.

9

10 Whereupon,

11 Kelly Edwards Dials, being duly sworn and cautioned
12 to speak the truth, the whole truth, and nothing
13 but the truth, testified as follows:

13

14

EXAMINATION

15

MR. MCALISTER: This will be the deposition of Kelly Dials, admissions director for Palmetto Faith Operating, LLC doing business as Faith Healthcare Center taken pursuant to notice and for all purposes permissible under the South Carolina Rules of Civil Procedure.

16

17

18

19

20

21

And if it's agreeable with counsel, I propose that we reserve all objections except as to form.

23

24

MR. HINES: Agreed.

25

MR. McALISTER: Okay.

1 BY MR. McALISTER:

2 Q Ms. Dials, please state your full name for the
3 record.

4 A Kelly Edwards Dials.

5 Q And do you understand that you're under oath and
6 sworn to tell the truth today?

7 A I do.

8 Q I want to walk you through a few ground rules just
9 to make it go smoothly. We shouldn't be here too
10 long. If you could, please answer my questions
11 with words and not head nods or shakes of the head.
12 It makes the court reporter's job --

13 A Yes, sir.

14 Q -- a little easier. Sorry. We've got a little
15 background noise. That makes it challenging. If
16 we could, try to not talk over one another. If you
17 would, please allow me to finish asking my question
18 before you begin your answer, and I'll try to give
19 you the same courtesy.

20 A Yes, sir.

21 Q All right. If you don't understand a question,
22 that's perfectly fine. You can ask me to rephrase
23 it or Mr. Hines to rephrase it.

24 A Okay.

25 Q But please direct those requests to the attorney

1 asking the question.

2 If you don't know or can't recall, that's
3 perfectly acceptable. We don't want you to guess
4 or speculate.

5 A Okay.

6 Q All right. Again, this shouldn't be too, too long.
7 But if you need to take a break or need a bottle of
8 water, you let us know. Okay?

9 A Okay.

10 Q All right. Are you taking any medications that
11 would prevent you from understanding my questions
12 and answering them fully?

13 A No, sir.

14 Q Are you suffering from any illness that would
15 prevent you from understanding and answering fully
16 today?

17 A No, sir.

18 Q Is there any reason why you won't be able to give
19 full, complete, and truthful answers today?

20 A No, sir.

21 Q Okay. Have you ever been involved in a lawsuit
22 either as a witness or a party?

23 A Not to my recollection, no, sir.

24 Q Okay. Have you ever had your deposition taken
25 before?

1 A No, sir.

2 Q All right. And I assume that means you've never
3 testified at trial either?

4 A No, sir.

5 Q Give me a little bit of information about your
6 current employer. Are you still with Faith
7 Healthcare Center?

8 A I am with Faith Healthcare at 617 West Marion
9 Street in Florence.

10 Q Okay. And what position do you currently hold?

11 A Admissions director.

12 Q And that's the same as you were back in 2019?

13 A Yes, sir.

14 Q And just for purposes of the record, what type of
15 services does Faith Healthcare Center provide?

16 A Skilled nursing, rehab, long-term care.

17 Q And how long have you been employed with Faith
18 Healthcare?

19 A Since October 2017.

20 Q Would you please give me a brief overview of your
21 job duties and responsibilities as admissions
22 director.

23 A Sure. I am responsible for reviewing any referrals
24 that are sent to Faith Healthcare, whether it be
25 via fax machine or through one of our electronic

1 referral systems. I review those referrals, look
2 at the clinical documentation, the financial
3 documentation, medications -- things that cost
4 out -- to make sure that financially we're able to
5 profit off of the patient to come in, that we're
6 not, you know, losing money to bring a patient in.
7 I make sure that it's a patient that we can provide
8 the care for, that we have everything we need to be
9 able to provide the care for that patient.

10 I run census each day to report off to our
11 upper management team, what number Medicare
12 insurance, Medicaid numbers that we have in-house
13 each day. I do -- we assist to do angel -- what's
14 called angel rounds, where we have a particular set
15 of patients assigned to us each day as managers
16 that we go in and check on ourself just to check,
17 make sure their rooms are in working order, that
18 they have everything they need, that they don't
19 have any concerns or complaints or any needs.

20 I also talk to families regularly. If they
21 call in with questions, I'm there to answer
22 questions about if they, you know, are concerned
23 about a family to try to get placement for them.
24 But my biggest is reviewing those referrals in
25 order to get a patient to the facility.

1 Q Okay. Do you have any clinical training? For
2 instance, are you licensed as a nurse?

3 A I'm not a nurse, no, sir.

4 Q Okay. Do you hold any license or certification?

5 A I do not.

6 Q And you mentioned a moment ago that you are
7 responsible for reviewing referrals.

8 A Uh-huh.

9 Q And I assume that means referrals from inpatient
10 facilities such as hospitals?

11 A Like McLeod Hospital, MUSC Hospital. Yes, that's
12 where we get the majority of our referrals. Or
13 other skilled nursing facilities, yes.

14 Q Okay. And MUSC was formerly Carolinas Medical --

15 A That's correct, yes.

16 Q And then with respect to those referrals that are
17 coming in, at that point in time, do you set up an
18 admissions meeting? How does that work?

19 A If we -- I make what I call a bed offer to a
20 patient. The hospital would reach out to the
21 patient or their loved one, let them know that I
22 have made the bed offer. If the bed offer is
23 accepted by the family, then once we have confirmed
24 a patient, we'll admit to the facility.

25 At that time is when I reach out to the family

1 to make arrangements to either come in to do their
2 tour -- which during COVID right now, we're not
3 really doing any tours at this time. But they
4 bring -- we bring the patient in so that I can set
5 up to do their admission documentation, do a tour
6 at that time if they would like one, and then I set
7 up for the patient's care plan meeting and invite
8 the family to attend the care plan meeting.

9 Q Okay. And those meetings with the family, that
10 occurs typically before the resident is transferred
11 to the facility?

12 A The admission paperwork -- it can be done once the
13 patient arrives at -- you know, simultaneously
14 arriving, or it could be done before the patient
15 arrives.

16 Q Okay.

17 A We do it within 24 hours of admission.

18 Q Is there any occasion where you actually go to the
19 hospital to meet with new residents or --

20 A Absolutely, yes. There are times when we do go to
21 meet with the families at the hospital, meet the
22 patient. Sometimes we want to check and see if
23 it's a patient that -- you know, if you can't
24 really tell by the clinical documentation how a
25 patient may be. Sometimes they look really bad on

1 paper, but if you go and look and see the patient
2 physically, you know, sometimes it gives you a
3 better idea of what you're dealing with.

4 So yes, we -- it's not out of the ordinary.

5 Q But as far as accepting new patents into your
6 facility, you want to ensure that the facility can
7 actually provide adequate care for that patient --

8 A Yes.

9 Q -- depending on their acuity?

10 A Absolutely.

11 Q Okay. Back in 2019 at Faith Healthcare Center, was
12 there anyone else involved in this admissions
13 process?

14 A No. I was the one who makes those decisions of the
15 patient admitting in 2019.

16 Q Okay. But you also mentioned a care plan meeting
17 that occurs. Who else is involved in that?

18 A After -- the care plan meeting happens after the
19 patient admits. And that's our whole
20 interdisciplinary team. They are involved. And
21 that would be therapy, head nurse of the unit,
22 dietary, MDS coordinators, activities, and social
23 are involved in that meeting.

24 Q Okay. And when you have a family that comes over
25 for that initial consultation and tour, do they

1 have the opportunity to sit down with staff in
2 addition to yourself at that initial meeting?

3 A If they request, yes. They typically do -- if I'm
4 taking them on a tour -- introduce them to staff as
5 we're going -- you know, introduce them to -- this
6 would be your unit manager; this is the head nurse,
7 DON -- as we go along through. It's not always
8 done that way. But there are -- if we're going on
9 a tour and we're passing through and meet them,
10 yes, they can have the opportunity to meet that
11 staff.

12 Q Okay. And that MDS coordinator that you
13 mentioned --

14 A Uh-huh.

15 Q -- that's a person that's doing the initial
16 assessment of the patient as they come into the
17 facility?

18 A Right.

19 Q And that's required by Medicare; correct?

20 A Right, yes.

21 Q And that allows y'all to receive reimbursement for
22 those services?

23 A Yes, sir.

24 Q Okay. How about -- back in 2019 who was
25 Vernita Johnson?

1 A She was the business office manager.

2 Q And would she be involved in this admissions
3 process?

4 A She would be, yes. She would be a part of that
5 care plan meeting that happens. And she would,
6 after the care plan meeting, have a separate
7 meeting with the patient or family to discuss
8 finances and things of that nature.

9 Q Back in 2019, who was your direct supervisor?

10 A My direct supervisor would have been Brooks
11 Arnette, who would have been my administrator at
12 that time.

13 Q And I assume Mr. Arnette is no longer at the
14 facility?

15 A Mr. Arnette is now an executive director of
16 Fundamentals Group. So he is still with the
17 facility but not directly in our facility. He
18 oversees the Faith Healthcare and several other
19 facilities.

20 Q Okay. And that takes me to my next question.
21 Fundamentals Group would be the parent entity that
22 you mentioned earlier, that you coordinate with,
23 with respect to management?

24 A Correct, Fundamentals is who operates the facility.

25 Q Okay. And do y'all have a corporate office

1 locally, or where are they located?

2 A The corporate office for Fundamentals is in
3 Maryland.

4 Q While working as the admissions director for Faith
5 Healthcare Center, did you work for any other
6 health care companies or facilities?

7 A Prior to working at Faith Healthcare, I worked for
8 McLeod Hospital.

9 Q And what did you do for McLeod Hospital?

10 A My position directly before I started at Faith was
11 in case management for two years as a case
12 management extender for the complex care team at
13 McLeod.

14 Q And as a case management extender, would you
15 coordinate from time to time with local skilled
16 nursing facilities?

17 A Yes, sir.

18 Q Okay. So in the event that you had a patient with
19 a complex medical condition or needed additional
20 rehab, that sort of thing, you would coordinate the
21 care thereafter?

22 A That's what I did, yes, sir. We, in that team,
23 sought placement for patients that need skilled
24 nursing, rehab, inpatient rehab, psychiatric care,
25 long-term care. That was my duty to assist in

1 finding placement for those patients.

2 Q Okay. And you told me earlier that you began with
3 Faith Healthcare Center back in October 2017.

4 When did you leave McLeod Health?

5 A In October 2017.

6 Q So you left McLeod to go to Faith?

7 A To go to Faith, yes, sir.

8 Q Okay. And have you worked anywhere else in the
9 health care field?

10 A I started at McLeod in 2001. So that's the
11 majority of my career. I believe I was 21 or 22
12 maybe when I started there. And other than that, I
13 worked as a CNA many years before that in -- you
14 know, just like for Nurses On Call and different
15 nursing homes.

16 Q Okay. So you worked at McLeod, though, from 2001
17 until 2017?

18 A Right, uh-huh.

19 Q In anticipation of today, other than your lawyer,
20 who have you talked to about this particular case?

21 A No one. I really was not aware that any of this
22 was going on until just a couple of weeks ago.

23 Q So you didn't have the opportunity to talk to
24 anyone else from the nursing home?

25 A No.

1 Q How did you go about preparing for today? For
2 instance, have you reviewed any documents?

3 A No. I just refreshed myself with, you know, the
4 admissions process. Just, you know, if there were
5 any questions you guys may have, just reviewing the
6 documents that I do have my patients to sign on
7 admission.

8 Q And would that be those business file documents?

9 A Correct, yes. We do the process a bit differently
10 than we did back then. Everything now is done
11 electronically. But back then unfortunately we had
12 everything paper, which, you know, is definitely
13 different. But we do electronic documentation now.
14 But yes, it was a big, thick file that we would get
15 patients or their families to sign on admission.

16 Q Sure. And I'll represent to you that I've been
17 provided prior to today a business file. It's
18 about 99 pages.

19 A Uh-huh.

20 Q Does that sound about right?

21 A That is about right, yes.

22 Q Okay. And then now -- today at least -- you go
23 through DocuSign or some other e-signature?

24 A Yeah. It's called AdmitPlus. And it's a lot of --
25 very much the same documents, but kind of -- a

1 little bit more compressed. Yes. Before it was
2 about 99 pages.

3 Q Okay. And you've indicated just a moment ago that
4 you had a chance to refresh your memory --

5 A Uh-huh.

6 Q -- on the admissions process.

7 A Uh-huh.

8 Q Tell me some of the documents that you reviewed in
9 anticipation of today.

10 A Just going over the admission agreement and
11 advanced directives, arbitration agreements,
12 readmission agreements.

13 Q Did you have the opportunity to look at any nursing
14 home chart or health care information about
15 Mr. Chavis?

16 A No, I didn't have any access to that.

17 Q Have you reviewed the complaint that was filed in
18 this case, the lawsuit?

19 A I have not.

20 Q How about the motion to compel arbitration, the
21 reason why we're here?

22 A No, I haven't. I really had no -- really no
23 knowledge as to what the actual case has been
24 brought about.

25 Q Okay. And were you involved in any way in the

1 search for documents such as Mr. Chavis' business
2 file?

3 A No. I just turned over what -- they asked me what
4 I had, and I turned over the documentation that I
5 had on him. Which was scanned into -- when a
6 patient admits, we scan in their documents into
7 their file in Matrix, and I just turned that over.

8 Q So other than those 99 pages of the business file,
9 there would be nothing else other than maybe his
10 chart?

11 A Right. Well, the chart is a real chart. And that
12 would have been kept in medical records. We don't
13 do electronic charting on the patients yet. We
14 still do whole paper charts. So that would have
15 been kept in the medical records department. I
16 don't have any access to those.

17 Q Okay. And having reviewed that business file, were
18 you left with any questions?

19 A No.

20 Q Did you ask to review any other materials?

21 A No.

22 Q Did you see anything that required correction or
23 clarification?

24 A No.

25 Q Now, you mentioned this a moment ago. And we'll

1 look at the documents in a few minutes. But as
2 part of the paperwork completed during the time of
3 admission, did you present residents or their
4 representatives with arbitration agreements?

5 A Yes.

6 Q Okay. And what is an arbitration agreement?

7 A In the arbitration agreement, it asked the patient
8 or their loved one that by signing the agreement
9 that they are giving up their right to a jury trial
10 in the event that there is any allegation of
11 neglect, abuse, or personal injury while residing
12 in the facility. And that's the way, you know, I
13 explain it and allow them to read over the
14 document.

15 Q Okay. And was there any other -- anyone else who
16 would have been responsible for presenting or
17 aiding in the completion of the arbitration
18 agreements?

19 A No.

20 Q And this document, this arbitration agreement, was
21 it a predrafted document?

22 A It is.

23 Q And so did you take any part in drafting the
24 provision of the agreement?

25 A No, no.

1 Q And that would have been the same back in 2019?

2 A Right.

3 Q This packet, this business file packet, admissions
4 packet --

5 A Uh-huh.

6 Q -- who provided that to you?

7 A When we are trained, we're trained on which
8 documents have to be signed. There is already a
9 premade packet that is kept, like an original copy
10 is kept with each admissions director. We keep
11 just a blank copy and just update the forms if need
12 be. Or if they, you know, start -- as you're
13 making copies, if they start to look ragged,
14 replace them with documents that you can print off
15 what's called our FRC where we have any document
16 that needs to be signed. We can replace those.
17 But we keep a ready-made packet, make a copy for
18 them to sign.

19 Q And when you became the admissions director for
20 this particular facility, were you trained on what
21 documents in that premade packet that you are
22 required to present?

23 A Yes.

24 Q Okay. And who -- and where did that training
25 occur?

1 A I first got my initial training from my regional
2 liaison, Glenda Eaddy, and also had training at
3 our -- one of our offices in Spartanburg where we
4 go to have our admission director training. So
5 initially through Glenda Eaddy, my regional
6 liaison.

7 Q And were you instructed or taught during the
8 training what arbitration is?

9 A Yes.

10 Q And I think you touched on this a moment ago. But
11 what right do you understand a resident is being
12 asked to give up when he consents to arbitration?

13 A Their -- if they sign the document, they are giving
14 up their right to the jury trial.

15 Q Okay. Do you believe, as admissions director, that
16 that right to a jury trial is important?

17 A I would think that -- yes, anyone, to have a right
18 to have a jury trial would be important. Yes.

19 Q Okay. And you understand it's a Constitutional
20 right?

21 A I do understand that, uh-huh, yes, sir.

22 Q And you understand Constitutional rights are taken
23 very seriously; correct?

24 A I absolutely do.

25 Q Okay.

1 A And that's why they're given the opportunity to
2 sign it.

3 Q Okay. Would it be wrong for a resident to sign
4 away their Constitutional right to a jury trial if
5 they can't understand what they're giving up?

6 A It would be wrong for the resident to sign if they
7 didn't understand, correct.

8 Q And how about their representative?

9 A Well, I mean, the representative has the
10 opportunity to review the document to see what
11 they're signing. I wouldn't ask anyone who did not
12 understand that to sign that document.

13 Q You know, as admissions director, that the
14 arbitration agreement cannot be a condition for
15 admission to the nursing home?

16 A It's not a condition to admission, right. If they
17 did not sign it, I would still take the patient.

18 Q Okay. And it's separate and apart from the
19 admissions process?

20 A Do what now?

21 Q Is it --

22 A Sorry.

23 Q -- separate and apart from the admissions process?

24 MR. HINES: Object to form.

25 A I'm not sure I understand what you're saying.

1 Q (MR. McALISTER) Sure. Is -- you've indicated that
2 the arbitration agreement is not a condition to
3 admission. But you've indicated earlier that it
4 was part of the admissions process; right?

5 A It is part of the admission process. But if the
6 patient or family decided not to sign that, it is
7 not a condition of the admission.

8 They're -- I'm not going to say "you cannot
9 admit if you do not sign this documentation."

10 Q Sure. It has to be voluntary; right?

11 A It has to be voluntary, yes.

12 Q Okay. And it should be adequately explained?

13 A Yes.

14 Q You've indicated on a number of occasions thus far
15 that you provide this admissions packet to the
16 patient or their representative or their family
17 member.

18 A Uh-huh.

19 Q Is there a checklist or a tool provided to staff to
20 ensure that these documents are completed by an
21 appropriate person with requisite authority?

22 A I am the one with the authority to complete the
23 admission paperwork.

24 Q Okay. How about for the resident that's being
25 admitted to the facility? How do you determine who

1 has authority to sign for them?

2 A Well, you have to read their -- well, first of all,
3 you have to kind of determine if the patient is
4 competent to sign. And based off of the hospital
5 paperwork, he has -- you know, medical history,
6 that would indicate that he definitely could not
7 understand what I would be explaining to him if I
8 had him to sign the paperwork.

9 And the patient in question, his particular
10 family come from the hospital already as his
11 representative at the hospital. And she was the
12 one who was representing him at the hospital. So,
13 you know, I don't have to have any necessary power
14 of attorney for a patient's family to be -- for me
15 to be able to get paperwork signed by a particular
16 family member.

17 Usually when a family comes in from the
18 hospital, the hospital has already determined to me
19 that she is acting as his representative to sign
20 him -- sign him in on his behalf.

21 Q Okay. So backing up just a little bit.

22 A Uh-huh.

23 Q And you're referring now to Mr. Chavis' and his
24 competency?

25 A Right, uh-huh.

1 Q And you made a determination based on your review
2 of medical records that he was unable to sign
3 documents?

4 A I would not feel comfortable with what was going on
5 with him at that time for him to be able to sign
6 those -- that paper.

7 Q Okay.

8 A Yeah.

9 Q So he wouldn't have the ability to sign documents
10 and make decisions on his own?

11 A Correct.

12 Q Okay. And you've also indicated that you don't
13 need a power of attorney for a family member to
14 sign on that patient's behalf?

15 A If that patient's family comes in and they are
16 accepting -- signing responsibility for that
17 patient, they are signing on his behalf.

18 Q Okay. Based on what?

19 A I -- from the hospital telling me that this is his
20 only relative that has stepped up on his behalf and
21 based off of her word that she is his
22 representative.

23 Q Okay. So not from Mr. Chavis --

24 A Right.

25 Q -- conveying that to you; right?

1 A Not from Mr. Chavis.

2 Q And at no point did you interact with Mr. Chavis in
3 advance to him being admitted to this facility, did
4 you?

5 A No.

6 Q So you received some records from the hospital.
7 And based on your determination, you determined
8 that he didn't have the capacity or competency to
9 sign?

10 A Well, I didn't say he didn't have capacity or
11 competency. That would have been discovered at a
12 later time whenever he gets there for them to deem
13 him with -- if he's going to be deemed incompetent.

14 But based off the clinical documentation,
15 saying that he was confused, disoriented or, you
16 know, what have you, that would be when that
17 determination would be made that he would not
18 understand what I was -- my admission process, he
19 would not understand.

20 Q And I guess -- and we'll get to this in a moment.
21 But I just want to make sure I'm clear on this. So
22 you have or you have not determined his capacity
23 before he's admitted to the facility?

24 A I do not personally, myself, make a patient
25 incapable of signing anything. But based off of

1 looking at their medical record, then I can look
2 and see this patient is -- I don't remember his in
3 particular -- but prior to a patient coming in,
4 whether or not they are -- if the patient has
5 clinical documentation that they are disoriented,
6 confused, a patient like that I would have a family
7 member to come in and then do paperwork at that
8 time with the family.

9 (Plaintiff's Exhibit No. 1 marked for identification.)

10 Q (MR. McALISTER) I'm going to mark this Plaintiff's
11 Exhibit 1, a progress note from March 15, 2019.
12 I'm going to ask you a couple of questions about
13 this.

14 A Uh-huh.

15 Q And I'll represent to you this is a part of his
16 chart that we received from the facility. And that
17 progress note that's entitled Social Service
18 Progress Notes at the top, will you read that first
19 portion.

20 A Okay. "Resident is a 74-year-old man being
21 admitted to the facility for rehabilitation
22 therapy. The daughter reported discharge plans
23 will be determined by his progress in therapy.
24 Social services will assist with the discharge.
25 Resident is able to communicate his thoughts and

1 wants to staff.

2 "At this present time, resident has expressed
3 his desires to notify his son of his plans.

4 Resident's daughter reported she will be the
5 contact person. Social services" -- I can't tell
6 what that says -- "explained to the daughter the
7 resident has rights to communicate with others if
8 he shall desire. The daughter stated she
9 understood, however, will follow up with family."

10 Q Okay. Let me ask you a few questions about that.

11 A Uh-huh.

12 Q Right here -- this is a progress note from the
13 facility. It indicates that the resident,
14 Mr. Chavis, is able to communicate his thoughts and
15 wants to staff.

16 A Uh-huh.

17 Q Is that correct?

18 A That's what the document says.

19 Q Okay. And that would be a medical document in his
20 chart --

21 A Uh-huh.

22 Q -- by a staff member of your facility?

23 A That is correct.

24 Q Okay. So there he would have the capacity and
25 competency to communicate his wants and desires;

1 right?

2 A It doesn't state his capacity. It just says that
3 he is able to communicate his thoughts and desires.

4 Q Sure.

5 A But it doesn't state about his capacity.

6 Q All right. And it goes on to say that he expressed
7 his desire to notify the son of his plans. And it
8 then states that the daughter reported she will be
9 the contact person. And --

10 A That's right.

11 Q -- social services explained to the daughter that
12 the resident has a right to communicate with others
13 as he shall desire; right?

14 A That's correct. That's what it says.

15 Q Okay. So that would indicate to us that he does
16 have the capacity and competency to provide
17 information about his care; right?

18 MR. HINES: Object to form.

19 A Well, I mean, I think competency and being able to
20 communicate thoughts and wants are different.

21 Q (MR. McALISTER) Okay. You've indicated to us
22 earlier that you don't make a determination with
23 respect to competency; right?

24 A I don't. A competency form has to be filled out by
25 a physician.

1 Q Right.

2 A Right.

3 Q But you're not aware of one in this --

4 A I'm not sure if he has one. That's been so long
5 ago. I'm not really sure.

6 Q Okay. But you've indicated earlier that you knew
7 that Mr. Chavis couldn't sign on his own behalf.

8 A From coming into the hospital, based off of his
9 records, I -- I would have his daughter to sign on
10 his behalf. Based off of what his hospital records
11 were indicating with his --

12 Q Okay. Let me just make sure we're clear.

13 A Uh-huh.

14 Q Are you talking about a specific recollection you
15 have from this time period back in 2019, or are you
16 talking about based on your review of documents in
17 anticipation of today?

18 A No, I have not -- I don't remember what the
19 documentation says. But if -- if I had a family
20 member to sign a patient to come in to my facility,
21 it is usually because of what the records indicated
22 prior to him coming in. Not a specific -- I don't
23 remember what his record said. But that would be
24 why I would have a family member to sign on a
25 patient's behalf.

1 Q Okay. So you don't have any specific recollection
2 of this interaction with Mr. Chavis or his family?

3 A Do I remember her coming in to sign paperwork?

4 Q Sure. On March 14, 2019, do you remember --

5 A I remember meeting her, yes. I remember meeting
6 her that day and her signing his paperwork, yes.

7 Q How many other residents' family members did you
8 meet that day?

9 A Just her.

10 Q Okay. Are you sure about that?

11 A I'm pretty sure. Pretty sure.

12 Q All right. Do you remember what day of the week
13 that was?

14 A I don't.

15 Q Do you remember what time of day it was?

16 A I don't.

17 Q Okay. Do you remember any other details about this
18 interaction on that particular day?

19 A As far as details, what -- when you say details,
20 what do you mean?

21 Q You've told me you have a specific recollection of
22 an interaction with Ms. Hagood.

23 A Uh-huh.

24 Q Okay. You've told me you don't recall what time of
25 day, what day it was, or what else was going on;

1 right?

2 A I mean, I meet a lot of different people. I
3 remember her. I remember in my mind how she looks.
4 I remember her coming in to sign the paperwork.
5 But, no, I couldn't tell you exactly what time it
6 was without looking at the admission documentation.
7 No, I don't recall.

8 Q Okay. Well, describe her physical appearance for
9 me.

10 A I do believe she is a red, ginger. Tan skin.
11 Petite. That's about -- maybe -- looked
12 attractive, cute, young lady to me. That's about
13 all I can remember of her.

14 Q Okay. Let's back up a little bit. Tell me, as
15 admissions director, what is required of an
16 individual to execute an arbitration agreement on a
17 resident's behalf?

18 A Say that again now.

19 Q Sure. What is required -- what should be required
20 to be performed or shown for an individual to
21 execute an arbitration agreement on a resident's
22 behalf?

23 A As with any of the paperwork, you know, they're
24 reading the documents and expressing that they
25 understand the documents, and they're signing the

1 documentation.

2 Q Okay. And is signing an arbitration agreement a
3 health care decision?

4 A I am not sure if that is a health care decision. I
5 don't make that determination if that's a health
6 care decision. I mean, I'm not sure what you're
7 saying. I don't understand the question.

8 Q Okay. When determining whether an individual has
9 the appropriate authorization to sign away a
10 resident's Constitutional right to a jury trial,
11 what steps does Faith Healthcare Center take to
12 make this determination?

13 A What steps does Faith Healthcare take for the
14 patients or their loved one to -- say that again.

15 Q Yes, ma'am.

16 A I don't understand.

17 Q When determining whether an individual, such as a
18 loved one --

19 A Uh-huh.

20 Q -- has the appropriate authorization to sign away a
21 resident's Constitutional right to a jury trial,
22 what steps does Faith Healthcare Center take to
23 make that determination?

24 A I mean, if a patient's family comes in, they are
25 telling me if -- that they are the patient's

1 representative. That is also sent to me from the
2 hospital, who is acting on the patient's behalf.
3 And they have full authority to read any
4 documentation.

5 I explain to them the documentation. And
6 that -- I don't -- that is -- the determination is
7 made. I'm giving them the opportunity to read over
8 any documents that they sign and not forcing them
9 to sign any documentation.

10 Q Okay. Before asking a representative to sign away
11 their loved one's Constitutional right to a jury
12 trial, should staff confirm that the individual
13 whom the agreement is being presented for signature
14 has the requisite legal authority to execute
15 documents on behalf of that resident?

16 MR. HINES: Object to form.

17 A I do -- I mean, I am not sure if that determination
18 had been made or -- with anyone -- you know, if a
19 patient has someone that has power of attorney, it
20 is asked that those documentations be brought in on
21 admission.

22 I do not recollect if that happened in this
23 particular case or not. If any of those
24 documentations were provided. But typically, you
25 know, it's -- our forms say that they are -- they

1 are signing on that patient's behalf.

2 So I don't know if there were any particular
3 forms signed prior to or at admission in this
4 particular case.

5 Q (MR. McALISTER) Okay. And if there was a power of
6 attorney that had been executed in advance of this
7 admission and this admission process, you'd expect
8 that to be in the business file; correct?

9 A Either in the social or business file. Typically,
10 they are kept either -- as a part of the chart in
11 whole, yes.

12 Q Okay. And do you also understand that the law in
13 South Carolina requires certain things for a power
14 of attorney to be effective?

15 A I would imagine so, that there are things that
16 power of attorney paperwork would need to be in
17 effect, yes.

18 Q Okay. What are those things that would be
19 required?

20 A I don't know all of it. But, you know, if a
21 patient -- it's not effective unless the patient is
22 incompetent. I mean, it all really is according to
23 what the paperwork itself says. But I don't really
24 know a lot about that particular part.

25 Q Do you know whether or not it has to be recorded

1 like a deed?

2 A It is something that is recorded, I think, at the
3 courthouse, yes.

4 Q Okay. So to the extent a power of attorney existed
5 and was effective, you could go find it at the
6 courthouse?

7 A Yes.

8 Q Okay. Do you know whether or not it requires
9 certain signatures?

10 A I don't know.

11 Q Okay. Were you expected to confirm that an
12 individual whom the agreement is being presented
13 for signature had that requisite authority?

14 A I'm sorry. Say that again.

15 Q Were you expected to confirm that the individual to
16 whom the agreement is being presented for signature
17 has requisite authority?

18 A I am not.

19 Q Okay. Who has that responsibility at Faith
20 Healthcare Center?

21 A I'm not really sure.

22 Q Okay. Who reviews documents to ensure the person
23 being asked to sign an arbitration agreement has
24 the appropriate authority to bind the resident?

25 A I'm not certain.

1 Q That's not something you did?

2 A No.

3 Q Can you agree that actual legal authority is
4 expressly conferred upon an agent by the principal
5 through a power of attorney?

6 A Say that again.

7 Q Can you agree that actual legal authority is
8 expressly conferred upon an agent by the principal
9 by a power of attorney?

10 MR. HINES: Object to form.

11 A I don't know. I don't even know if I understand
12 what you're asking.

13 Q (MR. McALISTER) Do you understand that actual
14 legal authority has to be expressly conveyed, those
15 acts -- that a principal must convey that authority
16 upon the agent?

17 MR. HINES: Object to form.

18 A If that's -- what you're saying, I'm not really
19 certain. I don't know.

20 Q (MR. McALISTER) Okay. All right. Let me ask you
21 this. With respect to a resident's agent, that
22 family member potentially, how do you ascertain the
23 scope of that agent's authority?

24 A Can you reword that. I'm not real sure what you're
25 asking.

1 Q Sure. What decisions is that patient's loved one
2 allowed to make? How do you determine the scope of
3 that agent's authority?

4 A I don't make those decisions. I'm not sure what
5 all they're allowed to make. I'm not sure what all
6 power they're given.

7 Q Okay. So you don't know whether or not they have
8 authority to sign an arbitration agreement; right?

9 MR. HINES: Object to form.

10 A They -- they're signing the arbitration agreement
11 as the patient's designated representative.

12 Q (MR. McALISTER) Designated by who?

13 A She's designated herself as -- you know, if the
14 patient has a loved one to come in, she is signing
15 that she is the designated person. I don't know
16 who designated her. I have no way of knowing who
17 designated her. She represents herself by signing
18 the form. He, she, whoever signs the form on
19 behalf of the patient has designated themselves or
20 telling me that they are the designated person to
21 sign on their behalf.

22 Q Would you agree that if a resident has the
23 capability of signing those documents that that
24 would be the appropriate person or be preferable to
25 that loved one?

1 MR. HINES: Object to form.

2 A I'm not sure in this case. If a patient is
3 competent, it is always best to have the patient to
4 sign their own documentation if they're competent.
5 I'm not really sure, you know, without looking at
6 the documentation. But yes, sir, it is good for a
7 patient to sign their own paperwork.

8 Q (MR. McALISTER) Sure. It would be appropriate for
9 the patient to sign their own paperwork; right?

10 MR. HINES: Object to form.

11 A It is -- if a patient is competent, they should be
12 signing their own paperwork. If the patient is
13 competent.

14 Q (MR. McALISTER) Sure. And there are occasions
15 where a patient may have granted a power of
16 attorney to a loved one to sign paperwork. And on
17 those occasions, at that point in time, that loved
18 one is authorized to sign; right? Or can be
19 authorized to sign?

20 A Yes.

21 Q Okay. And that's dependent upon what that power of
22 attorney actually states; right?

23 A There are instances where a patient could sign
24 without a power of attorney to give permission for
25 a patient's loved one to sign. There's a form that

1 they sign giving permission for a patient's family
2 to sign without a power of attorney.

3 Q Sure. And you're not aware of one in this case,
4 though; right?

5 A No, I'm not aware of it, uh-uh.

6 Q Okay. Would you agree that as admissions director
7 you have a duty to use due care to ascertain the
8 scope of an agent's authority?

9 A I'm sorry. Say that again.

10 Q Yes, ma'am. Would you agree that as admissions
11 director you have a duty to use due care to
12 ascertain the scope of an agent's authority?

13 MR. HINES: Object to form.

14 A I don't know that I understand exactly what you're
15 saying.

16 Q (MR. McALISTER) Sure. Do you have a duty to
17 ascertain whether or not that loved one, that you
18 consider an agent, has authority to sign documents
19 on that resident's behalf?

20 A I don't.

21 Q Would you agree that the resident has to be present
22 to be able to convey authority to you?

23 MR. HINES: Object to form.

24 A I don't.

25 Q (MR. McALISTER) Well, how would such authority be

1 manifested?

2 A Could you reword your question, please?

3 Q Sure. If you don't believe that the resident needs
4 to be present to convey such authority, how would
5 that resident convey authority to you?

6 A Authority for?

7 Q For his loved one to sign documents on his behalf?

8 A I'm not really sure. It would happen in
9 different -- it's different with each patient, I
10 would imagine. It happens in different -- or if
11 you're speaking -- are you speaking on this
12 specific or -- you know, just in general?

13 Q Yes, ma'am. Just in general.

14 A Just in general. I mean, it would all depend on
15 what the hospital documentation says prior to a
16 patient admitting and if a hospital did not allow
17 the patient to sign on their own behalf or not, or
18 if the hospital has told me this is -- this person
19 is the patient's representative. Then that's kind
20 of where I go from, based off of what has already
21 happened prior to a patient admitting.

22 Q Okay. Would you agree that agency cannot be
23 established solely by the declarations and conduct
24 of the alleged agent?

25 MR. HINES: Object to form.

1 A Can you repeat that again? Reword that.

2 Q (MR. McALISTER) Yes, ma'am. Would you agree that
3 this agency relationship between resident and their
4 loved one cannot be established solely by the
5 declarations and conduct of the loved one?

6 A I don't know if I can answer that. I don't
7 understand what you're saying.

8 Q Okay. That's fine. We're here today on behalf of
9 Frank Chavis in a lawsuit brought by his family
10 against Faith Healthcare Center for injuries he
11 sustained during his admission at the nursing home
12 from April 17, 2019, towards the end of May of
13 2019. Okay?

14 We talked about this a little bit earlier.
15 But I just want to make sure I'm clear about all
16 the recollections you have about Mr. Chavis or any
17 of his family members, whether that be that
18 Ms. Hagood or someone else. All right?

19 A Ms. who?

20 Q Ms. Hagood.

21 A I thought it was Stokes.

22 Q Okay. I think that's her former name. She's
23 Ms. Hagood now. I'm sorry.

24 A Okay.

25 Q And whether or not those recollections are based

1 off of your firsthand observations or something you
2 might recall based on what someone else told you.

3 And I also want to understand whether or not
4 you have independent recollections or whether it's
5 a memory based off of your review of some
6 documentation in anticipation of today. Okay?

7 A I have not reviewed any documentation prior to
8 today. Any of his records -- I do not have access
9 to any of those at all whatsoever. I did not even
10 know about this -- even coming here today until
11 yesterday. Last minute. I've been on vacation
12 myself. Just got back in town. So I have not
13 reviewed any of his documentation.

14 I just -- you know, I remember Mr. Chavis
15 being in our facility. I remember him going out to
16 the hospital. I remember her coming and signing
17 paperwork. Ms. Stokes coming to sign paperwork. I
18 remember her being very pleasant, very thankful,
19 very grateful to me. Very -- you know, just said
20 very nice things. I do maybe have -- she had even
21 called me while he was there and things of that
22 nature.

23 But other than that, I don't recollect
24 particular times of the day and week -- the day of
25 the week that it was. But that is all I can

1 remember of that day.

2 Q Okay. And earlier I think you told me that you did
3 not meet with Mr. Chavis prior to him coming to the
4 facility?

5 A No.

6 Q Did you ever meet with him personally once he
7 arrived --

8 A Yes.

9 Q -- at the facility?

10 A Several times.

11 Q Okay.

12 A Yes. He would -- he was out and about in the
13 facility, you know, things of that nature. Yes, I
14 seen him quite a few times while he was there.

15 (Pleading's Exhibit No. 2 marked for identification.)

16 Q (MR. McALISTER) All right. I'm going to show you
17 what's going to be marked as Plaintiff's Exhibit 2.
18 And this is going to be that admissions packet that
19 has been provided to us in anticipation of today.

20 A Uh-huh.

21 Q I'm sorry. It's all 99 pages. And they're marked
22 at the bottom there 1 to 99 with that Bates number.

23 Do you see that?

24 A Uh-huh.

25 Q Okay. And we're going to walk through some of

1 this. But first and foremost -- I just want to
2 make sure I'm clear. Did Mr. Chavis have a power
3 of attorney at the time of his admission?

4 A I do not remember.

5 Q But if he did, you would expect it to be in this
6 document; right?

7 A In this?

8 Q Yes.

9 A I'm not sure. If he had, it would be in his
10 medical record. I don't know if this -- this is
11 just the admissions and business file, not his
12 medical record. I'm not sure. The business office
13 manager, usually that document would go to her. So
14 I'm not really sure if it would be as a part of his
15 chart or a part of this packet.

16 Q Okay. And is it your position today that
17 Mr. Chavis had capacity to sign or did not have
18 capacity to sign?

19 A I don't recall. I don't -- I'm not sure if he had
20 been deemed incompetent. But prior to him coming,
21 based off of his medical record, it was determined
22 that his daughter would sign on his behalf.

23 Q Okay. Well, let's just walk through this document
24 real quick. This first page, page 1, at the top it
25 says Admissions Checklist - South Carolina.

1 A Uh-huh.

2 Q Okay. So this would be that document that you
3 indicated was provided by corporate?

4 A Uh-huh.

5 Q Okay. And this walks you through all the documents
6 that are required during this admissions process;
7 right?

8 A Uh-huh, uh-huh.

9 Q Okay. And here at the top, we have Resident's
10 Name: Frank Chavis. Admission date: March 14,
11 2019; right?

12 A Uh-huh.

13 Q And then it says Admit Completed by -- and I
14 believe that's KD. Is that your initials there?

15 A Yes.

16 Q Okay. So that would be your initials there as
17 Kelly Dials?

18 A That's correct.

19 Q Okay. Just below that it says "refer to your
20 State's User Guide to facility forms for a detailed
21 explanation of each form." Is that a policy manual
22 or some user guide that you have within the
23 facility?

24 A I'm not sure.

25 Q Okay. Is that something that you're familiar with?

1 A I'm not sure if I'm familiar with it or not. I'm
2 not sure if this is -- it could be several
3 different things, so I'm not really sure if maybe I
4 call it something else or not. But I'm not real
5 certain.

6 Q Would this State's User Guide be something that's
7 provided to the family or a resident upon
8 admission?

9 A I'm not -- State's User Guide to facility forms. I
10 personally, myself, do not give anyone anything
11 that says State's User Guide.

12 And this document here is not given to the
13 patient. It's not something that the patient or
14 family signs. This is just my check-off list
15 after.

16 Q Gotcha. And moving down the document, on the
17 left-hand side, it says Required Paperwork. Do you
18 see that?

19 A Uh-huh.

20 Q And it says for all admissions; right?

21 A Uh-huh.

22 Q Okay. And then it lists all those items that are
23 required; correct?

24 A Uh-huh.

25 THE COURT REPORTER: Is that a yes?

1 THE DEPONENT: Oh, I'm sorry.

2 MR. McALISTER: I'm sorry. I should have
3 stopped her as well.

4 THE DEPONENT: If you could repeat that.
5 I'm sorry.

6 Q (MR. McALISTER) Yes, ma'am. This document, on the
7 left-hand side, says required paperwork, and then
8 it indicates for all admissions. So these would be
9 items that are required for each admission at this
10 facility?

11 A This would be all of the documentation that we
12 would check off if I've provided it in my portion.
13 I would check off what I have provided and then
14 turn it over to the business office.

15 Q Okay. And so your initials would be down this
16 right-hand side as admissions. And then
17 Ms. Johnson would be just to the left of you as
18 business office manager; right?

19 A That's correct.

20 Q Okay. And so down here at the bottom of this form,
21 it has a bold section that says Optional Forms. Do
22 you see that?

23 A Yes.

24 Q And there's nothing provided there that's indicated
25 as optional; right?

1 A No.

2 Q Okay. And then down at the very bottom is
3 Administrator with a signature. Is that Mr. Brooks
4 Arnette?

5 A It is.

6 Q Okay. And, again, it's dated March 14, 2019?

7 A That's correct.

8 Q Okay. And then as you walk through or you go
9 through this admissions process, you then initial
10 these documents that are provided to family or the
11 resident; right?

12 A Some of these documents are not documents that
13 the -- it's stating that -- it's documents that we
14 have completed. Like the HIQA -- those are not
15 documents that are provided to the family.

16 This is just a check-off that we have
17 completed our portion of the admissions process.

18 Q Gotcha.

19 A These are not all forms that just necessarily go to
20 family or the patient.

21 Q Okay. Now, if we flip over to the next page, on
22 page 2 at the bottom, this would be the first page
23 of the admissions agreement for South Carolina
24 facilities; right?

25 A I'm sorry. Say that again.

1 Q This first page would be the -- page 1 of 12 for
2 the admissions agreement for those South Carolina
3 facilities; right?

4 A Correct.

5 Q Okay. And, again, this is a preprinted predrafted
6 contract; correct?

7 A That's right.

8 Q Okay. And as we walk through this, I'm going to
9 just ask you a few questions as we go, and I'm
10 going to hit on a few things. At the top there, it
11 says, "This admission agreement as above dated is
12 by and among Faith Healthcare Center, the facility;
13 Frank Chavis, resident; and/or Becky Stokes,
14 resident's durable power of attorney for health
15 care/resident's legal guardian/resident's
16 responsible party hereinafter collectively
17 representative."

18 So you told me earlier that you're not aware
19 of a power of attorney on behalf of Ms. Stokes;
20 right?

21 A That's right.

22 Q Are you aware of any court order naming her legal
23 guardian?

24 A I am not.

25 Q Okay. But you've indicated, at least based on your

1 testimony, that you considered her the responsible
2 party?

3 A I did.

4 Q Okay. And isn't a responsible party in a nursing
5 home that person that is contacted in the effect of
6 an issue like such as a fall with injury?

7 A I personally, myself, do not make that call. But I
8 would imagine that that would be the case. But I'm
9 not really sure of that process.

10 Q Okay. And just because they're identified as a
11 responsible party at the top doesn't mean they have
12 legal authority; right?

13 A I'm not sure. I'm not sure what all that gives
14 them the power to do.

15 Q Okay. If we move down this document, down to
16 Section 5, it says, "Terms and Conditions: By
17 signing this agreement, resident and/or
18 representative agrees to comply with all terms and
19 conditions set forth in this agreement and
20 facility's policies, as same apply and as may
21 change from time to time."

22 And obviously, that limits the signatory to
23 this agreement to the terms and conditions within
24 this agreement itself; right?

25 MR. HINES: Object to form.

1 A I'm not sure.

2 Q (MR. McALISTER) Okay. That's just what it says;
3 right?

4 A It said, "By signing this agreement, resident
5 and/or representative agrees to comply with all
6 terms and conditions set forth in this agreement
7 and facility's policy as same apply and as may
8 change from time to time."

9 Q And would you agree that the facility, Faith
10 Healthcare Center, also has a mutual duty to comply
11 with the terms and conditions of the agreement?

12 A I don't know if that's -- I mean, I think -- I'm
13 not sure exactly what you're saying.

14 Q Certainly. The provisions of the agreement have to
15 be mutual; right? It can't be one-sided; correct?

16 MR. HINES: Object to form.

17 A I'm not real sure. I think it -- I'm not -- I
18 don't think I understand exactly what you're asking
19 me.

20 Q (MR. McALISTER) Sure. You are providing this
21 admission agreement to a resident and/or their
22 family to sign.

23 A Uh-huh.

24 Q This binds them to the facility; right?

25 MR. HINES: Object to form.

1 A I don't -- by saying "bind," I don't know what you
2 mean by that.

3 Q (MR. McALISTER) Okay. We can move on. Let's flip
4 over to page 5 at the bottom, Chavis Business File
5 page 5. It's 4 of 12 of the document itself.

6 Okay. And I'll represent to you that this is
7 a carryover of Section B, which is resident and/or
8 representative agrees to. And I'm going to ask you
9 to look down to Number 11, second one from the top.

10 Okay. It says, "Abide by facility's policies
11 and procedures as amended from time to time and
12 outlined in the admission handbook and other
13 admissions materials which are made a part of this
14 agreement by reference herein."

15 What other admissions materials are made a
16 part of the agreement by reference herein?

17 A I'm not sure. I don't know.

18 Q Would the arbitration agreement be considered part
19 of the admissions materials?

20 A A signed arbitration agreement is a part of the
21 admission documentation if it's signed.

22 Q Sure. And so here that provision, provision 11,
23 indicates that this arbitration agreement would be
24 part of the agreement by reference herein; right?

25 A Say that again.

1 Q Yes, ma'am. You've indicated earlier that this
2 arbitration agreement was part of this admissions
3 process including the paperwork that's required in
4 this admissions checklist; right?

5 MR. HINES: Object to form.

6 MR. McALISTER: We can look back at page 1.

7 A You're saying required -- like required as in --
8 when you say required, I'm not sure what you mean
9 by that.

10 Q (MR. McALISTER) I'm just trying to understand
11 whether or not this arbitration agreement is
12 considered part of the admissions materials.
13 That's all.

14 A Whenever -- when a patient is admitted, it is a
15 part of my packet, yes. The arbitration agreement
16 is a part of my admission packet.

17 Q Okay. And this admission handbook, what is that?

18 A It's a handbook that goes over a lot of policies
19 and procedures within the facility. It speaks to
20 patient -- resident rights while they're in the
21 facility. It gives them a list of contacts of who
22 they could contact, you know, while the patient is
23 there, whether that be the DON, social worker,
24 things of that nature.

25 Q Okay. Number 18 -- moving down -- says, "In the

1 event resident becomes incapable of making medical
2 decisions and no guardian, proxy, surrogate, or
3 agent under a valid durable power of attorney for
4 health care or no person qualified under the South
5 Carolina Adult Health Code Consent Act is
6 available, the facility is authorized to seek court
7 appointment of a legal guardian."

8 Did that ever occur in this case?

9 A I'm not aware of that. No.

10 Q You certainly didn't start that process; right?

11 A No, I would not have started that process.

12 Q If we move over to page 9 at the bottom, 8 of 12 of
13 the agreement, this is a section on Medicare
14 beneficiaries. And I'm going to point you to
15 subpart 5. It says Application/Appeals.

16 Do you see that?

17 A Uh-huh, I do.

18 Q Okay. It says, "Resident and/or representative
19 authorizes facility to apply for government or
20 private benefits on resident's behalf and to appeal
21 the denial of such benefits."

22 Would you agree that any such authorization or
23 application must be compliant under the law?

24 A I'm sorry. I'm going to read this. I'm not real
25 sure what you're asking. It says, "Resident and/or

1 representative authorizes facility to apply for
2 government or private benefits on resident's behalf
3 and to appeal the denial of such benefits.

4 Resident and/or representative agrees to cooperate
5 fully in obtaining such benefits including but not
6 limited to promptly and thoroughly completing all
7 required documentation necessary to obtain such
8 payments. Resident and/or representative remains
9 responsible for and will continue to pay for
10 services rendered during the pendency of any
11 eligible or benefit application."

12 Q Sure. And I guess my question -- I'll try to ask a
13 better one -- is simply: It's your expectation
14 that a resident would apply for Medicare
15 reimbursement for his stay at the facility; right?

16 A I do not myself do anything with the Medicare
17 other -- or any of that myself. I don't require
18 that as bringing the patient in for the admission.
19 That would be handled by the business office.

20 Q Okay. But it is a provision of the admission
21 agreement that you present to the family or the
22 resident; right?

23 A For -- that the patient have benefits?

24 Q Well, that the patient will "authorize the facility
25 to apply for government benefits and complete all

1 required documentation necessary to obtain such
2 payments"?

3 A The resident or representative -- that is what it's
4 saying here.

5 Q Okay. If we flip over to page 11 at the bottom,
6 page 10 of 12 of the agreement.

7 A Uh-huh.

8 Q I'll ask you about the subsection on -- entitled
9 Resident. It says, "Use of the term resident
10 herein includes the resident and any person with
11 legal authority to handle resident's funds or
12 property and/or make medical decisions depending on
13 the context in which the term is to be used."

14 So as part of this agreement, the facility
15 understands that legal authority is required;
16 right?

17 A I'm not sure if -- what would be considered legal
18 authority.

19 Q Okay. If we flip over to the next page, page 12 at
20 the bottom, 11 of 12 of this agreement, this
21 Miscellaneous section. First and foremost,
22 subpart 1 says, "In the event resident is unable to
23 physically sign his or her name, resident will sign
24 below by making a mark. If this is the manner in
25 which the agreement is signed, the witness will

1 verify the resident was aware that he or she was
2 signing an agreement and that it was his or her
3 intent to sign."

4 So there are opportunities even when someone
5 is physically disabled to make a mark to sign on
6 their own behalf; right?

7 A I'm not really certain exactly what you're saying.
8 It would -- a lot would factor into that, I would
9 assume.

10 Q Okay. Tell me what factors would factor into that.

11 A You know, the patient's condition upon arrival,
12 what their medical documentation states, whether or
13 not the patient has a representative when they
14 admit, whether they understand what you're saying.
15 So, you know, it does state here that a resident
16 would make a mark if they were unable to physically
17 sign their name, is what it says here.

18 Q Okay. And in this particular instance, you've
19 indicated that you had no interaction with
20 Mr. Chavis before he came into the facility?

21 A No, I did not.

22 Q Okay. So you don't know whether or not he was able
23 to physically sign the document --

24 A I'm not sure.

25 Q -- or had that mental capacity?

1 A I would have to review his medical documents. But
2 typically, whenever a family signs as the
3 representative, then it was determined that the
4 patient was not oriented enough to do so.

5 Q Determined by who?

6 A Different -- I mean, I would -- the hospital would
7 not allow the patient to even sign themselves out
8 of the hospital to come over to me. They get
9 permission from the patient's family member to
10 discharge them to the facility. So that could be
11 the case. I'm not real certain specifically.

12 Q All right. Number 4 down there just below that.
13 It says, "Representative will supply facility with
14 a copy of any power of attorney, durable power of
15 attorney, durable power of attorney for health
16 care, or other legal documentation permitting him
17 or her to act on resident's behalf."

18 So, again, there, as admissions director for
19 this facility, you recognize that a power of
20 attorney or some other legal documentation is
21 required for that person to sign on the resident's
22 behalf; right?

23 MR. HINES: Object to form.

24 A Right. It's saying that they would -- the
25 representative will supply the facility with a copy

1 of the power of attorney, durable power of
2 attorney. She's signing as the representative.
3 She's not signing as the power of attorney. If
4 they have the documentation, they will provide it.

5 Q (MR. McALISTER) Okay. If they don't have power of
6 attorney, they can't provide it; right?

7 A If they don't have it, they can't provide it.

8 Q Isn't that a question that's important for you to
9 ask when you're admitting a new resident to a
10 facility?

11 A Not all patients that admit to a facility have a
12 power of attorney. When they admit, they -- most
13 patients have a representative.

14 Q Okay. And that's just based on your years of
15 experience in serving as admissions director at
16 Faith Healthcare Center?

17 A What do you mean? Can you say that again?

18 Q You've indicated that most people signing -- have a
19 representative signing -- that they don't have a
20 power of attorney. Is that based on your years of
21 experience as an admissions director for Faith
22 Healthcare Center?

23 A Not necessarily my years of experience. But just
24 in general, a lot of people do not have power of
25 attorney entering into the facility.

1 Q Okay. And if they don't have power of attorney and
2 they are capable of signing on their own, you would
3 expect the resident to sign these documents; right?

4 MR. HINES: Object to form.

5 A If a patient is able to sign on their own, it is in
6 the best interest to have the patient to sign if
7 they are capable to sign.

8 Q (MR. McALISTER) Okay. Page 13, this last page of
9 this admissions agreement. The signature block
10 here, to the right you have "print name of
11 resident." It says Frank Chavis. Is that your
12 handwriting?

13 A That is, yes.

14 Q And then you have his social security number just
15 below that to the left?

16 A That's right.

17 Q Okay. But there's no signature of the resident;
18 correct?

19 A That's correct.

20 Q Okay. And then down below that is the signature of
21 representative, and that's Rebecca Stokes; right?

22 A That's correct.

23 Q Okay. And, again, to the right, is that your
24 handwriting or is that Ms. Stokes'?

25 A That's her handwriting.

1 Q Okay.

2 A To the right of her name?

3 Q Yes, ma'am.

4 A Yeah, her signature. Yes, that's her handwriting.

5 Q Okay. And then just below that at the bottom,
6 there's a signature of the facility official. And
7 that's you; right?

8 A That's correct.

9 Q Okay. And this was March 14, 2019; right?

10 A That's the date, yes.

11 Q Okay. If we flip over to the next page, this will
12 be the arbitration agreement that was made part of
13 the motion to compel arbitration in this case.

14 Okay?

15 A Uh-huh.

16 Q Walk us through this. And I just want to make sure
17 I'm clear. Again, this is separate and apart from
18 the admission agreement; right?

19 MR. HINES: Object to form.

20 A This form is the arbitration agreement. And there
21 is an admission agreement, which would be the
22 page 1 through 12 document at the front of this
23 packet. And this is the arbitration agreement.

24 Q (MR. McALISTER) Okay. And you told us earlier
25 this was not a condition of admission; right?

1 A It's not a condition.

2 Q Okay. But it is a single page document that sits
3 14 pages into this admission packet; right?

4 A Yes. In this particular packet, it's -- that would
5 be the -- it would be at the 14th page.

6 Q Okay. And where would it be in other packets?

7 A Now we do AdmitPlus. So, you know, it could be --
8 I mean, it doesn't have to be necessarily in any
9 particular order in an admission packet. It's just
10 in the packet that we provide to the patient or the
11 representative. It doesn't have to be in any
12 particular order.

13 Q Okay. But, again, with respect to this arbitration
14 agreement, at no point did you determine whether or
15 not Ms. Stokes had a power of attorney; right?

16 A I don't recall whether I asked her for power of
17 attorney or if, you know, any was provided. I
18 don't recall.

19 Q Okay. And would you expect that question to be
20 asked?

21 A I don't know if I would expect it to be asked. I
22 think we ask all admissions "do you have" --
23 there's a part in the paperwork that -- it's
24 somewhere in here -- that asks "do you have a power
25 of attorney? living will?" Any of that

1 documentation. So it is asked in the admissions
2 process if they have that or not.

3 Q Okay. And you're asking that of Ms. Stokes; right?

4 A Yes. Or -- if he -- the patient, himself, has any
5 power of attorney -- a signed paperwork. Living
6 will, durable power of attorney, do not resuscitate
7 orders. Anything like that. If he, himself, has
8 it.

9 Q Sure. But you've indicated that you didn't speak
10 with Mr. Chavis prior to these documents being
11 signed; right?

12 A Right, uh-huh.

13 Q Okay. But, again, at the bottom here, it is your
14 signature; correct?

15 A That's correct.

16 Q And this is March 14, 2019; right?

17 A That's correct.

18 Q Okay. And are you familiar at all with Mr. Chavis'
19 course at this facility?

20 A Vaguely. He wasn't there very long.

21 Q Okay. And so he was admitted around this time in
22 March 2019; right?

23 A That's correct.

24 Q Are you aware that he was discharged on April 5,
25 2019?

1 A Correct.

2 Q Okay. And then he --

3 A Or I'm not -- the date. I know he had been
4 discharged. But I don't remember the date.

5 Q So he was discharged home from the facility; right?

6 A I don't know if he was discharged home or if he was
7 discharged to the hospital. I'm not sure where he
8 was discharged to.

9 Q Okay. And, again, at no point would you have
10 presented this document to Mr. Chavis; right?

11 A I don't recall. I don't think I presented this
12 document to him, no.

13 Q Okay. And it walks us through a few of the items
14 here. It says, "It's understood that in the event
15 of any controversy or dispute between the parties
16 arising out of or relating to the facility's
17 admission agreement or breach thereof or relating
18 in any way to the resident's stay at the
19 facility" --

20 A Where are you at?

21 Q The middle paragraph. I'm sorry. It goes on to
22 say that any dispute "shall be resolved by
23 arbitration as provided by the South Carolina
24 Alternate Dispute Resolution/Mediation Rules." And
25 that's the middle paragraph there.

1 A Uh-huh. That's right.

2 Q What are the terms of the arbitration in the event
3 that this thing goes to an arbitration?

4 A I do not -- I'm not sure.

5 Q Okay. Do you know how many arbitrators would be
6 chosen?

7 A I do not. It -- I'm not sure if it says it in
8 here, but I do not recall.

9 Q Do you know how the arbitrators would be paid?

10 A I do not. I don't.

11 Q Do you know where the arbitration would be held?

12 A I do not.

13 Q Okay. Do you know how many days this arbitration
14 agreement allows to be revoked?

15 A I do not.

16 Q Okay. Does it provide any clause or provision that
17 allows the agreement to be revoked?

18 A I'm not sure. I don't know.

19 Q Okay. The last paragraph at the bottom, just above
20 the signature block. It says, "This agreement
21 shall remain in effect for all care rendered at the
22 facility and shall survive any termination or
23 breach of this agreement or the admission
24 agreement."

25 At this particular time, if Mr. Chavis was

1 discharged from the facility before the negligent
2 care, would you agree that this arbitration
3 agreement would be null and void as well?

4 MR. HINES: Object to form.

5 A Before the what? I'm sorry.

6 Q (MR. McALISTER) Sure. If Mr. Chavis was
7 discharged on April 5, 2019, this agreement would
8 no longer be effective; right?

9 MR. HINES: Object to form.

10 A Well, I mean, it says that "this agreement shall
11 remain in effect for all care rendered at the
12 facility and shall survive any termination or
13 breach of this agreement or the admission
14 agreement. By his or her signature below, the
15 executing party represents that he or she has the
16 authority to sign on the resident's behalf so as to
17 bind the resident as well as the representative."

18 Q (MR. McALISTER) Sure. And there's no reference to
19 any readmission to this facility; right?

20 A I'm not sure if that's in here or not.

21 Q Okay. That last sentence that you just read, it
22 says "the executing party represents that he or she
23 has authority to sign on resident's behalf."

24 And what authority did Ms. Stokes have?

25 A She gave her signature here to say that she has the

1 authority to sign on his behalf.

2 Q Sure. And that would be Ms. Stokes'

3 representations --

4 A Ms. Stokes, uh-huh.

5 Q -- not Mr. Chavis'; right?

6 A Right. Ms. Stokes, yes.

7 Q Okay. Let's flip to page 17 at the bottom. This
8 will be the readmission agreement. Okay? Again,
9 Mr. Chavis was discharged from the facility and
10 then readmitted on April 17, 2019; is that correct?

11 A It says readmission date 4/17/2019, uh-huh.

12 Q Okay. And would you agree that this would be a new
13 admission for purposes of his residency?

14 MR. HINES: Object to form.

15 A I'm sorry. Say that again.

16 Q (MR. McALISTER) Would this be a new admission for
17 purposes of his residency if he had been
18 discharged?

19 A No. It would be a readmission.

20 Q Okay. And would you expect that admission
21 assessments would occur with respect to his
22 readmission?

23 A I'm not sure. I don't take part in that. I'm not
24 real certain.

25 Q Okay. But if we look at -- just below this heading

1 paragraph to the second paragraph, it says "for the
2 purposes of readmitting resident to the facility."

3 Do you see that?

4 A Uh-huh, I do.

5 Q It says "and in consideration of the mutual
6 promises contained in this agreement -- in the
7 original admission agreement, the parties agree as
8 follows."

9 Okay. Is there any reference to an
10 arbitration agreement there?

11 A I do not see any reference to -- specifically to
12 the arbitration agreement.

13 Q Okay. And then just below that, paragraph 1, it
14 says, "By execution of this readmission agreement,
15 the parties acknowledge and reaffirm the terms of
16 the original admission agreement between the
17 parties and acknowledge that this readmission
18 agreement does not replace or supersede the
19 original admission agreement."

20 A That's what it says.

21 Q And is there any reference to an arbitration
22 agreement there?

23 A I don't see any.

24 Q Okay. Going back to the arbitration agreement,
25 what consideration was given to Ms. Stokes for

1 entering into that agreement and waiving that
2 jury -- right to a jury trial?

3 MR. HINES: Object to form.

4 A I'm not sure what you're asking.

5 Q (MR. McALISTER) Okay. What benefit was conferred
6 to Ms. Stokes or Mr. Chavis by the facility to
7 enter into that agreement?

8 A What benefit?

9 Q Yes.

10 MR. HINES: Object to form.

11 A I don't know of any benefit. I don't understand
12 what you mean by that.

13 Q (MR. McALISTER) Okay. If we move down to
14 paragraph 5 of this readmission agreement, it says
15 "the undersigned acknowledges that as part of
16 resident's initial admission he or she received the
17 following documents, in addition to the admission
18 agreement," and then it lists these by bullet
19 point; correct?

20 A It does.

21 Q Okay. And it carries over to page 2 of this
22 agreement, which is page 18 at the bottom; right?

23 A That's correct.

24 Q Okay. At what point does it reference the
25 arbitration agreement being provided?

1 A I don't see where it does reference that.

2 Q Okay. Now, if we look at page 2 -- it's page 18 at
3 the bottom -- here we have again the signature
4 block with Mr. Chavis' name; right?

5 A Correct.

6 Q Okay. And then there's no signature by the
7 resident; correct?

8 A Correct.

9 Q You have a signature by Ms. Stokes on April 23,
10 2019.

11 A Correct.

12 Q Okay. So that's seven days after this agreement
13 was dated; right?

14 A Correct.

15 Q Okay. And then you have your signature on the
16 17th; right?

17 A That's correct.

18 Q Okay. So I guess my question is: Why is
19 Ms. Stokes signing seven days after the
20 readmission?

21 A I'm not really certain why that took place. I
22 don't recall why that was the case.

23 Q Okay. I'm going to show you something that's
24 marked as -- it's page 57 at the bottom. Same
25 exhibit. If you'll flip to page 57. And this is

1 an acknowledgment, and it just indicates that "I
2 acknowledge I have received the following
3 information and/or documentation, which fully
4 explains my rights under federal and applicable
5 state laws as a nursing home resident and the rules
6 and regulations governing my conduct as a
7 resident." And then there are certain items that
8 are checked off; right?

9 It indicates a written copy of the facility's
10 admission agreement, facility's handbook, a written
11 copy of resident's rights, advance directives, and
12 so forth.

13 At what point does it reference the
14 arbitration agreement?

15 A I don't see where it references the arbitration
16 agreement.

17 Q Okay. But, again, this document would have been
18 signed by Ms. Stokes on the 14th?

19 A That's correct.

20 Q Okay. And you as well; right?

21 A That's correct.

22 Q Okay. And that is similar to that list of items we
23 just saw in that readmission agreement; correct?

24 A That's correct.

25 Q All right. Let's go to the next page, page 58.

1 This document is dated March 15, 2019. So a day
2 later; correct?

3 A I'm sorry. Say that again.

4 Q It's dated March 15, 2019. One day after those
5 prior documents were signed; correct?

6 A That's correct.

7 Q Okay. And it says, "I, Frank Chavis would like to
8 switch my Medicare HMO UHC to regular Medicare. I
9 would like for Faith Healthcare to assist me in
10 this change. I am requesting this change be done
11 today. Thank you."

12 And then it says responsible -- excuse me --
13 resident/responsible party. And here Mr. Chavis is
14 signing this document; right?

15 A I'm sorry. Who is signing?

16 Q Mr. Chavis.

17 A I'm not sure if that's his signature or not. I
18 didn't do this document, so I'm not sure.

19 Q Sure. That's certainly not Ms. Stokes' signature.

20 A No.

21 Q Okay. And down below that, that's Ms. Johnson's
22 signature; right?

23 A That's correct.

24 Q Okay. But you're not sure whether or not this is
25 Mr. Chavis signing as resident?

1 A I'm not sure.

2 Q All right. But you would --

3 A I was not there.

4 Q -- agree if he can sign this Medicare form on
5 March 15, 2019, he has the capacity to sign the
6 arbitration agreement?

7 MR. HINES: Object to form.

8 A I couldn't agree to that one way or another. I
9 didn't do this document, so I wouldn't want to
10 speak to that.

11 Q (MR. McALISTER) Okay. But it's part of the
12 business file that is part of the admissions
13 process at Faith Healthcare Center; right?

14 A I do believe that that -- yes. This is
15 Miss Vernita's documentation.

16 Q Okay. And it says Chavis Business File 58 at the
17 bottom; right?

18 A That's correct.

19 Q Okay. And if somebody signed this on Mr. Chavis'
20 behalf or somebody that wasn't authorized to sign,
21 that would be improper; right?

22 A I'm not sure. I didn't have any interaction with
23 this, so I'm not -- I wouldn't want to speculate on
24 that.

25 Q Okay. Ms. Johnson could answer that question?

1 A I guess she could.

2 Q Okay. Well, she signed it as the business office
3 manager; right?

4 A She signed it, yes.

5 Q And these documents that go to Medicare go under
6 penalty of perjury; right?

7 A Yes.

8 Q Okay. So it's very important that this be
9 accurate; correct?

10 A I would imagine so, yes, sir.

11 Q All right. Flip over to page 61. This is a
12 financial acknowledgment and questionnaire dated
13 March 14, 2019; right?

14 A Yes, sir.

15 Q Okay. And at the top we have Frank Chavis as the
16 resident's name. And then down on the left-hand
17 side we have initials FC. Do you see that?

18 A I do.

19 Q Okay. And that stands for Frank Chavis; right?

20 A I would imagine that that is what that stands for.

21 Q Okay.

22 A Again, this is not my documentation here.

23 Q Sure. If we flip over to page 63, the third page
24 of the document, again, we have a signature of a
25 resident. And whose signature is that?

1 A I do not know.

2 Q Okay. Would you expect it to be Mr. Chavis' if
3 someone is signing on his behalf?

4 A I don't -- I can't tell you. I'm sorry. I don't
5 have any familiarization with this form here. It's
6 not a part of admissions.

7 Q Okay. Again, that would be Ms. Johnson's job?

8 A Miss Vernita would do this paperwork here.

9 Q But it's part of this business file; right?

10 A I mean, it's in his file here.

11 Q Sure. And these acknowledgments and this financial
12 paperwork are part of this admissions process;
13 correct?

14 A Not my admission process. I do not have these
15 forms. This particular form here, that would be
16 Miss Vernita. So I can't speak to what she had
17 signed.

18 Q Sure. But if you flip over to page 1 of this
19 business file, that checklist, it says -- just
20 below arbitration agreement -- financial
21 acknowledgment and questionnaire. And, yes, you're
22 right. Ms. Johnson checked that box.

23 But that would be part of the admissions
24 process; right?

25 A Her part. That would be her part of the admission

1 process, not my part.

2 Q Which is on this admissions checklist; correct?

3 A It is on the admissions checklist, yes.

4 Q All right.

5 A But not done by me.

6 Q Let's turn to page 75. This is a document from the
7 Social Security Administration. In the middle of
8 the page it says "Important Reminder - Penalty of
9 Perjury." And it's hard to read. It's a little
10 distorted. Do you see that?

11 A I see that.

12 Q Okay. And it says, "You declared under penalty of
13 perjury" -- and then there's a portion that's not
14 copied correctly. But I'll represent it says
15 something along the lines of all the information on
16 the application is true and accurate to your
17 knowledge. Do you see that?

18 A Where is that again? Oh, I see it. Where it's
19 missing a little bit of it there.

20 Q Sure.

21 A Uh-huh.

22 Q And this document is dated May 17, 2019, at the
23 top; right?

24 A That is the date on this form.

25 Q Okay. If we flip over to the next page, page 76,

1 halfway down the document, it says "information
2 about the person for whom you are applying." It
3 says, "Frank D. Chavis has no relatives or close
4 friends who live with or are interested in being
5 his representative payee."

6 Now, you told me earlier that Ms. Stokes was
7 his representative.

8 A His representative. Not representative payee. I
9 don't do these documents. I'm not familiar with
10 this.

11 Q But she's also his relative; right?

12 A Yes, she's his daughter, I understand. But I don't
13 do this. I don't know anything about this form
14 here.

15 Q Right. In this particular instance it says, "I
16 request that social security benefits for Frank D.
17 Chavis be paid to Faith Residential Care as
18 representative payee." So the facility would be
19 the payee; right?

20 A I'm not sure. I don't do anything with the
21 financial side. I'm not sure if that's what that
22 means.

23 Q All right. It goes on to say -- just two sentences
24 later -- "Frank D. Chavis does not have a legal
25 guardian"; right?

1 A That's what this form says.

2 Q So that would indicate to us that he did not have a
3 legal guardian; right?

4 A That's what this form says.

5 Q Under penalty of perjury; correct?

6 A That's what this form says. I'm not familiar with
7 this form. I'm not -- I don't even know where it
8 come from. I'm not sure about this form. I don't
9 have any dealing with it. I've never seen it
10 before.

11 Q Okay. But it is in this business file --

12 A It is.

13 Q -- for the facility; right?

14 A Uh-huh.

15 Q Now flip over to page 84. This is a Medicare
16 Screening Questionnaire. Dated -- admit date
17 4/17/2019 at the top. Do you see that?

18 A That's right.

19 Q And then down just below that on the left, it says
20 "Prior Stay Information: hospital."

21 "Hospital or hospital-based nursing home," and
22 then it says "4/5/19 to 4/17/19."

23 A Where are you -- oh, okay. I see now.

24 Q Top left corner. I'm sorry.

25 A All right.

1 Q Yes, ma'am. Earlier in the admission agreement, we
2 discussed the resident's obligation under that
3 admissions agreement for the facility to apply for
4 Medicare on his behalf; right?

5 A To apply for Medicare on his behalf?

6 Q Yes, ma'am. This would be a Medicare Screening
7 Questionnaire; right?

8 A That's what this form is called.

9 Q Okay. If we flip over to page 4 of the form, which
10 is page 87 at the bottom, there is a signature --
11 beneficiary or representative signature. Do you
12 see that?

13 A I do.

14 Q And then it says just below that "name of person
15 assisting in the completion of this form." And to
16 the right it says "business office"; correct?

17 A Uh-huh. That's what it says.

18 Q Whose signature is that?

19 A I have no idea.

20 Q Okay. And what's the date on this form?

21 A 8/27/15.

22 Q I'll represent to you that's 8/27/2019.

23 A Oh, I'm --

24 Q It does look like a 5.

25 A Yeah.

1 Q Now, I'm curious how this form could have been
2 signed on 8/27/2019 if Mr. Chavis died on June 6,
3 2019.

4 A I'm not sure, sir. I didn't -- this is not a form
5 that I do myself, personally. So I can't speak to
6 that. I don't know.

7 Q Okay. But it is, again, in the business file for
8 this facility related to Mr. Chavis; right?

9 A I mean, it's in this file that you gave to me, yes.

10 Q Now I just want to circle back to page 58. This is
11 that Medicare form that we initially looked at
12 dated March 15, 2019.

13 A Uh-huh, yes, sir.

14 Q Can you agree if Mr. Chavis had the capacity to
15 sign this form he had the capacity to sign the
16 admission agreement and arbitration agreement in
17 this case?

18 A I cannot make that determination. I'm not sure.

19 Q If he signed this form, if this is his signature,
20 should he have been signing that arbitration and
21 admission agreement?

22 A I can't speak to that. I'm not sure.

23 Q Well, how is it, Ms. Dials, that a family signs on
24 somebody else's behalf if you're not sure?

25 MR. HINES: Object to form.

1 A I have -- cannot speak to what Miss Vernita in the
2 business office had -- what paperwork she had
3 signed.

4 I spoke with the patient's representative.
5 She stated she was the patient's representative and
6 signed as the patient's representative. So that is
7 what I have here. But I cannot speak to what
8 Ms. Johnson had signed.

9 Q (MR. McALISTER) Okay. Mr. Chavis never told you
10 that Ms. Stokes was the patient representative?

11 A I did not have that conversation with Mr. Chavis.

12 Q And you agree that documents in that business file
13 should be true and accurate?

14 A I would think that anybody's file should be true
15 and accurate.

16 Q Especially something requiring a signature; right?

17 A Yes, it should be true and accurate.

18 MR. McALISTER: Nothing further at this
19 time.

20 EXAMINATION

21 BY MR. HINES:

22 Q Ms. Dials, I have just a couple of questions.

23 A Yes, sir.

24 Q And I'm looking at this Chavis Business File 1.

25 It's the first page of what's been marked as

1 Plaintiff's Exhibit 2.

2 A Yes, sir.

3 Q Do you see here where -- this language -- it says
4 Required Paperwork/Form Title.

5 A Yes, sir.

6 Q And you see down here where -- below that, included
7 in that list is the arbitration agreement. Do you
8 see that?

9 A That's correct.

10 Q Now, does that mean the arbitration agreement is
11 required to be signed as a condition of the
12 admission?

13 A No, it's not required to be signed if they choose
14 not to sign it. Then I would just leave that
15 blank, sign "refused" on the form, and file it
16 away.

17 Q Because I wouldn't want there to be any confusion
18 about what this word "required" means there, that
19 that means it's required to be signed.

20 A It's not required as a part of the admission -- to
21 be signed for the patient to admit.

22 Q Now, if it is signed, is it a part of the
23 admissions materials?

24 A If the form is signed, it gets filed away with the
25 admission paperwork, yes. But it's not a part

1 of -- it does not have -- it's not required in
2 order for the patient to admit. But it stays with
3 the patient's file.

4 MR. HINES: That's all I've got.

5 REEXAMINATION

6 BY MR. McALISTER:

7 Q Just so I'm clear, the admission agreement
8 indicates attachments or exhibits. What are those
9 attachments or exhibits?

10 A Say that again.

11 Q The admissions agreement makes reference to
12 exhibits or attachments. What are those exhibits
13 or attachments?

14 MR. HINES: Object to form.

15 A I'm not -- I'm not real sure without reading over
16 the document. I'm not real sure what you mean by
17 that.

18 Q (MR. McALISTER) Okay. I'll just end with, whether
19 or not an arbitration agreement is signed doesn't
20 make it effective; right?

21 A I'm not sure. I'm not sure what that means, to be
22 honest with you.

23 Q Sure. If an arbitration agreement is signed by
24 someone who is not supposed to sign it, doesn't
25 mean it's binding; right?

1 A I'm not sure.

2 Q If I sign an arbitration agreement on your behalf,
3 would that be binding?

4 A I'm not sure.

5 Q Okay. Can I go buy a car on your behalf?

6 A I would hope not.

7 Q How about a house?

8 A I would hope not.

9 Q Okay. So in order to sign a binding document that
10 waives a Constitutional right, would you agree that
11 that person signing that document must have
12 requisite authority?

13 MR. HINES: Object to form.

14 A I would not -- if a person represents themselves as
15 the patient's representative, that is the patient's
16 daughter, so yes.

17 Q Okay. That's how you do it at Faith Healthcare
18 Center?

19 A Yes.

20 Q And that's something you do on a regular basis?

21 A Yes, sir.

22 MR. McALISTER: No further questions.

23 MR. HINES: Nothing for me.

24 FURTHER DEPONENT SAITH NOT.

25 (Whereupon, there being no further questions, the

1 deposition was concluded at 11:58 a.m.)
2 (*This transcript may contain quoted material.
3 Such material is reproduced as read or quoted by
4 the speaker.)
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State of South Carolina)
)
County of York) CERTIFICATE

Be it known that Darlene Pastel took the foregoing proceeding and hereby attests:

That I was then and there a notary public in and for the State of South Carolina at-large and that by virtue thereof I was duly authorized to administer an oath;

That the deponent/witness was first duly sworn to testify to the truth, the whole truth, and nothing but the truth concerning the matter in the controversy aforesaid;

That the foregoing transcript represents a true, accurate, and complete transcription of the testimony so given at the time and place aforesaid to the best of my skill and ability;

That I am neither a relative nor an employee of any of the parties hereto, nor of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action.

Unless otherwise noted, this notary public administered the oath. Please refer to the transcript for any exceptions.

In witness thereof, I have hereunto affixed my signature and title.



Darlene Pastel, CVR-CM

Date: 10/10/2022
Notary public for South Carolina
My Commission expires 09/20/2027



Date: 3-15-19

To whom this may concern:

I, Frank Chavis would like to switch my Medicare HMO UHC to Regular Medicare. I would like for Faith Healthcare to assist me in this change. I'm requesting this change be done today. Thank You,

Resident/Responsible Party

Vernita Johnson, BOM

[Signature]
Vernita Johnson

REDACTED

Timmons ville, SC

REDACTED

617 W. Marion Street, Florence, SC 29501 | P 843-669-9958 F 843-629-1894

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	
Apryl Walsh as Power of Attorney for Audrey Burns,	)	C/A No. 2019-CP-23-02050
	)	
	)	
Plaintiff,	)	ORDER
	)	
Versus	)	
	)	
Windsor House Greenville-FHE, LLC d/b/a	)	
Windsor House Greenville, and Renee Wilson,	)	
	)	
Defendants.	)	

This matter came before the Court in Greenville County on October 4, 2019, on Defendants' Motion to Dismiss and Motion to Compel Arbitration in regard to Plaintiff's Complaint. Present for the hearing were Bradley H. Banyas of Mt. Pleasant, S.C. for the Plaintiff and Skyler C. Wilson of Charleston, S.C. for the Defendants.

This matter arises out of a civil action involving allegations of nursing home abuse and neglect and corporate negligence with claims of improper staffing, training, and underfunding. Both parties submitted briefs/memoranda as well as exhibits in support of their positions. Having listened to oral arguments from counsel and having reviewed the parties' legal memoranda for the reasons more fully set forth below, the Court hereby denies the Defendants' Motion to Dismiss and Motion to Compel Arbitration.

BACKGROUND

Plaintiff Apryl Walsh (hereinafter "Daughter") is the Daughter and Power of Attorney for Audrey Burns (hereinafter "Resident"), a resident at the Defendants' community residential care facility. The community residential care facility is Windsor House Greenville-FHE, LLC d/b/a Windsor House Greenville (hereinafter "Facility"). Resident was admitted to the Facility on July 31, 2017. Plaintiff alleges that Resident suffered from multiple preventable falls resulting in painful injuries, including a fractured right hip and fractured right wrist. Defendants deny these allegations.

At the time of admission, Daughter signed a “Resident Services Agreement” which included in a paragraph reading “ARBITRATION AGREEMENT.” Plaintiff argued that the Arbitration Agreement was unenforceable because Daughter lacked legal authority to bind Resident to arbitration.

LEGAL ANALYSIS AND CONCLUSIONS

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008). It is well established that “where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. If no agreement is found to exist, the court must deny any application to arbitrate.” Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 667 (S.C. 2007) (internal citation omitted). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013). Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007) (“General contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause.”).

I. The Arbitration Agreement is Unenforceable Because Daughter Lacked Capacity to Contract on Behalf of Resident.

The arbitration agreement with Windsor House was included within the Resident Services Agreement with Windsor House Greenville under paragraph two. On July 31, 2017, Daughter signed on the line for “Resident/Responsible Party Signature.” Plaintiff’s Affidavit submitted for the Motion states that at the time admission to the facility, Resident was competent to make her own legal decisions, and that Daughter did not have any actual or apparent authority given to her

by Resident to make legal decisions on her behalf. No evidence was presented by the Defendants to indicate otherwise.

In South Carolina, actual authority is expressly conferred upon the agent by the principal, but apparent authority exists where the principal knowingly permits the agent to exercise authority or when the principal holds the agent out as possessing such authority. Robertson v. S. Fin. of South Carolina, Inc., 365 S.C. 6, 9, 615 S.E.2d 112, 115 (S.C. 2005). It is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority. Frasier v. Palmetto Homes of Florence, 473 S.E.2d 865 (S.C. App. 1996). Because as of the date of admission Daughter did not have a valid durable power of attorney or court appointed guardianship, Daughter therefore lacked actual authority to bind Resident to arbitration. There is likewise no evidence to show that Daughter held herself out to have apparent authority, nor did she intentionally mislead any Windsor House employee. Without proper authority to bind the Resident to arbitration, the arbitration agreement itself is unenforceable.

II. Plaintiff is Not Equitably Estopped from Denying the Arbitration Agreement.

Defendants also argue that Plaintiff should be equitably estopped from denying the enforcement of the arbitration provision contained in the Resident Services Agreement, and that under the doctrine of equitable estoppel a party should not be permitted to sue under certain provisions of a contract while disclaiming provisions of the same contract. "Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements." Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conduct be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting the estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped;

and (3) make a prejudicial change in position in reliance on the conduct of the party to be estopped. Id.

Defendants have not met their burden to establish these elements. There is no evidence Daughter acted in a way amounting to a false representation to Defendants regarding Resident's status, or that Daughter intended for Defendants to act in reliance on her conduct. In fact, Resident's mental capacity would have enabled Defendants to simply have Resident sign the Resident Services Agreement. Additionally, the evidence shows Defendants cannot meet their burden to show they lacked knowledge or the means of knowledge of the truth of the facts in question. Equitable doctrines such as estoppel favor diligent parties who actively endeavor to protect their rights. A person cannot claim to have been misled and cannot rely on equitable estoppel if the party, by exercise of reasonable diligence, could have acquired knowledge to determine the truth of the facts in question. Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

Defendants certainly had the capacity to determine whether Daughter had authority to bind arbitration on Resident's behalf. Defendants are a sophisticated business entity frequently interacting with residents and their families during the nursing home admission process. Defendants are familiar with the legal concepts of guardianship and powers-of-attorney, and levels of decision-making capacity. Defendants had the ability to ask Daughter if she was Resident's guardian or power of attorney and had the ability to request supporting documents. The evidence shows that they failed to do so. Further, given Resident's mental capacity at the time of admission, Defendants had the ability to ask Resident to sign the Resident Services Agreement, or ask Resident if Daughter had her express permission to agree to all terms of the Resident Services Agreement. The evidence again shows that they failed to do this. Since Defendants have not cited or provided evidence on all required elements of equitable estoppel, Plaintiff is not equitably estopped from denying the arbitration agreement.

III. Defendant Waived Their Right to Compel Arbitration by Not Timely Raising It as an Affirmative Defense.

A motion to dismiss a Complaint due to the lack of jurisdiction of the forum for which the dispute is to be heard is an affirmative defense which must be properly raised and pled with the Defendants' Answer. "In pleading to a preceding pleading, a party shall set forth affirmatively the defenses: accord and satisfaction, arbitration and award...and any other matter constituting an avoidance or affirmative defense." South Carolina Rules of Civil Procedure, Rule 8(c). Rule 8(c) is the same as the Federal Rule except for some affirmative defenses are added to the list as a guide. The drafters note that "the aim is to avoid 'surprise' defenses permissible under the old general denial answer, and require the Defendant to also stick to 'fact' pleading." Affirmative defenses to a cause of action in any pleading must generally be asserted in a party's responsive pleading. Strickland, 375 S.C. at 85. "The failure to plead an affirmative defense is deemed a waiver of the right to assert it." Wright v. Craft, 372 S.C. 1, 21, 640 S.E.2d 486, 497 (Ct. App. 2006), citing Adams v. B & D, Inc., 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989)). Miller v. British America Assurance Co., 238 S.C. 94, 119 S.E.2d 527 (1961) (referring to an arbitration agreement set up in the answer as a "special defense"); 5 Am.Jur.2d *Arbitration and Award* § 51 at 556-57 (1962) (one's right to arbitrate given by contract may be waived by failing to raise the right in an answer).

Plaintiff filed the present action on April 12, 2019. Defendants filed their Answer on May 28, 2019, notably without asserting arbitration as an affirmative defense. Several months later, after participating in discovery, Defendants filed a Motion to Dismiss, or in the alternative stay proceedings, and compel arbitration on August 15, 2019. Because Defendants failed to raise arbitration as an affirmative defense in its initial Answer filed on May 28, they waived their right to seek arbitration.

IV. Defendants Waived Their Right to Compel Arbitration by Participating in Discovery.

Noted above, Plaintiff filed the present action on April 12, 2019. The following day on May 29, Plaintiff served Interrogatories, Requests for Production, and Requests to Admit. Defendant's served their First Set of Interrogatories and Requests for Production on June 14, 2019. Counsel for the Defendants requested an extension to respond to Plaintiff's discovery requests, with a proposed due date of July 29, which was granted. Defendants responded to Plaintiff's Requests to Admit on July 29 and issued a subpoena to Greenville Place (a community residential care facility) on August 1. Plaintiff communicated pursuant to SCRCP R. 11 regarding the Defendant's overdue Interrogatories and Requests for Production on August 5, requesting responses within ten (10) days. Having not received any additional responses, Plaintiff filed a motion to compel on August 15, which is the same day that the Defendants moved to compel arbitration.

"It is generally held that the right to enforce an arbitration clause may be waived." Liberty Builders, Inc. v. Horton, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). "In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration. There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." Id. at 665, 521 S.E.2d at 753 (citations omitted) (internal quotations omitted).

In the present case, the Court finds that the Plaintiff has been prejudiced by the Defendants delay in demanding arbitration. Defendants served their own Interrogatories and Requests for Production, requested an extension to answer Plaintiff's discovery requests, responded to Plaintiff's Requests to Admit, and issued a subpoena constitutes a waiver of the right to arbitrate, as these actions would be subject to the arbitration agreement itself. As such, Defendants have waived their right to seek to compel arbitration.

CONCLUSION

Therefore, based upon the foregoing reasons, the Defendants' Motion to Dismiss, or in the Alternative Stay Proceedings, and Compel Arbitration and Motion for Protective Order are hereby DENIED. Further, the Plaintiff's Motion to Compel Discovery Responses is hereby

GRANTED. The parties shall fully and completely respond to each other's respective discovery requests within twenty-one (21) days of this Order.

IT IS SO ORDERED.

The Honorable Edward W. Miller
Judge, Thirteenth Judicial Circuit
State of South Carolina

Greenville, South Carolina
Date: _____



Greenville Common Pleas

Case Caption: Apryl Walsh , plaintiff, et al vs. Windsor House Greenville FHE LLC , defendant, et al

Case Number: 2019CP2302050

Type: Order/Other

So Ordered

s/ Edward W. Miller

Electronically signed on 2019-10-25 14:51:15 page 8 of 8

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2017-CP-07-02636

JOSEPH HOLMES, as Personal Representative of the ESTATE
OF DAVID HOLMES
PLAINTIFF(S)BAYVIEW MANOR, LLC, d/b/a BAYVIEW MANOR; EPIC
GROUP, LP; and EPIC GENERAL, LLC
DEFENDANT(S)

Submitted by: Eric M. Poulin

Attorney for : ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (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), SCRCPP; ☐ Rule 41(a), SCRCPP (Vol. Nonsuit); ☐ Rule 43(k), SCRCPP (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCPP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: Defendants' Motion for Non-Jury Trial is DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge	Judge Code	Date
For Clerk of Court Office Use Only		
This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:		
Eric M. Poulin / Stefan B. Feidler	W. McElhaney White	
32 Ann Street	101 West St. John Street, Suite 200	
Charleston, SC 29403	Spartanburg, SC 29306	
ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)	
	CLERK OF COURT	

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOR THE 14TH JUDICIAL CIRCUIT

CASE NO: 2017-CP-07-02636

JOSEPH HOLMES, as Personal
Representative of the ESTATE OF DAVID
HOLMES,

Plaintiff(s),

v.

BAYVIEW MANOR, LLC, d/b/a
BAYVIEW MANOR; EPIC GROUP, LP;
and EPIC GENERAL, LLC,

Defendant(s).

ORDER DENYING DEFENDANTS'
MOTION FOR NON JURY TRIAL

THIS MATTER is before the Court on Defendants' Motion for Non-Jury Trial.

Arguments were held on April 25, 2018 in the Beaufort County Courthouse. Present at the call of the case was attorney Eric M. Poulin, representing the Plaintiff, and attorney W. McElhaney White, representing the Defendants. For the following reasons, Defendants' Motion is respectfully **DENIED**.

BACKGROUND

The Decedent, David Holmes, was a resident of Defendants' long term care facility. Decedent was first admitted on December 2, 2014, and re-admitted on February 17, 2015. Decedent was incompetent during both admissions. At each admission, Decedent's family signed an Admission Agreement.¹ The Admission Agreements contained the following provision:

¹ Plaintiff argues that the family members lacked authority to sign these Admission Agreements to the extent they contain jury waiver clauses. However, because the Court finds this waiver was invalid and unenforceable in the first instance, it is not necessary to discuss the issues of authority or agency.

Waiver of Jury Trial: (Please read carefully)

Resident hereby knowingly, voluntarily, and intentionally waives the right to trial by jury with respect to any litigation, including any counterclaim which Resident may assert, arising from or relating to this Agreement or any other document connected with this Agreement, or arising out of or relating to any of the said documents or any relationship between the Facility and Resident, including the Resident's admission itself, or any other course of conduct, course of dealing statements (whether verbal or written) or actions of the facility or Resident.

Resident represents and warrants that the waiver contained in this Paragraph has been freely and voluntarily made after reviewing the same, or having had an opportunity to review the same, with counsel of Resident's choice.

The Admission Agreements also contained an Arbitration Clause which states that arbitration is "Optional" and allows the person signing to decline by marking an "X." At each admission, the family declined arbitration by marking an "X." Upon Decedent's death, his Estate brought this medical negligence action against the Defendants and requested a jury trial. Defendants now seek to invoke the jury waiver clause of the Admission Agreements, and seek an order setting this case for non-jury disposition.

LAW

An illegal contract is unenforceable. Berkebile v. Outen, 311 S.C. 50, 53 n. 2, 426 S.E.2d 760, 762 n. 2 (1993). "The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Id. Federal regulations require Medicare and Medicaid certified facilities to accept Medicare/Medicaid reimbursement rates as payment in full. See 42 C.F.R. § 489.30; 42 C.F.R. § 447.15. Moreover, such facilities, in the case of an individual who is entitled to medical assistance, must "not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under

the state plan...any other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay at the facility.” 42 U.S.C. § 1396r(c)(5)(A)(iii).

Finally, it is well settled that to be valid and enforceable, a contract must be supported by valuable consideration. Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct.App.1984)(“[a] contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act.”). Consideration may consist of “some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.” Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998).

ANALYSIS

In the instant case, it is undisputed that Decedent was a Medicare and Medicaid beneficiary while residing at Defendants' facility and that the facility was billing and accepting payment from Medicare and Medicaid for Decedent's care.² Therefore, the question of enforceability turns, in part, on whether the jury waiver provision was a mandatory part of the Admission Agreement and a required pre-condition to admission. During arguments, counsel for Defendants was unable or unwilling to take a position on this issue. However, in light of the following analysis, the Court finds that this provision is unenforceable in either case.

If the jury waiver provision was a required pre-condition to admission, then this requirement was a clear violation of Federal Law. 42 U.S.C. § 1396r(c)(5)(A)(iii) prohibits a

² During the hearing, counsel for Defendants stated his belief that Decedent was Medicare eligible but only “Medicaid pending” during his stay. However, Mr. White has since confirmed that Decedent was, in fact, Medicaid eligible during his stay.

facility such as Defendants' from soliciting or accepting "any other consideration" as a condition to admission outside of the Medicaid payments when admitting a patient in Decedent's position. By requiring Decedent's family to waive his right to a jury trial as a condition of admission, Defendants' were requiring and accepting consideration in addition to Medicaid payments. Therefore, the jury waiver clause would be unenforceable due to its illegality.

Alternatively, if the jury waiver was not a precondition to admission, then it fails for lack of consideration. As noted, the waiver, as written, works only in one direction. When asked during arguments what the consideration for the waiver might be, counsel for Defendants argued only that the admission was the consideration for the waiver. When pushed on whether any additional consideration was present (separate and apart from the admission and care) counsel agreed there was none. Here, Defendants cannot have it both ways. They cannot, on the one hand, argue that the waiver was not consideration for the admission but, on the other, argue that the admission was valuable consideration for the waiver. For the waiver to be enforceable as a non-pre-condition to admission, it must be supported by some other valuable consideration, which it is not.

CONCLUSION

Therefore, we are left with a clause that, if a pre-condition to admission, is unenforceable under the doctrines of illegality; if not a precondition to admission, void for lack of consideration. For these reasons, Defendants' Motion for Non-Jury trial is respectfully **DENIED.**

IT IS SO ORDERED!

Dated this ____ day of May, 2018
Walterboro, S.C.

The Honorable Perry M. Buckner, III
Presiding Judge, 14th Judicial Circuit



Beaufort Common Pleas

Case Caption: David Holmes Estate Of , plaintiff, et al VS Bayview Manor Llc ,
defendant, et al

Case Number: 2017CP0702636

Type: Order/Jury Trial

It is so Ordered

s/ Perry M Buckner III 2122

Electronically signed on 2018-05-15 11:49:25 page 7 of 7

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	TWELFTH JUDICIAL CIRCUIT
COUNTY OF MARION	)	CASE NO. 2022-CP-33-00183
REBECCA C. HAGOOD	)	
as Personal Representative of the Estate of	)	
Frank D. Chavis, Sr.,	)	
	)	DEFENDANTS' MEMO IN SUPPORT OF
Plaintiff,	)	MOTION TO COMPEL ARBITRATION
	)	
vs.	)	
	)	
PALMETTO FAITH OPERATING, LLC	)	
d/b/a Faith Healthcare Center and	)	
BROOKS ARNETTE,	)	
	)	
Defendants.	)	

Defendants, Palmetto Faith Operating, LLC d/b/a Faith Healthcare Center (“the Facility”) and Brooks Arnette (“Arnette”), submit this memo in support of their motion to compel arbitration.

The Facility is a skilled nursing facility, and Plaintiff’s¹ decedent, Frank D. Chavis (“Mr. Chavis”), was a resident of the Facility intermittently from March 14, 2019, through May 28, 2019. Following Mr. Chavis’s death, which occurred after his discharge from the Facility, Plaintiff filed this wrongful death and survival action based on alleged deficiencies in the care/treatment Mr. Chavis received at the Facility. In conjunction with his admission to the Facility, however, an Arbitration Agreement was executed that covers the entirety of Plaintiff’s claims against Defendants. Despite Plaintiff’s contentions to the contrary, the Arbitration Agreement is enforceable—or at least Plaintiff should be estopped from denying its

¹ “Plaintiff” refers to Rebecca C. Hagood as Personal Representative of the Estate of Frank D. Chavis, Sr. Rebecca C. Hagood is the daughter of Mr. Chavis, and in her individual capacity, she is referred to as “Mrs. Hagood” or, as she is also known, “Becky Stokes” or “Rebecca C. Stokes,” which is the name under which, as further explained below, she executed (on behalf of Mr. Chavis) the Admission Agreement and Arbitration Agreement at issue.

enforceability—and, as such, Defendants respectfully request that this Honorable Court compel this matter to arbitration pursuant to the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, et seq.

BACKGROUND

With the help of Mrs. Hagood, Mr. Chavis was admitted to the Facility on March 14, 2019. In conjunction with Mr. Chavis’s admission, Mrs. Hagood signed an Admission Agreement (and, about a month thereafter, a Re-Admission Agreement²), and an Arbitration Agreement on his behalf. (See **Exhibits 1, 2, and 3**, respectively, attached hereto).

Accordingly, Mr. Chavis was admitted to the Facility, whereupon he received and accepted various benefits attendant thereto, including, without limitation, skilled nursing care and treatment, room, board, and other services.

Mrs. Hagood explicitly represented that she was authorized to admit Mr. Chavis to the Facility and to execute documents on his behalf, including the Arbitration Agreement. Indeed, the very first provision of the Admission Agreement states that *all information submitted to the Facility* is true and correct, including Mrs. Hagood’s authority to bind her father, Mr. Chavis. (See **Ex. 1.**)

Mrs. Hagood signed the Admission Agreement on behalf of Mr. Chavis as his “Representative.”

The relevant provisions of the Arbitration Agreement state the following:

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

² The Re-Admission Agreement expressly “reaffirm[s] the terms of the original Admission Agreement” and “acknowledge[s] that [it] does not replace or supercede the original Admission Agreement.”

or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules. (*See Ex. 3.*)

The Arbitration Agreement further provides:

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

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

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

Moreover, the Arbitration Agreement states "It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assignees, personal representatives, guardians, or any persons deriving their claims through or on behalf of Resident." (*Id.*) By its terms, the Arbitration Agreement is binding on the Facility's "agents, employees, and servants" as well. (*Id.*) This includes Arnette, whom Plaintiff sues as "the Administrator of the Facility." (Am. Compl. ¶¶ 4.)

The Arbitration Agreement was executed by Mrs. Hagood as the "Resident's Durable Power of Attorney for Health Care"/ "Resident's Legal Guardian"/ "Resident's Responsible Party" Representative," collectively referred to as "Representative," of Mr. Chavis and Kelly Dials on behalf of the Facility. (*See id.*; *see also* **Deposition of Kelly Dials, attached hereto as Exhibit 4.**) Ms. Dials conducted the admissions process for Mr. Chavis. When asked whether

anyone else (besides her) would have been responsible for presenting or aiding in the completion of the arbitration agreements, she responded “no.” (*Id.* at 18:15-19.) She recalled Mrs. Hagood (Ms. Stokes at the time) and testified that she gave her signature, indicating she had the authority to complete admissions paperwork, including the Arbitration Agreement. (*Id.* at 30:21-31:13; 66:24-67:6.)

Further, Ms. Dials testified that she explains the meaning of the arbitration agreement to the patient or their loved one. (*Id.* at 18:6-14.) She testified that Mrs. Hagood represented that she had the authority to sign the Arbitration Agreement, Admission Agreement and other documents on her father’s behalf. (*Id.* at 66:24-67:4.) Mr. Chavis never repudiated or invalidated Mrs. Hagood’s act of signing the Arbitration Agreement and never indicated to Ms. Dials that his daughter lacked the authority to sign on his behalf.

Because the acts complained of by Plaintiff fall within the scope of the Arbitration Agreement, the Court should stay these proceedings, and compel this matter to arbitration. 9 U.S.C. § 3.

ARGUMENT

I. THE FAA GOVERNS THE ARBITRATION AGREEMENT.

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

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

(See **Ex. 3.**) This must be enforced like any other contract term. *Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 196, 844 S.E.2d 66, 70 (Ct. App. 2020) (“We first consider whether the FAA applies. We hold it does, for two reasons. First, the [subject contract] provides the parties ‘specifically agree that this transaction involves interstate commerce.’ We must enforce this agreement like any other contract term.”) (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363–64 (2001) (finding the FAA applied because the parties had agreed the subject contract involved interstate commerce)).

Moreover, and in any event, the FAA applies “to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.” *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363; *see also Allied–Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress’s power under the Commerce Clause). 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).

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

“[T]he basic purpose of the [FAA] is to overcome courts’ refusals to enforce agreements to arbitrate”³ and “ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement.” *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). To that end, the FAA provides that an arbitration agreement is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in

³ *Allied–Bruce*, 513 U.S. at 270.

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).

III. THE ARBITRATION AGREEMENT IS VALID ON ITS FACE.

The Arbitration Agreement is valid on its face. In other words, there is nothing within the four corners of the document itself that calls its validity into question. It bears Mrs. Hagood's signature on behalf of Mr. Chavis, along with Mrs. Hagood's express representation that she is authorized to sign for Mr. Chavis.⁴ Additionally, the Agreement lists Mr. Chavis as a party. It is countersigned by the Facility. It is duly supported by consideration and sets forth all necessary terms, containing, as it does, the parties' mutual promises to submit a certain defined scope of disputes to binding arbitration⁵ before an arbitrator who is either agreed upon by the parties themselves or selected by the Court, in a proceeding to be conducted pursuant to the South Carolina ADR Rules, which will result in a decision that is enforceable in a court of competent jurisdiction. To require more just because an arbitration agreement is in issue would violate the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts. *Concepcion*, 563 U.S. at 339.

Moreover, the Arbitration Agreement is not unconscionable. For an agreement to be deemed unconscionable, there must be both (1) an absence of meaningful choice on the part of one

⁴ By virtue of her signature, Mrs. Hagood is "presumed to have read, understood, and assented to [the] terms" of the Arbitration Agreement, *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) ("[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms."), including, of course, the express representation therein of her authority to act on Mr. Chavis's behalf. Moreover, there is an implied covenant of good faith and fair dealing in every contract, *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) ("There exists in every contract an implied covenant of good faith and fair dealing."), and Mrs. Hagood is no less bound by this covenant than the Facility.

⁵ The parties' mutual promises to arbitrate constitute sufficient consideration. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997) ("A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement.") (citing *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 304, 468 S.E.2d 292, 300 (1996) ("[T]he exchange of promises qualified as consideration."); see also *Evatt v. Campbell*, 234 S.C. 1, 8, 106 S.E.2d 447, 451 (1959) ("Mutual promises also constitute a good consideration.")).

party due to one-sided contract provisions and (2) terms that are so oppressive no reasonable person would make them and no fair and honest person would accept them. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007). Neither is the case here.

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

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

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

By signing the Arbitration Agreement and Admission Agreement, Mrs. Hagood, acting on behalf of Mr. Chavis, represented that she understood and assented to their terms. Indeed, she was given the option of entering into the Arbitration Agreement – *or not* – and she freely and voluntarily made the decision to proceed. The Arbitration Agreement by its plain language was

not a precondition of admission to the Facility and simply could not have been an adhesion or “take it or leave it” contract. Mrs. Hagood had the option not to enter into the Arbitration Agreement on behalf of her father, yet she voluntarily did so, voluntarily did not retract her agreement thereto, and her father stayed at the Facility and received and accepted direct benefits attendant to his admission.

Defendant offered the option of entering into the Arbitration Agreement and, on Mr. Chavis’s behalf, Mrs. Hagood made the decision to proceed. Mrs. Hagood did not have to accept this offer nor has there been any allegation or evidence that she was coerced into signing anything. Nonetheless, even if Plaintiff could demonstrate that there was an absence of meaningful choice, a finding of unconscionability would still not be warranted in the present case, as Plaintiff must still show that the “terms [of the agreement] are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669.

When determining this aspect of unconscionability, this Court must focus on “whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision maker.” *Id.* at 25, 644 S.E.2d at 668. Under the terms of the Arbitration Agreement, the parties are to select a third party arbitrator *jointly* “from a panel having experience and knowledge of the health care industry.” *See Ex. 3*. If the parties are unable to agree upon such an arbitrator, the agreement vests the Court with authority to make a selection. The selected neutral arbitrator is vested with authority to hear the case and make a decision which is “binding on all parties.” As a result, it can only be said that the Arbitration Agreement allows for complete mutuality of remedies. Neither party is given an advantage by its terms. The Arbitration Agreement simply binds the parties (both sides) to resolve disputes via arbitration. And there is nothing about the Arbitration Agreement—which,

again, calls for arbitration conducted pursuant to the South Carolina ADR Rules—that would suggest it is not geared towards achieving an unbiased decision by a neutral decision-maker. Indeed, Rule 1 of the South Carolina ADR Rules expressly states, “These rules shall be construed to secure the just, speedy, inexpensive and collaborative resolution in every action to which they apply.”

Lastly, the United States District Court for the District of South Carolina and trial courts around South Carolina have repeatedly upheld the validity of arbitration agreements nearly identical to the one at issue in this matter. In evaluating these arbitration agreements in the context of nursing home admissions, federal courts in South Carolina have all agreed that these agreements are not unconscionable. *McCutcheon, supra*, at *3; *THI of S.C. at Columbia, LLC v. Wiggins, C/A* No. 3:11-888-CMC, 2011 WL 4089435, at *6 (D.S.C. Sept. 13, 2011) (Currie, J.); *Benson, supra*. Along similar lines, any holding that the Arbitration Agreement at issue is unconscionable simply because it was executed in the context of an admission to the skilled nursing facility would be in violation of the clear precedent under *Kindred* and the FAA, which instruct that arbitration agreements must be placed on equal footing with all other types of contracts. Accordingly, any argument by Plaintiff that the Arbitration Agreement is unconscionable is unfounded and must be rejected.

IV. PLAINTIFF'S CLAIMS ARE WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT.

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

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

This plain language clearly embraces the subject matter of Plaintiff's claims. And even if there were "any doubts concerning the scope of arbitrable issues[,] [they] should be resolved in favor of arbitration" *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999); *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001) ("[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.").

V. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE, OR AT LEAST PLAINTIFF SHOULD BE ESTOPPED TO DENY ITS ENFORCEABILITY.

A. The Plain Language of the Agreement Binds Plaintiff

According to the plain language of the Arbitration Agreement and consistent with her actions during the admissions process, Mrs. Hagood represented herself to admissions personnel at the Facility as her father's representative with the authority to sign documents and enter

agreements on his behalf.⁶ It was clearly Mrs. Hagood's intention to bind Mr. Chavis according to the terms of the Admission Agreement and Arbitration Agreement. Moreover, Mr. Chavis evinced no intentions or directions to the contrary. Accordingly, the plain language of the Arbitration Agreement confirms that Mrs. Hagood was authorized to enter this Agreement binding his mother to arbitration, and the Agreement directly applies to the instant dispute. For these reasons, the Court should find this Agreement is valid and enforceable, and the present action must be stayed and compelled to arbitration.

Furthermore, the fact that Mrs. Hagood signed the Arbitration Agreement upon Mr. Chavis's initial admission to the Facility on March 14, 2019, and that she did not execute a new agreement upon his readmission to the facility a few weeks later, has no impact whatsoever on the enforceability of the Agreement in relation to the Plaintiff's claims in this case. Mrs. Hagood signed the "Readmission Agreement" for her father on April 17, 2019, which expressly states that it "does not replace or supersede the original Admission Agreement." (*See Ex. 2.*) Rather, the parties acknowledged and re-affirmed the terms of the original Admission Agreement. (*Id.*) The terms of the original Admission Agreement were incorporated by reference in the Readmission Agreement. (*Id.*)

This Court has found the plain language of arbitration agreements to support enforceability in at least two other cases with circumstances nearly identical to the case at bar. *See e.g. Macie Price v. THI of South Carolina at Magnolia Manor Inman, LLC et. Al*, 2018-CP-42-01054 (S.C. Com. Pls. August 7, 2018) (attached hereto as **Exhibit 5**); *Josephine Spears v. Rehab Center of Cheraw, LLC et al.* 2019-CP-13-00308 (January 10, 2020) (attached hereto as

⁶ *See Ex. 3* "It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assignees, personal representatives, guardians, or **any persons deriving their claims through or on behalf of Resident.**" (emphasis added).

Exhibit 6). In both cases, the plaintiff was the wife of a resident at a skilled nursing facility in South Carolina. The resident's wife in each case executed an admissions agreement and an arbitration agreement *identical* to the ones in the case at bar, and as here represented to the facility that she had authority to enter these agreements on her husband's behalf. (See **Ex. 5**, p. 2-3; see **Ex. 6**, p. 1.) Similar to Mrs. Hagood's deposition testimony in this case, the plaintiffs in *Price* and *Spears* later executed contradictory affidavits in opposition to the Defendants' motion to compel arbitration, disclaiming their authority to enter the agreements. Nevertheless, this Court found that the signatory plaintiffs' attestations of authority in the arbitration agreements prevailed over the contradictory affidavits, and bound plaintiffs in both cases to the terms of the agreements. The Court should reach the same conclusion in the present case, and enforce the Arbitration Agreement.

Specifically, this Court determined in *Price* that "the terms of the Arbitration Agreement clearly apply to the instant dispute[,] because was it clearly the intent of the wife to bind her husband (and herself, as personal representative) according to the plain language terms of the arbitration agreement. (See **Ex. 5**, p. 5.) Likewise, in *Spears*, the arbitration agreement at issue contained an express attestation of authority to enter into the agreement on behalf of the resident identical to Plaintiff's attestation in the Arbitration Agreement noted above. As such, this Court in *Spears* held, in part, that the wife's authority to sign the arbitration agreement at issue was "valid on its face" by its plain language (and indeed the arbitration agreement as a whole was found to be valid on its face) and that the skilled nursing facility had no obligation whatsoever to inquire as to the signatory plaintiff's authority beyond her own attestation. (See **Ex. 6**, p. 4.) As in *Price* and in *Spears*, Mrs. Hagood in this matter expressly attested to her own authority to enter into the Arbitration Agreement on behalf of her father, Mr. Chavis. Therefore, the Court

should find that Plaintiff is bound by the plain language of the Arbitration Agreement and compel this matter to arbitration.

B. Mrs. Hagood Possessed the Apparent and Inherent Authority to Execute and Bind Mr. Chavis to the Arbitration Agreement, and/or Plaintiff should be Estopped from Denying Mrs. Hagood's Authority.

1. Agency Relationship

In addition to representing herself as authorized to enter the Arbitration Agreement on her father's behalf by the plain language of the Arbitration Agreement and by her own express representations, Mrs. Hagood possessed the *apparent and inherent authority* to bind Mr. Chavis under this Agreement. A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)).

Alternatively "[a]n agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties." *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145-146, 425 S.E.2d 764, 773 (Ct. App. 1992.) The doctrine of apparent authority provides that a principal may be bound by the acts of its agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

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

When signing the arbitration agreement, the brother in *Carraway* left the resident signature line blank and signed it as the "authorized representative" of his sister. Suit was later filed and the facility moved to compel arbitration, which the trial court granted. On appeal, the Alabama Supreme Court affirmed the trial court's decision holding, relevant here, that the resident's brother possessed the apparent authority to enter into the arbitration agreement on his sister's behalf, as evidenced by the fact that she never objected to him signing on her behalf and the arbitration agreement specifically provided that any person authorized by the resident may execute it on her behalf. *Id.* See also, *Tenn. Health Mgmt. v. Johnson*, 49 So. 3d 175 (Ala. 2010) (holding that a daughter possessed the apparent authority to enter into an arbitration agreement on her mother's behalf). Notably, the Supreme Court of Alabama's holding in *Carraway* was applied as "persuasive authority" by this Court in *Price, supra.* (Ex. 6, p. 8.)

Clearly, in this matter, Mrs. Hagood held herself out as an agent for her father without any indication to the contrary when she executed various admission documents on behalf of her

father, including the Arbitration Agreement. Based on Mrs. Hagood's conduct and explicit representations, Ms. Dials believed she possessed the authority to execute all admissions documents on her behalf, including the Arbitration Agreement. Therefore, it was Ms. Dials's and the Facility's reasonable and justified belief that Mrs. Hagood was her father's authorized representative and had the authority to execute the documents on her behalf.

Moreover, by allowing Mrs. Hagood to procure his admission to the Facility and, thereafter, by accepting the benefits of the contracts entered into in connection with that admission, Mr. Chavis represented that Mrs. Hagood was Mr. Chavis's authorized representative to act on his behalf in connection with admission. *See R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000) (If a principal holds another out as having the authority to act on his behalf or knowingly permits another to act as his agent, "either *generally* or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances") (emphasis added).

A holding to the contrary would contradict the fundamental concept of apparent agency: *an agency relationship is based on a third party's understanding of a principal's manifestations and a reasonable belief that the agent has been authorized to act.* Ms. Dials and the Facility had reason to believe that, by allowing Mrs. Hagood to sign the admissions paperwork, including the documents providing for Mr. Chavis's stay and the skilled nursing care provided at the Facility, Mr. Chavis cloaked Mrs. Hagood with the authority to execute those documents. Further, Neither Mr. Chavis nor any other family member repudiated or invalidated Mrs. Hagood's actions. Instead, Mr. Chavis accepted the benefits of the contracts with the Facility by remaining at the Facility and receiving skilled nursing care and services, thereby ratifying his daughter's actions.

Because no one attempted to repudiate the Arbitration Agreement or even question it, the Facility was further justified in believing Mrs. Hagood had been authorized to execute it. It is clear that an apparent agency relationship existed such that the Arbitration Agreement should be deemed enforceable.

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

The basis for this doctrine is that, as between an equally innocent principal and third party, the third party should prevail. This well-established legal principle follows from one of the cardinal principles of agency law: that third parties, such as the Facility, should not be disadvantaged because they dealt with an agent rather than a principal. As set forth above, there is no dispute as to whether Mrs. Hagood was authorized to admit her father to Faith. To the

extent Plaintiff takes issue with Mrs. Hagood's authority to bind her father to the Arbitration Agreement and the specific terms therein, such actions merely accompanied and were incidental to Mrs. Hagood's authority to admit her father to the Facility. The Facility should not be disadvantaged for acting in accordance with the express representations of Mrs. Hagood regarding her authority.

2. Agency by Estoppel

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

In *Price*, supra, this Court ruled that the Plaintiff was estopped from denying that she was her sister's authorized agent during the latter's admission to the skilled nursing facility:

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

present based upon the record before this Court such that the arbitration agreement is similarly enforceable.

(See **Ex. 6**, p. 9.) Accordingly, the court concluded that the arbitration agreement was valid and enforceable.

Similarly, in *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011) the United States District Court of South Carolina concluded the plaintiff was estopped from denying he had authority to bind his wife to arbitration. (Attached hereto as **Exhibit 7**.) As in the present case, the husband in *McCutcheon* executed a number of documents on his wife's behalf upon her admission to a nursing home facility, including an admissions agreement and an arbitration agreement. As in this case, the admissions agreement in *McCutcheon* provided that the husband was his wife's legal representative for the purposes of admission, as he was her next-of-kin and represented himself as authorized to make health care decisions on her behalf. The court held:

Even if the Arbitration Agreement and Admissions Agreement constitute two separate contracts, plaintiff takes inconsistent positions regarding these contracts, which were executed by the same parties under the same purported authority. [Accordingly,] [i]t would be inequitable [] to allow plaintiff to assert that Elijah McCutcheon had authority to sign the Admissions Agreement on behalf of [his wife], but lacked such authority to sign the Arbitration Agreement. For these reasons, the court finds that plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

Id. at *5.

Like in *Price* and *McCutcheon*, it would be disingenuous and inequitable to allow the Plaintiff in this case to assert that she was her father's authorized agent as to the Admissions Agreement, consents, and various other forms she executed on admission but not the Arbitration Agreement. In the case at bar, the Facility had no knowledge or reason to believe that Mrs.

Hagood was not Mr. Chavis's authorized agent for purposes of executing the Arbitration Agreement and other admissions paperwork. The Facility relied on the affirmative representations of Mrs. Hagood in admitting her father to the Facility for the provision of the skilled nursing care. Additionally, the Arbitration Agreement was signed and executed with the expectation that all disputes between the parties would be governed by its contents and such representations were relied upon by the Facility, only for the instant lawsuit to seemingly ignore the binding agreement. Accordingly, Plaintiff should be estopped from denying the validity of the Arbitration Agreement.

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

In any event, the Admission Agreement and the Arbitration Agreement merged (and therefore should be considered as one), and because Mr. Chavis received direct benefits under the Admission Agreement (with which the Arbitration Agreement merged), Plaintiff should be estopped to deny the enforceability of the Arbitration Agreement.

1. Merger

The Arbitration Agreement and Admission Agreement were executed by Mrs. Hagood on behalf of Mr. Chavis. The enforceability of these instruments must be determined in accordance with the general principles of contract law and agency law that would apply to any other contract. *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010).

The Arbitration Agreement provides that “any controversy or dispute between the parties *arising out of or relating to Facility's Admission Agreement . . . or relating in any way to Resident's stay at Facility*” shall be resolved by arbitration pursuant to the terms of the Arbitration Agreement. (*See Ex. 3.*) (Emphasis added.) As previously described, the Arbitration

Agreement and the Admissions Agreement were both signed by Mrs. Hagood on behalf of her father on the same day, at the same time, for the same purpose, and in the course of the same transaction—Mr. Chavis’s admission to the Facility.

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

Indeed, in *Coleman v. Mariner Health Care, Inc.*, even though our Supreme Court found against merger on the particular facts of the case, it nonetheless confirmed the validity of the general proposition of law on which the *Coleman* appellants based their merger/equitable estoppel argument in the very context of nursing home admission agreements and arbitration agreements. 407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (“Appellants’ equitable

estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. . . . Here, the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.”).

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

The Admission Agreement and the Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction.⁷ They should be considered merged, i.e., they should be considered and construed together as effectively one contract.

⁷ To be clear, *Coleman* unequivocally answers the question of whether the Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. As the *Coleman* Court expressly observed regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), “the documents were executed at *the same time, by the same parties, for the same purposes, and in the course of the same transaction.*” 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

2. Equitable Estoppel of Merged Agreement

“South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including . . . estoppel.” *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019). “Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity.” *Int’l Paper Co. v. Schwabedissen Maschinen & Anlaeën GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000) (citation and internal quotation marks omitted). “A nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause.’” *Id.* (quoting *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999)); *see also Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290–297, 733 S.E.2d 597, 601–605 (Ct. App. 2012) (applying the direct benefits test as set forth in *International Paper Co.* to reverse the circuit court’s denial of a motion to compel arbitration); *Wilson*, 426 S.C. 326, 339–345, 827 S.E.2d 167, 174–177 (favorably discussing the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals’ earlier decision in *Pearson*, 400 S.C. 281, 733 S.E.2d 597, and under which the Facility contends Plaintiff is estopped to deny the enforceability of the Arbitration Agreement here, where Ms. Doe received direct benefits (in the form of her admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement merged); *see also id.* at 340, 827 S.E.2d at 175 n. 6 (while expressing no opinion on the petitioner’s alternative argument based on the application of the state’s “traditional” six-factor test for estoppel, which the *Wilson* Court found unpreserved for

review, observing nonetheless that that test, i.e., “[t]he traditional test referenced by [the] [p]etitioners,” “has been analyzed most-often in *non*-arbitration cases”) (emphasis added).

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

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

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

. . . .

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

524 F. Supp. 2d 742, 749-50 (E.D. Va. 2007) (quoting in part *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bide. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981) (citing in part *Int'l Paper Co.*, 206 F.3d at 416) (internal quotations omitted)).⁸

Of note, this Court applied this precise reasoning in *Spears*, referenced above. (See **Ex. 6**, pg. 9). In that case and as discussed above, a woman admitted her husband to a skilled nursing facility and in connection with his admission, executed admission and arbitration agreements *identical* to the ones here. The agreements were both executed by the woman and a representative of the skilled nursing facility at the same time. This Court considered the agreements as merged and held that the plaintiff was estopped from refusing to comply with the arbitration agreement where, like here, the resident received “direct benefits from the Admission Agreement in the form of his admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein.” *Id.*, pg. 10 (footnote omitted).

The key to determining when direct benefits estoppel may be applied is whether the contractual benefits flowing to the nonsignatory, i.e., the party to be estopped, are direct or indirect. See *Wilson*, 426 S.C. at 343, 827 S.E.2d at 176 (“It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In

⁸ See also *THI of S.C. at Columbia, LLC v. Wiggins*, C/A No. 3:11–888–CMC, 2011 WL 4089435, at *6 (D.S.C. Sept.13, 2011) (“Hall's care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate.”); accord *THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. 7:13-CV-2929-BHH, 2014 WL 6863550, at *4 (D.S.C. Oct. 31, 2014), *report and recommendation adopted*, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. Mar. 19, 2015).

contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.”) (internal citations omitted). Direct benefits estoppel simply recognizes, and remedies, the patent inequity that would result if a party were able to enjoy direct benefits under an agreement containing an arbitration clause while at the same time denying that the arbitration clause is enforceable.

Here, Mr. Chavis embraced all aspects of the Admission Agreement with the Facility. Indeed, his receipt of direct benefits under the Admission Agreement (with which the Arbitration Agreement merged) cannot reasonably be denied. Undoubtedly, Mr. Chavis received direct benefits (in the form of room, board, various amenities/services, and the care/treatment he received at the Facility). To deny his receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of his residency: every night’s stay, every meal, every amenity/service provided, every instance of care/treatment, essentially every moment at the Facility—even Plaintiff’s complaint does not go nearly so far as that. (*See generally* Am. Compl.)

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

As described, the Plaintiff’s allegations fall within the scope of the Arbitration Agreement. In accordance with the foregoing law, Plaintiff cannot assert claims against the

Facility based upon certain terms of the Admission Agreement while repudiating the Arbitration Agreement and should be prevented from doing so pursuant to the doctrine of equitable estoppel. Pursuant to numerous orders of this Court and numerous other courts on essentially identical facts and concerning identical arbitration agreements, where a non-signatory receives the benefits of the contract, which Mr. Chavis certainly did here, Plaintiff must be prevented from refusing to comply with the Arbitration Agreement merely because Mr. Chavis did not sign it.

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

To the extent Plaintiff may argue the Admission Agreement and Arbitration Agreement are not merged pursuant to *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 350, 755 S.E.2d 450, 452 (2014), *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 769 (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), such reliance is misplaced.

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

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

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

Instead, in the present case, the agreements were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction and, therefore, the documents merged. *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (citing *Klutts*, *supra*, 268 S.C. at 88, 232 S.E.2d at 24).⁹

⁹ To be clear, even though the *Coleman* Court found evidence of an intent contrary to merger on the particular facts before it, it nonetheless recognized as *correct* the general proposition of law on which the *Coleman* Appellants’ based their merger argument, i.e., the *Coleman* Court expressly observed that the admission agreements and arbitration agreements before it (which, in this respect, are no different than the instant agreements—though that is not the case in regard to the material facts bearing on the question of merger), “the documents were [indeed] executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction.” 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

While the Admission Agreement in this case does contain an “Entire Agreement” clause, unlike the admission agreements in those other cases, the provision in this case does not separately reference the Arbitration Agreement (in fact, it doesn’t refer to it at all). Indeed, directly contradicting the idea of “separatedness” (in the parlance of the *Coleman* Court¹⁰), 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.” And 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).

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,

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

both instruments provide that South Carolina law applies except where it is displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, the termination provisions provide no evidence of “separatedness.” Again, the only reason for the Arbitration Agreement is the Admission Agreement—the only point of the Arbitration Agreement is to cover disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still *connected* to the Admission Agreement even after the termination of the Admission Agreement. This is simply how agreements to arbitrate work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) (“Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.”).

The merger question examines whether, “where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,”¹¹ there is evidence to upset the *default presumption* that the contracting parties intended the instruments to be construed together as effectively one contract. As a practical matter, if this presumption is to mean anything, upsetting it must require actual evidence of sufficient probity that, notwithstanding the concurrence of all the circumstances that must come together for the presumption of merger to even arise in the first place—i.e., same time, parties, purpose, and transaction—a reasonable, non-speculative inference can be drawn that the parties’ possessed a contrary intention. *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125,

¹¹ *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

130 (Ct. App. 2005) (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). No such inference can be drawn here. It does not even make sense that the parties would not have intended the Admission Agreement and the Arbitration Agreement to merge.

Such superficial things as the fact that the admission arbitration agreements have their own titles, are separately paginated, and/or are separately signed cannot suffice to show evidence of intent contrary to merger. To point to such things is really to do no more than to point out that the admission agreement and arbitration agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger. The very nature of merger is to *merge* separate documents.

And—besides the fact that there is no ambiguity as to the merger of the Admission Agreement and the Arbitration Agreement to begin with—to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that, as a matter of law, *merger is the default position*, i.e., it is *presumed*, and that this presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these align—same time, same parties, same

purpose, same transaction—our courts will consider and construe the documents together *unless* there is evidence of a contrary intention.

The *Coleman* Court clearly endorsed the rule of law that a presumption of merger arises where, as here, multiple instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction and that upsetting this presumption requires evidence “indicating [(i.e., affirmatively showing)] a contrary intention.” 407 S.C. at 355, 755 S.E.2d at 455. While it is true that the *Coleman* Court also cited the rule that ambiguity is construed against the drafter,¹² (a) it did so in dicta and (b) it never addressed the logical inconsistency—which thus remains fair game as an argument in this case¹³—in recognizing a rule of law creating a presumption in favor of merger (i.e., in recognizing the occurrence of a set of circumstances (same time, parties, purpose, and transaction) as sufficiently probative to affirmatively tip the scales in favor of merger) while at the same time allowing that presumption to be completely overturned by evidence that is merely ambiguous, i.e., that does not even go so far as to clearly indicate a contrary intention and, indeed, is actually still susceptible to a reasonable conclusion in favor of merger. *See S.C. Dep’t of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) (“A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation.”). To allow the merger presumption to be upset based on evidence that is merely ambiguous is to allow the exception to devour the rule.

Even though, as noted above, the Arbitration Agreement was not a precondition to admission, this does not mean that the two instruments did not work hand-in-hand once the arbitration agreement came into existence (i.e., once it was in fact entered into). While it is true

¹² *Id.* at 407 S.C. at 355–56, 755 S.E.2d at 455.

¹³ To be clear, none of *Coleman*’s progeny has addressed this either.

that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true; the Admission Agreement is indeed necessary to the Arbitration Agreement. In other words, yes, the Admission Agreement *could* have stood on its own, without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with; *but that is not what happened*. The Arbitration Agreement was in fact executed, of course, and it was executed under circumstances giving rise to a presumption of merger—again, same time, parties, purpose, and transaction. Unlike the Admission Agreement, however, which is capable of making sense either standing alone or, alternatively, together with the Arbitration Agreement, the Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the Arbitration Agreement’s) sole reason for being.

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

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

4. Respectfully, the Court of Appeals’ recent decision in *Solesbee v. Fundamental Clinical and Operational Services, LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023), is erroneous and should not control the disposition of the instant motion.

During the pendency of this case, the Court of Appeals decided *Solesbee*, wherein it affirmed the denial of a motion to compel arbitration in the face of a merger/equitable estoppel argument substantially the same as the Facility’s here. Indeed, the Arbitration Agreement and Admission Agreement in issue in the instant case are the same form documents as in *Solesbee*.

In affirming the denial of the motion to compel arbitration in *Solesbee*, the Court of Appeals likened that case to *Coleman* and *Hodge* and found that the circuit court had correctly determined that there was no merger of the Admission Agreement and the Arbitration Agreement and, in turn, had properly denied the Facility’s equitable estoppel argument. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149 (“Thus, like the *Coleman* and *Hodge* courts, we find there was no merger in this case and [the Facility’s] equitable estoppel argument was properly denied.”).¹⁴ Most respectfully, the Court erred in its reliance on *Solesbee*—and, indeed, the *Solesbee* Court’s merger analysis is itself erroneous—and *Solesbee* should not control the disposition of the instant motion.¹⁵

¹⁴ To be clear, the Court of Appeals’ decision in *Solesbee* turned on its affirmance of the circuit court’s ruling against *merger* of the Arbitration Agreement and the Admission Agreement. Consequently, the *Solesbee* Court did not address the substance of the *equitable estoppel* prong of the merger/estoppel argument.

¹⁵ In this regard, Defendants would also note that it is still possible that the Supreme Court might review *Solesbee* via a writ of certiorari.

First, the *Solesbee* Court erroneously found against merger on the basis that “the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law.” 438 S.C. at 648, 885 S.E.2d at 149. It is simply not true that “the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law.”

Regarding governing law, what the Admission Agreement actually states is this: “This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which the Facility is located.” (Admission Agreement p. 10.) And what the Arbitration Agreement actually states is this:

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.

(Arbitration Agreement.)

Without question, the Federal Arbitration Act, 9 U.S.C. §§ 1–16 (the “FAA”), applies to the Arbitration Agreement.¹⁶ Again, the FAA applies whenever an arbitration agreement

¹⁶ The Arbitration Agreement expressly states that the FAA applies (Arbitration Agreement), 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 that the subject contract involved interstate commerce)). Moreover, and in any event, the FAA applies “to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.” *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363; *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress’s power under the Commerce Clause); *id.* at 273–77

involves interstate commerce—and this is so even where an arbitration clause is included in a single instrument that is otherwise governed by South Carolina law. *See Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (The FAA “create[d] a body of federal substantive law,” which is “applicable in state and federal courts.”); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) (“[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.”); *see also Allied-Bruce*, 513 U.S. 265, 270–77. Moreover, even under the FAA, the general state law of contracts continues to apply. *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). Further still, the Arbitration Agreement expressly calls for the arbitration proceedings to be conducted pursuant to the South Carolina ADR Rules. (Arbitration Agreement.)

Again, essentially, the provisions of the Admission Agreement and the Arbitration Agreement regarding governing law are to the effect that South Carolina law applies except where displaced by federal law, and they do not support any reasonable inference of any intent contrary to merger.

(1995) (explaining that unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce). 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).

Second, the *Solesbee* Court erroneously found against merger on the basis that “[t]he Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement ‘shall survive any termination or breach of this Agreement or the Admission Agreement.’” 438 S.C. at 648–49, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger here. Unlike in *Coleman* and *Hodge*, the supposed textual recognition of the Admission Agreement as being separate from the Arbitration Agreement is not included in any “Entire Agreement” provision. Rather, the “Entire Agreement” provision of the Admission Agreement expressly states, “other Admissions materials . . . are made a part of this Agreement by reference.” (Admission Agreement p. 12.) And as in the instant case, the Arbitration Agreement that was signed in conjunction with the admission is clearly among these “other Admissions materials.” Moreover, that the Arbitration Agreement “shall survive any termination or breach of this Agreement or the Admission Agreement” just means that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. Again, this is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. 2d at 612–13 (“Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.”).

Third, the *Solesbee* Court erroneously found against merger on the basis that “[t]he Arbitration Agreement is silent as to whether it could be revoked, but the Admission Agreement provides, ‘Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.’” 438 S.C. at 649, 885 S.E.2d at 149. This provides no

reasonable inference of an intent contrary to merger. The absence of a “revocation” provision is one way in which the Arbitration Agreement is materially different from those at issue in *Coleman* and *Hodge*, and, for that matter, *Thompson*. Moreover, the *Solesbee* Court drew a false equivalency between the concepts of “revocation” and “termination.” A “revocation” is an annulment (i.e., making something a nullity),¹⁷ whereas “termination” is putting or bringing something that properly exists to an end—which is materially different from making something a nullity, i.e., void and never having properly existed in the first place. *Id.* at p. 1482. And, again, that the Arbitration Agreement survives the termination of the Admission Agreement is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. at 612–13.

Fourth, the *Solesbee* Court erroneously found against merger on the basis that “the Admission Agreement and Arbitration Agreement were separately paginated and had their own signature pages.” 438 S.C. at 648, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. Again, 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 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 whether they were intended to 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

¹⁷ *Black’s Law Dictionary* p. 1321 revocation (7th ed. 1999); *id.* at 89 annulment (“The act of nullifying or making void.”).

arise, i.e., separate instruments, shows an intention contrary to merger. Again, the very nature of *merger* is to *merge* multiple things together as one.

Finally, the *Solesbee* Court erroneously found against the Facility on merger on the basis that Arbitration Agreement was voluntary. 438 S.C. at 648, 885 S.E.2d at 149. While, again, it is certainly true that the Arbitration Agreement was voluntary (*see* No. 3 above), this fact provides no reasonable inference of an intent contrary to merger. Again, 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 the resident to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was signed. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. Again, the two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

To say that the Arbitration Agreement was not required for admission, which it was not, is not to say that it was not intended to be part of the admissions materials in the event it was agreed to, which it was, by Mr. Dover on Ms. Solesbee's behalf in *Solesbee* and by Mrs. Hagood on Mr. Chavis's behalf in the instant case. 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”).)

Again, 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 the resident’s relationship with the Facility: the Admission Agreement setting forth the terms of the admission, the Arbitration Agreement providing for arbitration of disputes arising out of the admission. (*Compare* Admission Agreement (setting forth the terms of the admission) *with* Arbitration Agreement (providing for arbitration of disputes arising out of the admission).)

CONCLUSION

For the reasons set forth herein, this Defendant respectfully requests that this Court enter an Order staying the pending action and compelling arbitration.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,
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August 18, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	TWELFTH JUDICIAL CIRCUIT
COUNTY OF MARION	)	CASE NO. 2022-CP-33-00183
REBECCA C. HAGOOD	)	
as Personal Representative of the Estate of	)	
Frank D. Chavis, Sr.,	)	
	)	MOTION TO ALTER, AMEND, AND/OR
Plaintiff,	)	RECONSIDER ORDER
	)	DENYING DEFENDANTS' MOTIONS
vs.	)	TO COMPEL ARBITRATION
	)	
PALMETTO FAITH OPERATING, LLC	)	
d/b/a Faith Healthcare Center and	)	
BROOKS ARNETTE,	)	
	)	
Defendants.	)	

TO: THE HONORABLE H. STEVEN DEBERRY, IV, Presiding Judge, and PLAINTIFF'S COUNSEL OF RECORD

NOW COME Defendants, Palmetto Faith Operating, LLC d/b/a Faith Healthcare Center ("the Facility") and Brooks Arnette, by and through their undersigned counsel, pursuant to Rule 59(e), SCRCF, and, on the grounds set forth below, hereby most respectfully move this Honorable Court to alter, amend, and/or reconsider its order filed September 8, 2023 (the "Subject Order"), denying Defendants' respective motions, filed July 13, 2022, to compel Plaintiff's¹ claims to arbitration (collectively, the "Underlying Motions").

¹ "Plaintiff" refers to Rebecca C. Hagood as Personal Representative of the Estate of Frank D. Chavis, Sr. Rebecca C. Hagood is the daughter of the decedent Frank D. Chavis, Sr. ("Mr. Chavis"), and in her individual capacity, she is referred to as "Mrs. Hagood" or, as she is also known, "Becky Stokes" or "Rebecca C. Stokes," which is the name under which she executed (on behalf of Mr. Chavis) the Admission Agreement and Arbitration Agreement at issue.

1. **Contending that the Underlying Motions should have been (and should now be) granted, Defendants most respectfully ask the Court to (re)consider and expressly rule on each and every distinct issue/argument raised in support of the Underlying Motions, i.e., each and every distinct issue/argument set forth in the Underlying Motions themselves; in Defendants' memo in support of the Underlying Motions, filed August 18, 2023; and via oral argument at the hearing on the Underlying Motions on August 21, 2023, 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 most respectfully ask the Court to (re)consider and expressly rule on/address the following particular points.**
 - (a) **The Subject Order misstates the burden on Defendants with respect to their merger/equitable estoppel argument when it states, “Defendants must prove a valid and enforceable arbitration agreement was signed in a ‘knowing, voluntary and intentional’ capacity.”²**

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

² (Subject Order p. 3.)

To be clear, Defendants’ merger/equitable estoppel argument is a standalone argument. Conceptually, Defendants’ merger/equitable estoppel argument is not an argument for the *enforceability* of the Arbitration Agreement per se but rather for Plaintiff to be *estopped to deny the enforceability* of the Arbitration Agreement. *See 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). In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and because Mr. Chavis effectively embraced and directly benefitted from the Admission Agreement, Plaintiff, as personal representative of Mr. Chavis’s estate, is estopped to deny the enforceability of the Arbitration Agreement merged therewith.

Accordingly, any contrary analysis/argument regarding the Arbitration Agreement’s, or, for that matter, the Admission Agreement’s,³ supposed lack of validity (whether because of Ms. Hagood’s lack of common law agency authority, actual⁴ or apparent⁵, or the lack of power of

³ By its very nature, i.e., because Defendants’ argument in favor of direct benefits estoppel is based on the direct benefits Mr. Chavis received under the Admission Agreement (with which the Arbitration Agreement merged), this argument applies with equal force to estop Plaintiff from denying the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.

⁴ (See Subject Order pp. 5–6.)

⁵ (See Subject Order pp. 7–8.)

attorney⁶ or because of the inapplicability of the South Carolina Adult Health Care Consent Act or of Ms. Hagood's lack of authority thereunder⁷ or because of another alleged defect in contract formation) is beside the point and unavailing to refute Defendants' merger/equitable estoppel argument, which, again, turns not on the question of whether the Admission Agreement/Arbitration Agreement is enforceable per se but whether Mr. Chavis and, in turn, Plaintiff, as personal representative of his estate, should be estopped to deny its enforceability.

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 Defendants 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. Hagood's signing of the Admission Agreement/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.").

⁶ (See Subject Order pp. 2, 5–6.)

⁷ (See Subject Order pp. 8–9.)

- (b) **The FAA requires arbitration agreements to be placed on equal footing with all other contracts under South Carolina law, and the propositions cited in the Subject Order about “interpreting a jury trial waiver narrowly”⁸ and giving the party opposing arbitration “the benefit of all reasonable doubts and inferences that may arise”⁹ violate the FAA.**

As the Subject Order recognizes, the FAA applies here.¹⁰ “[T]he basic purpose of the [FAA] is to overcome courts’ refusals to enforce agreements to arbitrate”¹¹ and “ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement.” *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). To that end, the FAA provides that an arbitration agreement is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. “By its terms, the [FAA] leaves no place for the exercise of discretion by a . . . court, but instead *mandates* that . . . courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis added); *see also* 9 U.S.C. § 4 (“The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.*”) (emphasis added).

⁸ (Subject Order p. 3.)

⁹ (Subject Order p. 3.)

¹⁰ (Subject Order p. 4 (“Here, the Arbitration Agreement states it shall be governed by and enforced under Federal law, specifically, the [FAA], as opposed to state arbitration law, unless ‘contrary to state law’.”).) Out of an abundance of caution, Defendants would note, however, that the Arbitration Agreement does not include the “unless ‘contrary to state law’” language quoted in the Subject Order. Rather, the Arbitration Agreement provides as follows: “The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the [FAA], notwithstanding any contrary provision of this Agreement or contrary state law.”

¹¹ *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 270 (1995).

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 with approval authorities in favor of “interpreting a jury trial waiver narrowly”¹² and giving the party opposing arbitration “the benefit of all reasonable doubts and inferences that may arise.” (Subject Order p. 3.) But the FAA requires arbitration agreements to be placed on equal footing with all other contracts under state law and prohibits courts from singling them out for disparate treatment 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, arbitration agreements cannot be subjected to state-law rules that call for their narrow interpretation or otherwise tilt the scales against their enforcement unless

¹² (Subject Order p. 3.)

the same rules also apply to all other contracts. Defendants are aware of no such general rules under South Carolina law,¹³ and accordingly, to apply them in this case violates the FAA.

- (c) **Again, the FAA requires arbitration agreements to be placed on equal footing with all other contracts under South Carolina law, and the purported rule, cited in the Subject Order, that “[w]hen a facility knows a resident is competent at the time of admission and is allowed to sign other forms, the resident should sign the arbitration agreement”¹⁴ (i) is not in fact a rule to begin with and (ii) even assuming, *arguendo*, it is, it violates the FAA.**

The Subject Order cites *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 574, 813 S.E.2d 292, 308 (Ct. App. 2018), for the proposition that, that “[w]hen a facility knows a resident is competent at the time of admission and is allowed to sign other forms, the resident should sign the arbitration agreement.”¹⁵ This is erroneous for two reasons. First off, *Hodge* does not actually endorse such a rule. What *Hodge* actually says is this: “[The resident] did not have a health care power of attorney. Additionally, the Facility knew she was competent at the time of admission as indicated by the doctor’s examination and allowed her to sign other forms.” *Id.* at 574, 813 S.E.2d at 308. The point that the *Hodge* Court was making in this regard had only to do with the resident’s husband’s lack of authority to sign an arbitration agreement for the resident under a health care power of attorney, as (a) there was none and (b) even if there were,

¹³ Moreover, Defendants would note the following South Carolina rules that are particularly favorable to the proponent of arbitration: that “[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration;” that, “unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered;” and that “[a] motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute.” *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118–19 (2001).

¹⁴ (Subject Order p. 5 (“When a facility knows a resident is competent at the time of admission and is allowed to sign other forms, the resident should sign the arbitration agreement. *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 574, 813 S.E.2d 292, 308 (Ct. App. 2018).”).)

¹⁵ (Subject Order p. 5.)

the husband's springing power to act thereunder would not have sprung into existence because the resident was competent at the time of admission.¹⁶ And in any event, even assuming, *arguendo*, that *Hodge* does endorse a rule of law that "[w]hen a facility knows a resident is competent at the time of admission and is allowed to sign other forms, the resident should sign the arbitration agreement," it violates the FAA's equal footing rule by singling arbitration agreements out for disparate treatment based on a state-law defense that is applicable "only to arbitration or derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339.

- (d) **The merger/equitable estoppel analysis in the Subject Order is erroneous. The Court should have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Mr. Chavis 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—and, thus, granted the Underlying Motions.**

The core question here is this: Is the Arbitration Agreement (which Ms. Hagood signed for Mr. Chavis) enforceable against Mr. Chavis—or, more precisely, against Plaintiff, his estate—even though it was not signed by Mr. Chavis himself? The answer is yes. The Arbitration Agreement is enforceable against Plaintiff—or, more precisely, Plaintiff is estopped to deny that the Arbitration Agreement (and, for that matter, the Admission Agreement) is enforceable.

¹⁶ Under South Carolina law, all health care powers of attorney executed on or after January 1, 2007, must be in substantially the same form as the statutory form set forth in S.C. Code Ann. § 62-5-504. *Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 576, 828 S.E.2d 82, 86 (Ct. App. 2019). "The statutory form is a springing durable power of attorney." *Id.* at 426 S.C. at 577, 828 S.E.2d at 87. Although a durable power of attorney is traditionally effective upon execution, under South Carolina's statutory springing health care power of attorney, the attorney-in-fact's authority does not "spring" into effect until it is activated by the principal's incapacity. *Id.* at 426 S.C. at 576–78, 828 S.E.2d at 86–87.

(i) The Court's merger analysis is erroneous.

In *Coleman*, even though our Supreme Court found against merger on the particular *facts* of the case, it nonetheless confirmed the validity of the general proposition of *law* on which the *Coleman* appellants based their merger/equitable estoppel argument:

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 agreements] 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 erred in rejecting Defendants' 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*, 422 S.C. 544, 813 S.E.2d 292.¹⁷

The Court wrongfully concluded that the Admission Agreement and the Arbitration Agreement are separate contacts that do not merge. (Subject Order pp. 9–11.) 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,”¹⁸ as undoubtedly the Admission Agreement and the Arbitration Agreement were here,¹⁹ there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the instruments were intended to be construed together as effectively one contract. This is a question of 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.

It must be remembered that, where, as here, the instruments in question were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, merger is *presumed*. For the merger presumption to mean anything in practice it cannot be upset

¹⁷ The Court also erred in its reliance on the recent case of *Solesbee v. Fundamental Clinical and Operational Services, LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023), which is separately addressed below.

¹⁸ *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

¹⁹ To be clear, *Coleman* unequivocally answers the question of whether the instant Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. As the *Coleman* Court expressly observed regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), “the documents *were* 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).

based on mere conjecture, but only by 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.”). No such inference can be drawn here. Indeed, under the circumstances, the idea that there would have been an intention contrary to merger does not make sense.

Unlike the arbitration agreements at issue in *Coleman*, *Thompson*, and *Hodge*, all of which contained a provision allowing them to be disclaimed or revoked within 30 days of signing while the corresponding admission agreements did not, the instant Arbitration Agreement has no disclaimer/revocation provision. (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* Court²⁰), 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 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

²⁰ 407 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).

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)). And any notion that there is ambiguity in this regard is unsupported and erroneous.

To be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required as a precondition of Mr. Chavis’s residency at the Facility. But all this means is that the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become part of the admissions materials once it was in fact executed. 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. (Arbitration Agreement (providing for arbitration of “any controversy or dispute between the parties arising out of or

relating to [the] Facility's Admission Agreement, or breach thereof, or relating in any way to [Mr. Chavis's] stay at [the] Facility, or to the provisions of care or services to [Mr. Chavis]"); *id.* ("This [Arbitration] Agreement shall remain in effect for all care rendered at [the] Facility").)

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission, whereupon it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Mr. Chavis's relationship with the Facility, the Admission Agreement setting forth the terms of his admission, the Arbitration Agreement providing for arbitration of disputes arising out of his admission. (*Compare* Admission Agreement (setting forth the terms of Mr. Chavis's admission to the Facility) *with* Arbitration Agreement (providing for arbitration of disputes arising out of Mr. Chavis's admission in 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 ("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, the survival of the Arbitration Agreement is no evidence of “separatedness.” Again, the only reason for the Arbitration Agreement is the Admission Agreement, as the point of the Arbitration Agreement is to cover disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how 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 intention contrary to merger. Respectfully, to point to such things 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 whether they are intended to be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger. The very nature of *merger* is to *merge* separate documents.

And—besides the fact that there is indeed 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.

Merger is *presumed* upon the occurrence of a particular set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our courts will consider and construe the documents together *unless* there is evidence of a contrary intention. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence “indicating [(i.e., affirmatively showing)] a contrary intention.” 407 S.C. at 355, 755 S.E.2d at 455. While it is true that the *Coleman* Court also cited the rule that ambiguity is construed against the drafter,²¹ (a) it did so in dicta and (b) it never addressed the logical inconsistency—which thus remains fair game as an argument in this case²²—in recognizing a rule of law creating a presumption in favor of merger (i.e., in recognizing the occurrence of a set of circumstances (same time, parties, purpose, and transaction) as sufficiently probative to affirmatively tip the scales in favor of merger) while at the same time allowing that presumption to be completely overturned by evidence that is merely ambiguous, i.e., that does not even go so far as to clearly indicate a contrary intention and, indeed, is actually still susceptible to a reasonable conclusion in favor of merger. See *S.C. Dep’t of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) (“A contract is ambiguous when the terms of the contract are *reasonably* susceptible of more than one interpretation.”) (emphasis added).

Respectfully, the Court’s finding against merger relies on improper speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding intent. It must be remembered that the presumption of merger arises from the concurrence of the four elements of

²¹ *Id.* at 407 S.C. at 355–56, 755 S.E.2d at 455.

²² To be clear, none of *Coleman*’s progeny has addressed this either.

time, parties, purpose, and transaction. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. This is why for the merger presumption to mean anything in practice it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties’ intention was contrary to merger. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130 (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). The merger presumption is “earned,” so to speak, by the fact that for it even to arise in the first place there must be, as there is here, a concurrence of particular circumstances (same time, parties, purpose, and transaction). It is the very rarity of this concurrence that both safeguards against the overzealous application of the merger doctrine and justifies ascribing to it (the concurrence) the presumptive intent of merger.

The Court should have found that the Arbitration Agreement merged with the Admission Agreement. The instruments were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, the whole of which related to Mr. Chavis’s admission to the Facility and would not have been done at all but for his admission to the Facility.

Re: the Court’s reliance on *Solesbee*

During the pendency of this case, the Court of Appeals decided *Solesbee*, 438 S.C. 638, 885 S.E.2d 144, wherein it affirmed the denial of a motion to compel arbitration in the face of a merger/equitable estoppel argument substantially the same as the Facility’s here. Indeed, the Arbitration Agreement and Admission Agreement in issue in the instant case are the same form documents as in *Solesbee*. But the Court erred in its reliance on *Solesbee*, and indeed, the *Solesbee* Court’s merger analysis is itself erroneous and should not control the disposition of this case.

In affirming the denial of the motion to compel arbitration in *Solesbee*, the Court of Appeals likened that case to *Coleman* and *Hodge* and found that the circuit court had correctly determined that there was no merger of the Admission Agreement and the Arbitration Agreement and, in turn, had properly denied the Facility's equitable estoppel argument. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149 ("Thus, like the *Coleman* and *Hodge* courts, we find there was no merger in this case and [the Facility's] equitable estoppel argument was properly denied.").²³ Most respectfully, the Court erred in its reliance on *Solesbee*—and, indeed, the *Solesbee* Court's merger analysis is itself erroneous—and *Solesbee* should not control the disposition of the Underlying Motions.²⁴

First, the *Solesbee* Court erroneously found against merger on the basis that "the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law." 438 S.C. at 648, 885 S.E.2d at 149. It is simply not true that "the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law."

Regarding governing law, what the Admission Agreement actually states is this: "This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which the Facility is located." (Admission Agreement p. 10.) And what the Arbitration Agreement actually states is this:

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

²³ To be clear, the Court of Appeals' decision in *Solesbee* turned on its affirmance of the circuit court's ruling against *merger* of the Arbitration Agreement and the Admission Agreement. Consequently, the *Solesbee* Court did not address the substance of the *equitable estoppel* prong of the merger/estoppel argument.

²⁴ In this regard, the Facility would also note that it is still possible that the Supreme Court might review *Solesbee* via a writ of certiorari.

United States Code), notwithstanding any contrary provision of this Agreement or contrary state law.

(Arbitration Agreement.)

Without question, the FAA applies to the Arbitration Agreement. The FAA applies whenever an arbitration agreement involves interstate commerce²⁵—and this is so even where an arbitration clause is included in a single instrument that is otherwise governed by South Carolina law. *See Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (The FAA “create[d] a body of federal substantive law,” which is “applicable in state and federal courts.”); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) (“[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.”); *see also Allied-Bruce*, 513 U.S. 265, 270–77. Moreover, even under the FAA, the general state law of contracts continues to apply. *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

²⁵ The FAA applies “to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.” *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363; *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress’s power under the Commerce Clause); *id.* at 273–77 (1995) (explaining that unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce). 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).

the Act’s language and Congress’ intent.”) (emphasis added) (internal citations omitted). Further still, the Arbitration Agreement expressly calls for the arbitration proceedings to be conducted pursuant to the South Carolina ADR Rules. (Arbitration Agreement.)

Again, essentially, the provisions of the Admission Agreement and the Arbitration Agreement regarding governing law are to the effect that South Carolina law applies except where displaced by federal law, and they do not support any reasonable inference of any intent contrary to merger.

Second, the *Solesbee* Court erroneously found against merger on the basis that “[t]he Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement ‘shall survive any termination or breach of this Agreement or the Admission Agreement.’” 438 S.C. at 648–49, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger here. Unlike in *Coleman* and *Hodge*, the supposed textual recognition of the Admission Agreement as being separate from the Arbitration Agreement is not included in any “Entire Agreement” provision. Rather, the “Entire Agreement” provision of the Admission Agreement expressly states, “other Admissions materials . . . are made a part of this Agreement by reference.” (Admission Agreement p. 12.) And as in the instant case, the Arbitration Agreement that was signed in conjunction with the admission is clearly among these “other Admissions materials.” Moreover, that the Arbitration Agreement “shall survive any termination or breach of this Agreement or the Admission Agreement” just means that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. Again, this is simply how arbitration agreements work—and would be so even were the agreement

to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. 2d at 612–13 (“Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.”).

Third, the *Solesbee* Court erroneously found against merger on the basis that “[t]he Arbitration Agreement is silent as to whether it could be revoked, but the Admission Agreement provides, ‘Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.’” 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. The absence of a “revocation” provision is one way in which the Arbitration Agreement is materially different from those at issue in *Coleman* and *Hodge*, and, for that matter, *Thompson*. Moreover, the *Solesbee* Court drew a false equivalency between the concepts of “revocation” and “termination.” A “revocation” is an annulment (i.e., making something a nullity),²⁶ whereas “termination” is putting or bringing something that properly exists to an end—which is materially different from making something a nullity, i.e., void and never having properly existed in the first place. *Id.* at p. 1482. And, again, that the Arbitration Agreement survives the termination of the Admission Agreement is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. at 612–13.

Fourth, the *Solesbee* Court erroneously found against merger on the basis that “the Admission Agreement and Arbitration Agreement were separately paginated and had their own signature pages.” 438 S.C. at 648, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. Again, the fact that the Admission Agreement and the Arbitration

²⁶ *Black’s Law Dictionary* p. 1321 revocation (7th ed. 1999); *id.* at 89 annulment (“The act of nullifying or making void.”).

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 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 whether they were intended to 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. Again, the very nature of *merger* is to *merge* multiple things together as one.

Finally, the *Solesbee* Court erroneously found against the Facility on merger on the basis that Arbitration Agreement was voluntary. 438 S.C. at 648, 885 S.E.2d at 149. While, again, it is certainly true that the Arbitration Agreement was voluntary (*see* No. 3 above), this fact provides no reasonable inference of an intent contrary to merger. Again, 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 the resident to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was signed. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. Again, the two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

To say that the Arbitration Agreement was not required for admission, which it was not, is not to say that it was not intended to be part of the admissions materials in the event it was agreed to, which it was, by Mr. Dover on Ms. Solesbee's behalf in *Solesbee* and by Ms. Hagood on Mr.

Chavis's behalf in the instant case. 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”).)

Again, 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 the resident's relationship with the Facility: the Admission Agreement setting forth the terms of the admission, the Arbitration Agreement providing for arbitration of disputes arising out of the admission. (*Compare* Admission Agreement (setting forth the terms of the admission) *with* Arbitration Agreement (providing for arbitration of disputes arising out of the admission).)

Re: Footnote 2 in the Subject Order

At the conclusion of Section 2 of the Court’s analysis (setting forth the Court’s reasoning that “[t]he Admission and Arbitration Agreements Do Not Merge”²⁷), the Court includes the following footnote:

Evidence also shows the underlying Admission Agreement was terminated, and Mr. Chavis was discharged from the Facility. He later returned to the Facility, and his daughter signed a Readmission Agreement. It also contained a separate title, different pagination, and different signature block. It did not reference arbitration or any such agreement. Despite his readmission, Mrs. Hagood was not presented any additional arbitration agreement for signature. Likewise, this Readmission Agreement does not merge.

(Subject Order p. 11 n.2.)

This is demonstrably incorrect and provides no basis whatsoever for rejecting Defendants’ merger/equitable estoppel argument. The Readmission Agreement, which is attached as Exhibit 2 to Defendants’ memo in support of the Underlying Motions, expressly refutes the notion that “the underling Admission Agreement was terminated,” providing:

1. By execution of this Readmission Agreement, the parties acknowledge and reaffirm the terms of the original Admission Agreement between the parties and acknowledge that this Readmission Agreement does not replace or supercede the original Admission Agreement.

2. The terms, conditions, and obligations of the parties as stated in the original Admission Agreement, along with each of its attachments, are incorporated in this Readmission Agreement by reference thereto and shall be effective as if rewritten fully herein.

(Readmission Agreement p. 1.) The Admission Agreement and the Arbitration Agreement merged at the time of Mr. Chavis’s original admission—when, as explained elsewhere, they were executed at the same time, by the same parties, for the same purpose, in the course of the same transaction—

²⁷

(Subject Order p. 9 (underline and bold print in original omitted).)

and the Readmission Agreement expressly states that it does not replace or supercede the Admission Agreement and that the Admission Agreement is fully incorporated into the Readmission Agreement by reference.

(ii) The Court's equitable estoppel analysis is erroneous.

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 Defendants contend Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Mr. Chavis received direct benefits (in the form of his admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement merged. *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.

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.

As set forth in our Supreme Court’s controlling decision in *Wilson*, and consistent with the Court of Appeal’s decision in *Pearson*, which the *Wilson* Court favorably cites, the essence of the test for direct benefits estoppel is simply whether the nonsignatory has exploited other parts of the contract by reaping its benefits. Indeed, to require more than this—or, in other words, to limit the

applicability of direct benefits estoppel to only instances where the nonsignatory's claim relies solely on the contract terms to impose liability—is to invite the very sort of have-your-cake-and-eat-it-too inequity that the doctrine aims to prevent in the first place. Neither *Wilson* nor *Pearson* nor general notions of equity countenance,²⁸ much less call for, such a result.

Here, Mr. Chavis was a direct beneficiary. Indeed, to deny his receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of his residency: every night's stay, every meal, every amenity/service provided, every instance of care/treatment, essentially every moment at the Facility—even Plaintiff's complaint does not go nearly so far as that. (*See Am. Comp.*) And to the extent that the Subject Order suggests that Plaintiff herself, the wrongful death beneficiaries, or the beneficiaries of Mr. Chavis's estate must have directly benefitted,²⁹ it is erroneous. It is Mr. Chavis's receipt of direct benefits that matters, and as explained, he clearly did so.

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

²⁸ *See Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) (“Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible.”).

²⁹ (*See Subject Order* p. 11 (“[T]he Plaintiff, a third-party who represents the wrongful death beneficiaries and estate, is not suing under the Arbitration Agreement or attempting to invoke the Arbitration Agreement itself.”).)

- (e) **Out of an abundance of caution, to the extent that the Subject Order suggests that the Arbitration Agreement is not enforceable as to wrongful death beneficiaries,³⁰ it is erroneous.**

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,³¹ 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).

“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

³⁰ (See Subject Order p. 11 (“[T]he Plaintiff, a third-party who represents the wrongful death beneficiaries and estate, is not suing under the Arbitration Agreement or attempting to invoke the Arbitration Agreement itself.”).)

³¹ *See Concepcion*, 563 U.S. at 339.

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].");³² *Glenn*, 254 S.C. at 134, 174 S.E.2d at 158 ("If an action for wrongful death is instituted by one other than the personal representative of a decedent, duly appointed by the Probate Court, it should be dismissed.").

Even though it is for their "benefit," a wrongful death claim does not belong to the wrongful death beneficiaries themselves. It is a claim that is brought on behalf of the estate of the deceased person. The substantive right to bring the claim belongs to decedent's personal representative, who must bring the claim and is the real party in interest under South Carolina law. 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 to the extent that it does so, the Subject Order is erroneous in concluding otherwise.

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 (both those

³² 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.*

advanced in writing and those advanced via oral argument), all of which Defendants incorporate by reference herein and asks the Court to (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.

Respectfully submitted,
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September 18, 2023

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

Appeal from Marion County
Court of Common Pleas
H. Steven DeBerry IV, Circuit Court Judge

Case No. 2022-CP-33-00183

Rebecca C. Hagood
as Personal Representative of the Estate of Frank D. Chavis, Sr.,
Respondent,

v.

Palmetto Faith Operating, LLC
d/b/a Faith Healthcare Center and
Brooks Arnette,
Appellants.

NOTICE OF APPEAL

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Attorney for Respondent

Defendants/Appellants, Palmetto Faith Operating, LLC d/b/a Faith Healthcare Center and Brooks Arnette (collectively, “Appellants”), hereby appeal the following orders of the Honorable H. Steven DeBerry IV, Circuit Court Judge:

- **Order Denying Defendants’ Motions to Compel Arbitration**, filed September 8, 2023; and
- **Order Denying Defendants’ Motion for Reconsideration**, filed October 2, 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 October 2, 2023.

Respectfully submitted,
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November 1, 2023

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

Appeal from Marion County
Court of Common Pleas

H. Steven DeBerry IV, Circuit Court Judge

Case No. 2022-CP-33-00183

Rebecca C. Hagood
as Personal Representative of the Estate of Frank D. Chavis, Sr.,
Respondent,

v.

Palmetto Faith Operating, LLC
d/b/a Faith Healthcare Center and
Brooks Arnette,
Appellants.

PROOF OF SERVICE

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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 November 1, 2023, by emailing (see attached email) a copy of the same to Respondent's counsel of record:

A. Keith McAlister Jr., Esquire
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Attorney for Respondent

I further certify that a copy of Appellants' **NOTICE OF APPEAL** was this day, November 1, 2023, E-Filed with the lower court (see attached NEF), thus also, i.e., in addition to service by email, effecting 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
Russell G. Hines (SC Bar No. 72100)

Attorneys for Appellants

Charleston, South Carolina

November 1, 2023

From: [Hines, Russell](#)
To: [Kip McAlister](#)
Cc: [Brown, Stephen L.](#); [Davis, Jay](#); [Riddle, Matthew](#); [Grevey, Kara S.](#); [Justman, Aimee](#); [Bell, Pollyana \(Polly\)](#); [Preiser, Skyla](#); [Peterson, Susan](#); [Wakeham, Rebecca \(Becky\)](#)
Subject: Hagood v. Palmetto Faith Operating (Case No. 2022-CP-33-00183) -- Notice of Appeal
Date: Wednesday, November 1, 2023 2:48:17 PM
Attachments: [image001.png](#)
[Hagood v. Palmetto \(2022-CP-33-00183\) -- Notice of Appeal.pdf](#)
[Appealed Order 1 -- Order Denying MTCA filed 9-8-23.pdf](#)
[Appealed Order 2 -- Order Denying MTR Order Denying MTCA filed 10-2-23.pdf](#)

Attached for service please find Defendants' **Notice of Appeal** (and copies of the **Appealed Orders** attached thereto) 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: 2022CP3300183

Official File Stamp: 11-01-2023 02:55:20 PM
Court: CIRCUIT COURT
Common Pleas
Marion
Case Caption: Frank D Chavis Sr , plaintiff, et al VS Palmetto Faith Operating, 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:

Joseph Jakob Kennedy for Frank D Chavis, Sr, Rebecca C Hagood
Russell Grainger Hines for Palmetto Faith Operating, Llc et al
Matthew Oliver Riddle for Palmetto Faith Operating, Llc et al
Donald Jay Davis, Jr. for Palmetto Faith Operating, Llc et al
William John Tuck for Frank D Chavis, Sr, Rebecca C Hagood
Kara Shea Grevey for Palmetto Faith Operating, Llc et al
Allen Keith McAlister, Jr. for Frank D Chavis, Sr et al

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

Sep 04 2024

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.

Respectfully submitted,
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September 4, 2024